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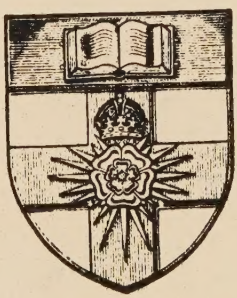

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RIVER WEAR COMMISSIONERS *v.* ADAMSON AND OTHERS

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan, Lord Blackburn and Lord Gordon), April 30, May 8, July 27, 1877]

[Reported 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521]

Pier—Damage by ship—Liability of owner—Act of God—Derelict ship driven against pier by storm—Harbours, Docks & Piers Clauses Act, 1847 (10 & 11 *Vict.*, *c.* 27), *s.* 74.

Section 74 of the Harbours, Docks and Piers Clauses Act, 1847, provides that the owner of every vessel shall be answerable to the undertakers for any damage done by such vessel, or by any person employed about the same, to a harbour, dock, or pier, or the quays or works connected therewith, except where the vessel, at the time when the damage is caused, is in charge of a compulsory pilot.

A ship of the respondents, after being abandoned by her crew through stress of weather, became a complete wreck, was driven by a storm against a pier of the appellants, and did damage to it.

Held (Lord Gordon dissenting): the owners were not liable under s. 74 for the damage so caused on the following grounds: per Lord Cairns, L.C. (with whom Lord Hatherley agreed "with extreme doubt and hesitation"): the section was not intended to create a right to recover damages in a case where before the Act there would not have been a right to recover damages for damage occasioned by negligence or wilful misconduct, and, therefore, it did not impose liability for damage caused by an act of God; per Lord O'Hagan: the liability of a shipowner under s. 74 was confined to damage done by a ship while in charge of the master or some other person and did not apply where the vessel had become a derelict and had passed out of the owner's control, or to an act of God; per Lord Blackburn: the hardship which would be placed on the shipowner, and the injustice worked, if in such a case as the present a shipowner was held to be liable, was great enough to justify the court in so construing s. 74 as not to include in it damage occasioned by misfortune.

Statute—Construction—Act to be construed as a whole—Words to be given ordinary meaning—Exception to rule—Ordinary meaning producing inconsistency, absurdity, or great inconvenience.

Per Lord Blackburn: In construing an Act of Parliament the statute must be construed as a whole, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity, or inconvenience so

great as to convince the court that the intention of the legislature could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification which, although less proper, is one which the court thinks the words will bear.

Notes. Considered: *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal*, [1891-4] All E.R. Rep. 804; *Butterley Co.* v. *New Hucknall Colliery Co.*, [1910] A.C. 381; *Hollinshead* v. *Hazleton*, [1914-15] All E.R. Rep. 1117; *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231. Applied: *Davies* v. *Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488. Considered: *Great Western Railway and Midland Railway* v. *Bristol Corpn.* (1918), 87 L.J.Ch. 414. Applied: *Re Burnyeat, Burnyeat* v. *Ward*, [1923] 2 Ch. 52. Considered: *Postmaster-General* v. *Beck and Pollitzer*, [1924] All E.R. Rep. 412; *The St. Nicolai* (1925), 133 L.T. 640. Explained and Distinguished: *Witham Outfall Board* v. *Boston Corpn.* (1926), 136 L.T. 756; *Great Western Rail. Co.* v. *Mostyn (Owners), The Mostyn*, [1927] All E.R. Rep. 113. Referred to: *Stoomvaart Maatschappij Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; *Western Counties Railway* v. *Windsor and Annapolis Railway* (1882), 7 App. Cas. 178; *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*, [1898] A.C. 571; *A.-G.* v. *Gas Light and Coke Co.* (1902), 18 T.L.R. 517; *Metropolitan Water Board* v. *New River Co.* (1904), 20 T.L.R. 687; *Badische Anilin Und Soda Fabrik* v. *Hickson*, [1906] A.C. 419; *Re Gibbs, Martin* v. *Harding*, [1907] 1 Ch. 465; *Jackson* v. *Blanche (Owners), The Hopper No. 66*, [1908] A.C. 126; *Jones* v. *E. Hulton & Co.*, [1908-10] All E.R. Rep. 29; *Broken Hill Proprietary Co.* v. *Peninsular and Oriental Steam Navigation Co.*, [1917] 1 K.B. 688; *Valentine* v. *Hyde*, [1919] 2 Ch. 129; *Hudson's Bay Co.* v. *Maclay* (1920), 36 T.L.R. 469; *Rhondda's Claim*, [1922] 2 A.C. 339; *Gayler and Pope, Ltd.* v. *B. Davies & Son, Ltd.*, [1924] All E.R. Rep. 94; *Abrahams* v. *MacFisheries, Ltd.*, [1925] All E.R. Rep. 194; *British-American Tobacco Co.* v. *Jones* (1925), 134 L.T. 405; *Dee Conservancy Board* v. *McConnell*, [1928] All E.R. Rep. 554; *J. & J. Makin, Ltd.* v. *London and North Eastern Rail. Co.*, [1943] 1 All E.R. 645; *Alexander* v. *Tredegar Iron and Coal Co.*, [1944] 1 All E.R. 451; *Workington Harbour and Dock Board* v. *Towerfield Steamship (Owners)*, [1950] 2 All E.R. 414; *Southport Corpn.* v. *Esso Petroleum Co.*, [1954] 2 All E.R. 561; *Fowler* v. *Lanning*, [1959] 1 All E.R. 290; *Scruttons, Ltd.* v. *Midland Silicones, Ltd.*, [1962] 1 All E.R. 1.

As to a shipowner's liability for damage to a harbour, etc., see 35 HALSBURY'S LAWS (3rd Edn.) 834-836; and for cases see 41 DIGEST 974, 975. As to the principles of the construction of statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 387 et seq.; and for cases see 42 DIGEST 614 et seq. For Harbours, Docks and Piers Clauses Act, 1847, see 23 HALSBURY'S STATUTES (2nd Edn.) 1128.

Cases referred to:

(1) *Dennis* v. *Tovell* (1872), L.R. 8 Q.B. 10; 42 L.J.M.C. 33; 27 L.T. 482; 37 J.P. 263; 21 W.R. 170; 2 Asp.M.L.C. 402, n.; 41 Digest 974, *8641*.

(2) *Graves* v. *Legg* (1854), 9 Exch. 709; 23 L.J.Ex. 228; 23 L.T.O.S. 254; 2 C.L.R. 1266; 156 E.R. 304; 12 Digest (Repl.) 473, *3531*.

(3) *Heydon's Case* (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, *143*.

(4) *Allgood* v. *Blake, Roach* v. *Blake, Reed* v. *Blake* (1873), L.R. 8 Exch. 160; 42 L.J.Ex. 101; 29 L.T. 331; sub nom. *Reed* v. *Blake, Clennell* v. *Blake, Roach* v. *Blake*, 21 W.R. 599, Ex. Ch.; 44 Digest 1014, *8724*.

(5) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest (Repl.) 20, *31*.

(6) *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534; 7 B. & S. 655; 35 L.J.Q.B. 193; 15 L.T. 67; 30 J.P. 613; 12 Jur.N.S. 812; 14 W.R. 914; 2 Mar.L.C. 397; 41 Digest 199, *381*.

(7) *Paradine* v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

(8) *Latless* v. *Holmes* (1792), 4 Term Rep. 660.
(9) *Birks* v. *Allison* (1862), 13 C.B.N.S. 11, 24; 32 L.J.C.P. 51; 7 L.T. 786; 9 Jur.N.S. 693; 11 W.R. 90.
(10) *Abley* v. *Dale* (1851), 11 C.B. 378; 2 L.M. & P. 433; 20 L.J.C.P. 233; 15 J.P. 757; 15 Jur. 1012; 138 E.R. 519; 43 Digest 449, *771.*
(11) *Biffin* v. *Yorke* (1843), 5 Man. & G. 428; 6 Scott, N.R. 222; 12 L.J.C.P. 162; 7 Jur. 259; 134 E.R. 630; 12 Digest (Repl.) 630, *4863.*
(12) *Hutton* v. *Harper* (1876), 1 App. Cas. 464; 28 Digest (Repl.) 46, **120.*
(13) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr.N.S. 79; 3 L.T.O.S. 277; 8 Jur. 793; 8 E.R. 1034, H.L.; 42 Digest 650, *569.*
(14) *Fordyce* v. *Bridges* (1847), 1 H.L.Cas. 1; 11 Jur. 157; 9 E.R. 649, H.L.; 42 Digest 636, *387.*

Also referred to in argument:

Eglinton v. *Norman* (1877), 46 L.J.Q.B. 557; 36 L.T. 888; 25 W.R. 656; 3 Asp.M.L.C. 471, C.A.; 41 Digest 821, *6806.*
The Merle (1874), 31 L.T. 447; 2 Asp.M.L.C. 402; 41 Digest 932, *8216.*
R. v. *Leigh* (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357; 113 E.R. 152; 41 Digest 53, *388.*
Coe v. *Wise* (1864), 5 B. & S. 440; 33 L.J.Q.B. 281; 10 L.T. 666; 28 J.P. 677; on appeal (1866), L.R. 1 Q.B. 711; 7 B. & S. 831; 37 L.J.Q.B. 262; 14 L.T. 891; 30 J.P. 484; 14 W.R. 865, Ex.Ch.; 41 Digest 57, *413.*
R. v. *Somerset Sewers Comrs.* (1799), 8 Term Rep. 312; 101 E.R. 1407; 41 Digest 62, *454.*
Nichols v. *Marsland*, post, p. 40; 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 12 Digest (Repl.) 417, *3238.*
Brewster v. *Kitchel* (1698), Holt, K.B. 175; Carth. 438; Comb. 466; 1 Ld. Raym. 317; 12 Mod. Rep. 166; 1 Salk. 198; 90 E.R. 995; 12 Digest (Repl.) 334, *2582.*
Baily v. *De Crespigny* (1869), L.R. 4 Q.B. 180; 10 B. & S. 1; 38 L.J.Q.B. 98; 19 L.T. 681; 33 J.P. 164; 17 W.R. 494; 12 Digest (Repl.) 420, *3249.*
Nugent v. *Smith* (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697; 34 L.T. 827; 41 J.P. 4; 25 W.R. 117; 3 Asp.M.L.C. 198, C.A.; 2 Digest (Repl.) 365, *457.*
The Clara Killam (1870), L.R. 3 A. & E. 161; 39 L.J.Adm. 50; 23 L.T. 27; 19 W.R. 25; 3 Mar.L.C. 463; 1 Digest (Repl.) 165, *531.*
Nield v. *London & North Western Rail. Co.* (1874), L.R. 10 Exch. 4; 44 L.J.Ex. 15; 23 W.R. 60; 36 Digest (Repl.) 322, *673.*

Appeal by the plaintiffs (the commissioners appointed by a local Act of Parliament for constructing a pier in Sunderland harbour at the mouth of the river Wear) in an action brought by them against the respondents, the owners of the steamship *Natalian.*

On Dec. 17, 1872, the *Natalian* was on a voyage from London to Newcastle, and was compelled by stress of weather to attempt to put in to Sunderland harbour. While still outside the entrance, in the open sea, she struck the ground near the appellants' pier, and the lives of all on board were in great danger from the violence of the storm. The crew were saved by the rocket apparatus, and when the tide rose the storm drove the ship against the appellants' pier, doing great damage to it. The ship had become a complete wreck, and it was impossible for the crew to go on board again, or to obtain control of her in any way. An action was brought by the appellants against the respondents to recover in respect of the damage so caused under s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, which enacts:

"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the

charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

The case was tried before QUAIN, J., at the Durham Summer Assizes in 1873, when a verdict was entered for the plaintiffs for the agreed amount of £2825, with leave to move for a rule to enter a nonsuit or a verdict for the defendants. The Court of Queen's Bench refused the rule on the authority of *Dennis* v. *Tovell* (1); but their decision was reversed by the Court of Appeal (SIR GEORGE JESSEL, M.R., KELLY, C.B., MELLISH, L.J., DENMAN, J., and POLLOCK, B.), who held that, the damage having been occasioned by the "act of God," the owners could not be made liable under the section (1 Q.B.D. 546). The plaintiffs appealed to the House.

Charles Russell, *Q.C.*, and *Shield* (*Herschell*, *Q.C.* with them) for the appellants. *Sir John Holker*, *Q.C.*, and *Greenhow* for the respondents.

Their Lordships took time for consideration.

July 27, 1877. The following opinions were read.

LORD CAIRNS, L.C.—The question depends upon the true meaning of the Harbours, Docks, and Piers Clauses Act, 1847, which enacts that the owner of every vessel or float of timber shall be answerable to the undertakers (that is, in this case to the appellants) for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, with certain further provisions which I need not at present mention. The Court of Appeal have been of opinion, and I think rightly, that the injury was not in this case occasioned by the voluntary act or the negligence of the respondents, or, indeed, of any person on board of or connected with the ship; that it could not have been prevented by any human instrumentality; but that it was occasioned by a vis major—namely, by the act of God in the violence of the tempest. Founding himself on this, the Master of the Rolls states that it is a familiar maxim of law that, where there is a duty imposed or liability incurred, as a general rule there is no such duty required to be performed, and no such liability required to be made good, where the event happens through the act of God or the Queen's enemies, and that the court may well come to the conclusion that the act of God and the Queen's enemies were not meant to be comprised within the first words of the section. The Lord Chief Baron states that no man can be answerable, unless by express contract, for any mischief or injury occasioned to another by the act of God. MELLISH, L.J., states that the act of God does not impose any liability on anybody. DENMAN, J., states that in every Act of Parliament words are not to be construed to impose a liability for an act done if the act is substantially caused by a superior power, such as the law calls the act of God.

In my opinion, these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is the duty of a carrier to deliver safely the goods entrusted to his care; but, if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused because the safe delivery has by the act of God become

impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why he should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damage. If, therefore, by the section to which I have referred, it is meant that the owner of every vessel shall, irrespective of whether anything has happened which would at common law give a right of action against anyone, pay to the undertakers the damage done by a ship to the pier, I should be unable to see any reason why the payment should not be made in the manner required by the statute.

I cannot, however, look upon this section of the statute as intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from someone. The section and those which follow it are in an Act which collects together the common and ordinary clauses which it was the habit of Parliament to insert in private Bills authorising the construction of piers and docks. There was no special legislation intended on this head for any particular place or any particular state of circumstances; and it would be difficult to suppose that, by means of ordinary and routine clauses inserted in private or local Acts, the legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, would create a new right of liability to damages unknown to the common law. By the common law, if a pier were injured by a ship sailing against it, the owner might be liable, if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without showing that those navigating the vessel were his servants.

In my opinion, it was to meet this state of the law that this section was introduced. It proceeds, as it seems to me, on the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person—that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. The section relieves the undertakers from the investigation, always a difficult one for them to pursue, whether the fault has been the fault of the owner, or of the charterer, or of the persons in charge. It takes the owner as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable —that is to say, the person who is to answer, or is to be sued, for the damage done. It does not absolve the master or crew if there has been wilful fault or negligence on their part. They, in that case, may be sued as well as the owner, but if the owner is thus in the first instance made to pay the damage, where there has been wilful or negligent conduct on the part of the master or crew, the owner may recover over against the master or crew; and if the damage has occurred by reason of the act or omission of any other person—if, for example, someone who had hired the ship sent her to sea insufficiently manned, and the accident occurred in consequence—the owner may apparently recover from the hirer by reason of this act or omission [see s. 76]. The sections appear to me to be sections of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before.

This makes the part of s. 74 relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge,

the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship and did an act which caused damage, he would be liable at common law, and the Act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest, the owner would not be liable. I, therefore, think, although I do not concur in the reasoning of the learned judges of the Court of Appeal, that their conclusion was right, and that the appeal ought to be dismissed, with costs.

LORD HATHERLEY.—I must candidly say that this case has given me much anxiety, and I have felt very great doubt and difficulty as to the proper interpretation to be given to this section, which is, as it appears to me, somewhat inartistically framed. I cannot concur in the views expressed in the court below by some of the learned judges—on the one hand, that the damage which was done in this case having been caused by what is commonly said to be an accident, but is called in the language technically used in the law courts "the act of God," namely, a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief. Neither can I think, on the other hand, that, as has been held by others of the learned judges in the court below, the clause in question refers only to cases where a vessel is in charge of somebody.

I do not think, in the first place, that the grammatical construction of the section will admit of that solution of our difficulties. When we look at the whole construction of the section, it appears to me that it speaks in the first place of damage done by a vessel, without regard to anyone being on board or not; then it speaks in the second place of damage done by any person employed about the vessel; and then it says that the master or person in charge of a vessel is to be liable if damage is done through his wilful act or negligence. Then the excepted case occurs of the pilot, because he had been compulsorily, and against any power of resistance of the owner, placed on board and in charge. We have to see whether or not damage arising from the "act of God"—that is to say, in this particular case, a tempest—should be held to be excepted. There might be other cases which would be similar to this of a tempest; the vessel might have been driven on the pier in some other way, or have been injured and become unmanageable by lightning, or the like. However it occurred, if the pier was damaged by the vessel in the way which was called by the learned judges in the court below "the act of God," is there anything in the Act of Parliament to say that the owner of the vessel shall not be responsible for the damage, but that there shall be an exception in respect of damage so caused?

One can easily conceive that the legislature might think it desirable that those who provide this great accommodation for the navigation of the country—those who provide harbours of refuge and the like, which are greatly wanted in many parts of the coasts of the United Kingdom—should be indemnified against the possible damage which may accrue to their docks or other works which they construct in discharge of the duties in question and in the exercise of those powers which they have for making docks and other works. Those promoters might say: "We offer protection to the public at all times, only protect us from having our works damaged, in consideration of the benevolent hospitality which we so afford." There is nothing, as it appears to me, utterly unreasonable in such a proposition reasonably carried out. It is quite true that many cases put by the learned judges in the court below are cases in which it would seem to be a very rigid enactment indeed, that damage to a very large and extensive amount, exceeding the value of the vessel itself, should be compensated by the persons whose vessel has done this damage being made answerable to make it good to the full amount of the damage done, which might even

A go to the destruction of the principal works, and might, therefore, result in the ruin of those persons whose vessel had been so forced against them. But, on the other hand, if there was any intention at all of giving a relief of this kind, which must be sought, of course, in the words of the Act, then, I apprehend, the exception of a storm or tempest would be a very singular one, because B it is a probable case to happen. There are, no doubt, many other ways in which damage might be done; but it is among the very probable causes that a storm or tempest should be the thing which would occasion the damage through the medium of the ship, which directly produced that damage.

I do not think, therefore, that I can say, at all satisfactorily to my own mind, that, provided that the Act itself is clear and specific in its sections, the C party who caused the damage could be exempted because the damage was the result of a tempest, and not of what is ordinarily called his fault. Neither, as I have already said, by the grammatical construction of the section do I think that it is only to be applied in cases where some master, or other person, is in charge of the vessel. Possibly the expression of Mellish, L.J., may come nearer to the mind of the legislature. His notion of the general intent of the D section is that it points to something in which man is concerned. I think that is his expression. That is to say, in which human agency intervenes; and it was on that ground that he coincided with the views taken by the other learned judges. His idea of the whole intent and purpose of the section was, not that the "act of God" was wholly to excuse the person liable under the enactment, if that liability once existed; but that the section pointed to some E act of man which was to take place, and not to a mere casualty occasioned by the tossing and driving about of the vessel from the effect of a storm upon the sea.

Finding that I cannot concur in the reasons given in the court below, of course one has to consider the construction of the section. I think that, taking the view which was taken by the appellants in this case, the section has been framed with probably extraordinary pressure and severity against the F persons by whose vessels this damage would be created. No one can possibly deny that; and that severity seems to have induced some of the judges before whom the case has come, to think that it is impossible to attribute such an intention to the legislature. I am afraid that it does sometimes occur that an Act of the legislature cannot be carried out without very great inconvenience and hardship; that is not because the legislature intended it, but because the G possibility of its occurrence had been forgotten. I think that such a circumstance may have occurred here, and produced the enactment that we have before us. However, it is the opinion, I believe, of the majority of your Lordships, that, on the whole case being considered, this is not a case that we can regard as struck at by this section. Whether the ground to be assigned for that is the H view which has been expressed by the Lord Chancellor, or whether any view may be adopted by any of your Lordships, similar to that taken in the court below, leading to the conclusion that the damage which here occurred is not brought within the meaning or purview of this Act, I shall not pause to inquire. There being this difference of opinion, I shall not do what I might probably under other circumstances have thought it my duty to do in this case. I am unwilling to I do anything further than say that I cannot concur in the opinion expressed by my noble and learned friend on the woolsack, otherwise than with extreme doubt and hesitation.

LORD O'HAGAN.—I need scarcely say that this is a difficult and embarrassing case. The various views which have been adopted by able judges make this very plain, and I do not think that any conclusion at which we can arrive will be completely satisfactory. The difficulty arises from the former of the sections we are required to interpret. Your Lordships, exercising your appellate jurisdiction, act as a court of construction. You do not legislate, but you ascertain

the purpose of the legislature; and if you can discover what that purpose was, you are bound to enforce it, although you may not approve the motives from which it springs, or the object which it aims to accomplish. Our daily experience demonstrates that the task of construction so understood, is not an easy one. It sometimes involves the necessity of harmonising apparently inconsistent clauses, and making homogenous provisions cast together haphazard by various minds, differently constituted, and looking to different and special objects, without regard to the harmony of the whole.

Undoubtedly, if the first division of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, stood alone, it would seem to cast upon the owner under all possible circumstances liability to the undertakers for any damage done by his vessel. That was the view reluctantly adopted by the Court of Queen's Bench, which we are asked to affirm in opposition to the judgment of the Court of Appeal; and if your Lordships, on a full consideration of the whole section are satisfied that that was the view intended to be carried out, you have no alternative but to act upon it. No speculation as to the inconvenience or even the injustice which it may accomplish, no consideration of the admitted innocence of the owner of the vessel, or of the inevitable nature of the accident which wrought the injury, would justify a refusal to interpret the statute according to the design of the makers of it; and if you clearly see that they meant the liability to be unqualified and universal, you are not at liberty, on such grounds, to defeat that design and say that the appellants shall not have the benefit of it. If the law as it stands is oppressive or inequitable, the legislature which devised it can alone reform it; and certainly, in my judgment, should your Lordships feel yourselves obliged to reverse the ruling of the Court of Appeal, such a reform will be needful, and should be promptly made, for the results of such a reversal seem very serious. It would involve the obligation of the owner to make good damage done by his ship, although, as in this case, he be free from blame for any imaginable injury by himself, or his servants, or in any other way. If necessarily abandoned on the high seas a thousand miles away, she drifts ashore, after long wandering, and does an injury; or, if taken out of his hands absolutely by a pirate or an enemy, she is brought in his absence, and against his will, to attack the coast of England; or if, as was put by the judges of the Appeal Court, the undertakers themselves shall have got hold of the vessel and employed it so as to injure their own pier—in all these cases, and in others easily to be conceived, he would be responsible for results to which he had not contributed.

No doubt it is possible that the legislature may have contemplated for the protection of harbours, docks, and piers an enactment fraught with consequences of this description; but before we attribute to it so strange a purpose, we are bound, I think, to see whether the phraseology it has used, taken altogether, does not enable us to reconcile its action with common sense and common justice, and to say that, although it has spoken obscurely, it has not made unavoidable such a very startling construction of its words. The case before us is not, perhaps, quite so shocking as those which have been supposed to test the effects of this piece of legislation. But certainly it does seem hard that the respondent, having had his ship so injured by the winds and waves on the high seas that the crew abandoned her to save their lives, and she was derelict and was forced by the storm against the pier, should not only have lost her value (£10,000) save in so far as she was insured, but, in addition, nearly £3000 for mischief done admittedly without fault of his, and by the "act of God." We must take care that a hard case shall not make bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant without coercive necessity.

I have come to the conclusion, though not without serious hesitation and misgiving, that there is no such necessity, and that the statute, well considered, is

A not applicable in the peculiar circumstances before us. I do not propose that your Lordships should act on any very large application of the old maxim, "qui haeret in litera haeret in cortice," or refuse, from any assumption of error in policy on the part of the legislature, to give effect to the literal meaning of the Act. But when we pass from the first clause of the section, B and find it dealing with "the master or person having the charge of such vessel," I think it is indicated that "such vessel" may be taken to limit the description of "every vessel" in the preceding phrase, and to confine the liability of the owner to vessels "in charge" of a master or of somebody else. I do not see how we are to give effect to the word "such" otherwise than by qualifying the generality of the preceding language, and holding with Mellish, C L.J., that the section points to something done by the act of man, or to the act of the person in charge. The terms of the statute appear to me fairly to bear this interpretation; and, if they do, it is manifestly more in accordance with reason and probability than that which is opposed to it. In any view the provision is hard upon the owner, and puts him in a worse position than he would have held at common law. But there is something compara- D tively tolerable in the notion that he shall be responsible if an accident occurs when his captain, or someone else employed by him, acting for him and under his control, has at least the chance of avoiding it. When this chance is gone, because his servants cease to be in charge, and his ship becomes an ungoverned log, irresistibly borne against a pier without the possibility of check or guidance, the hard measure of liability for an act which is not his nor his E agents' should not be imputed to him if there is fair ground for thinking that the section did not contemplate such a state of circumstances. In the one case it may be just that the owner should answer, if the injury arises from the actual or presumed default of his servants; and it may be politic to make him careful in the selection of them from an apprehension of the consequences of such an actual or presumed default. In the other, his utter and necessary F powerlessness to avert the mischief should make us slow to say that he was meant to answer for it.

As to the proviso, it appears to be reasonably explicable on the one construction and not on the other. If it was meant that the owner should be universally liable, whether or no any control remained with him or with his crew, how can G we account for the exception as to the presence of the pilot? The injury is the same, the instrument of the injury is the same, and why, if the liability is to arise without any regard to circumstances in all other cases, although every possibility of control or default is absent, why should the pilot's compulsory employment exonerate the owner? On the other hand, if the true construction makes him only liable when a master or some other freely chosen H by himself and on his own responsibility is in charge, we can see good reason for the exoneration as soon as the pilot, whose retainer is not optional as in the case of his own people, assumes the care of the ship, and so disables him from meddling with her directly or indirectly. In the one case there is some control remaining with him; in the other there is none. The law displaces the person he had chosen to guide his vessel, and he is made irresponsible. I Why should he not be so when the stress of the storm has the same effect, and forces his captain and his crew to abandon the trust he had committed to them? The proviso appears to me persuasively to sustain the argument of the respondents.

It has been said that, unless the appellants prevail, the statute must have failed of its object, which was manifestly the greater protection of the pier owners, because it gives them nothing which they had not at common law. I think that this is a fallacy. At common law there were serious questions continually arising which, on either construction of the statute, can arise no more. Often it was doubtful on whom liability should be charged, or by what

evidence the charge of it could be made successfully. We can well conceive that the undertakers might have found difficulty in properly selecting a defendant amid the varying circumstances which affect the direction and management of merchant vessels, and the proof establishing responsibility must often have been hard to find, and inadequate to satisfy a jury. I do not know the exact history of the legislation; but in this state of things the undertakers may perhaps have reasonably complained, that, having performed great public service in forming a harbour, a dock, or a pier, they found themselves unable to recover for injuries confessedly done to works accomplished with much expense and labour, and of the utmost importance to the commerce of the country. And the legislature may have fairly said that greater protection was due to them than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly, they made the owner, a person easily and always to be found, "answerable" as *owner*, and they dispensed with the proof of negligence, or any other proof, save of the fact of injury by the vessel, in all the cases contemplated by the Act. This was a great change, and a great addition to any security which the undertakers enjoyed at common law; and it was so whether we give the sections the universal force for which the appellants contend, or the more restricted application which, with the Court of Appeal, I think your Lordships should attribute to them. In addition a further material advantage, unknown to the antecedent law, is afforded to the undertakers, who are empowered to

> "detain the vessel or float of timber until sufficient security has been given for the amount of damage done by the same."

These most important provisions supply the raison d'être for the legislation, whatever be the issue of the controversy as to the extent of its action; and I think it is vain to allege that we cannot suggest for it a sufficient motive without straining its effect to work confessed injustice.

I do not stay to consider the argument that this construction, approved by the Court of Appeal, should be rejected because a float of timber is not usually "in charge" of anyone as a vessel is, and that Parliament cannot, therefore, be supposed to have restricted its view to cases in which the instrument of injury is derelict. The first answer is that floats may be, and are often, "in charge," not perhaps of such a "master" as governs a vessel, but of other persons such as the statute takes care to mention. And next the statute deals with the vessel and the float of timber, quoad the "charge" of them, precisely in the same way, and the observations I have made as to the first will, if they have force, be equally applicable to the second.

My reasoning has not been precisely that of the Court of Appeal, and I have not based it altogether upon the legal doctrine as to the "act of God." That doctrine is founded on the view, which commends itself alike to equity and reason, that liability should not be imposed, unless in special circumstances, or where public interests imperatively require it, for consequences which are not wrought by human will or act, and for which no human being is morally responsible. There are exceptions to its application, as when a man voluntarily contracts, with full opportunity of anticipating possible results, to do that from doing which he is disabled by inevitable accident; or when, as is said, the repairing of sea-walls is imperative by prescription, and is made impossible by such accident; and in various other cases. I am not at all prepared to say that the legislature has not full power, if it be so minded, to declare that a proceeding it forbids, or a proceeding it commands, shall not be justified, in the commission of the one, or the omission of the other, because the result was caused by the "act of God." A law so providing we should be bound to enforce, and if in the case before us the statute was universally applicable,

as the appellants contend, the unhappy shipowner must have submitted to its hard infliction. As I have said, I think that it is not so applicable, and that in these circumstances it does not apply, and it seems proper to suggest that we should not, upon any phraseology of a doubtful character, or without the clearest and most unequivocal expression of legislative intention, or if we may anywise reasonably interpret that intention in another sense, assume that a maxim so ancient, so well-established, and so accordant with the common sense of mankind, has been set at nought by the statute before us.

In the view I have presented to your Lordships, the only case cited as touching the present (*Dennis* v. *Tovell* (1)) has no application to it. There the vessel was not derelict, and the owner may properly have been held liable. Here, on the other hand, in the words of POLLOCK, B.,

> "out on the high seas she met with certain risks and injuries, which compelled the crew to leave her, and she became derelict."

In my judgment, she should be dealt with as if she had been abandoned at the Antipodes, and had been ploughing the ocean without a crew for years before she was driven against the pier at Sunderland. On the whole I think that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed.

LORD BLACKBURN.—I have had very great doubt and hesitation in this case, and have, while considering it, changed the opinion I at first held. The question raised depends upon the true construction of three sections of the Harbours, Docks, and Piers Clauses Act, 1847, namely, ss. 74, 75, and 76. These are part of a set of sections gathered together under one head. viz., "Protection of the harbour, dock, and pier, and the vessels lying therein, from fire and other injury." I do not think any other section in the Act throws light on the construction of those sections, nor do I think that the construction put upon them will have any legitimate bearing on the construction of sections in other parts of the Act; though, no doubt, the principles of construction of statutes laid down by this House in the present case must have an important effect on those who have to construe that, or any other, enactment. It is of great importance that those principles should be ascertained, and I shall, therefore, state as precisely as I can what I understand from the decided cases to be the principles on which courts of law act in construing instruments in writing, and a statute is an instrument in writing.

In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer than by referring to the old rules of pleading as to innuendoes in cases of defamation. Those rules, though highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they prima facie bore, unless it was supported by an inducement, or preliminary averment of facts, and an averment that the libel was published, or the words spoken, of and concerning those facts, and of and concerning the plaintiff as connected with those facts. If these preliminary averments were proved, words which prima facie bore a very innocent meaning might convey a very injurious one, and it was for the court to say whether, when used of and concerning the inducement, they bore the meaning imputed by the innuendo: see 1 WMS. SAUND. 246, b. The legislature has rendered it no longer necessary to set out in the record the facts and the colloquium necessary to support an innuendo, they are now only matters of proof on the trial, but the principle remains.

In construing written instruments, I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs; and, therefore, evidence is admissible to show all that he knew, and the court has to say what is the intention indicated by the words, when used with reference to those extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family. In the case of a contract the two parties are speaking of certain things only, and, therefore, the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves* v. *Legg* (2). In neither case does the court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention indicated by the words used under such circumstances really is.

This as applied to the construction of statutes is no new doctrine. As long ago as *Heydon's Case* (3) Lord Coke says that it was resolved (3 Co. Rep. at p. 7b):

> "That for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: First, What was the common law before the Act? Secondly, What was the mischief and defect for which the common law did not provide? Thirdly, What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? and fourthly, The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy."

But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call "the golden rule" is right, viz., that we are to take the whole statute together, and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity, or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them some other signification which, though less proper, is one which the court thinks the words will bear.

In *Allgood* v. *Blake* (4), in the judgment of the Exchequer Chamber as to the construction of a will, it is said (L.R. 8 Exch. at pp. 163, 164):

> "The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity, or inconvenience so great, as to justify the court in putting on them another signification, which to that mind seems a not improper signification of the words; while to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient, as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction. . . . We apprehend that no precise line can be drawn, but that the court must in each case apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will."

I think this is applicable, mutatis mutandis, to the construction of statutes as much as of wills, and I think it is correct. In local and personal Acts

there was found to be great inconvenience from the clauses being framed according to the views of the promoter's counsel, and, consequently, being very differently worded; and to remedy this a practice arose of obliging the promoters to submit their bills to the revision of the chairman of committees, who required them to make their clauses in the form he had approved of unless some good reason was shown for deviating from it. These forms of clauses were well-known, and the research which my noble and learned friend, Lord Gordon, has made, shows that in the Harbour Acts passed in 1846, the common form of the clause used was in the words of what is now s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, but, except in one instance, without a proviso similar to that at the end of it. That shows what the frame of the section would have led one to guess—that the proviso was an afterthought, added to the enactment after it had been adopted. The preamble of the Harbours, Docks, and Piers Clauses Act declares that it is passed for the purpose of comprising in one Act the clauses usually contained in harbour and pier Acts for the purpose of avoiding prolixity and producing uniformity. The clause in question is one of a series for the "protection of the harbour, docks, and pier, and the vessels lying therein from fire or other injury."

The first inquiry for your Lordships is: Are we justified in putting a different construction on the words of an Act passed at the instance of particular promoters, from that which would be put on similar words in a general Act? To some extent I think we are. If in a local and personal Act we found words that seemed to express an intention to enact something quite unconnected with the purpose of the promoters, and which the committee would not, if they did their duty, have allowed to be introduced into such an Act, I think the judges would be justified in putting almost any construction on the words that would prevent them from having that effect. But I do not think it impossible that the legislature can have intended in such an Act to create a new liability to damages unknown to common law. The creation of such a liability would be in direct furtherance of the declared object of the enactment—the protection of the piers from injury. In every construction of the enactment in question which I have heard suggested, the legislature does impose on the owners a liability for damages occasioned by persons for whom they would not be liable at common law. At present I cannot see my way to limiting the words in this Act more than in a general Act; but I think that neither in a general Act nor in a special Act could the legislature have meant to shift the burden of a misfortune befalling the owner of a pier from the owner of the pier, who at common law would bear it, to the owner of a ship wholly free from blame, and involved without fault of his in a common misfortune. It may have been said, but it can hardly have been intended to be said.

The common law is, I think, as follows. Property adjoining a spot in which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour, or a navigable river, or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is liable to make it good, and he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for that owner incurs no liability merely as owner; but he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship, or a float of timber, on water, to take reasonable care, and use reasonable skill to prevent it from doing injury, and that this neglect caused the damage; and if he can prove that the person who has been guilty of this negligence stood in the relation of servant to another, and that the negligence was in the course of his

employment, he establishes a liability against the master also. In the great majority of cases the servant actually guilty of the negligence is poor, and unable to make good the damage if it is considerable, and the master is at least comparatively rich, and consequently it is generally better to fix the master with liability; but there is also concurrent liability in the servant, who is not discharged from liability because his master also is liable. In a very large number of cases the owner of the carriage, or ship, or float of timber is, or at least is supposed to be, the master of those who were negligent, and consequently the action is most frequently brought against the owner, and is very often successful. But the plaintiff succeeds, not because the defendant is owner of the carriage, or ship, or float of timber, but because those who were guilty of the negligence were his servants.

I have stated the law with particularity, because I think it important to have it clearly before us. What I have said is really a statement of the law as laid down by PARKE, B., in delivering the judgment of the Exchequer in *Quarman* v. *Burnett* (5), where the plaintiff was nonsuited because the defendants, though owners of the carriage, and actually seated in it at the time of the accident, were not the employers of the coachman whose negligence caused the accident. I have already said that in the ordinary course of things those employed about a ship are the servants of the owners, and in *Hibbs* v. *Ross* (6) the majority of the Court of Queen's Bench thought this was so much the case that proof of ownership in the defendant was prima facie evidence that they were his servants, calling on him to prove an exceptional state of things in which they were not his servants. A case very likely to occur in a harbour in which this would be disproved would be where the ship was put in the hands of a shipwright to be repaired, and the shipwright's servants in moving her into a graving dock negligently did mischief. The owner would not there be liable at common law. Where the owner of a ship is compelled to take a pilot on board, that pilot is not the servant of the owner, and he is not liable for the negligence of that pilot; but the captain and crew remain his servants, and he is liable for their negligence though a pilot is on board. Where no one is to blame—as where the damage is occasioned by inevitable accident—the loss, at common law, was borne by the owner of the property injured. Lastly, the person injured has at common law no lien on the ship, but only a right of action against the person to blame, and also, if he was a servant, against his employer.

Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the legislature was to give the owners of harbours, docks, and piers, more protection than they had. It seems to have occurred to those who framed the statute that in most cases where an accident occurs it is from the fault of those who were managing the ship, and in most cases those are the servants of the owners, but that these were matters which in every case must be proved, and that consequently there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this the remedy proposed was that the owner, who was generally really liable, though it was difficult and expensive to prove it, should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened; and this is expressed by saying that the owner "shall be answerable for any damage done by the vessel, or by any person employed about the same," to the harbour. It seems to have been suggested that where a compulsory pilot was on board the mischief might very well be by his fault, and the presumption on which they acted—that mischief generally was due to the fault of the owner's servants—did not arise. This case, therefore, was by the proviso taken out of the enactment, and restored to common law. As to the possible case of the mischief being occasioned by the servants of a shipwright, or some other substantial person, it seems to have been thought

A enough to give the owner the remedy over provided by s. 76. As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of
B the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier without fault of either seems not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words.

On reading the words of the enactment, I am brought to the conclusion that
C such was the scheme of legislation adopted by Parliament—the mischief being the expense of litigation, the remedy that the owners should be liable without proof of how the accident occurred. If it had been confined to cases in which the damages were under £50, and might be recovered before two justices under s. 75, I think it would be a scheme of legislation against which no very serious objection could be raised. *Dennis* v. *Tovell* (1), was a case under £50 raised in the county
D court, and brought by appeal before the Court of Queen's Bench. Without bestowing so much consideration on the case as I have now done, I joined in the judgment of the court, which I have for a long time thought right, and now dissent from with great doubt and hesitation. It is impossible, however, to put any limit on the amount. The shipowner, if liable at all under this statute, is personally liable to his last farthing for the whole damage, however great and
E however small may be the value of his ship. In the present case the amount is £2825, and if the statute transfers the liability for so large a sum from the plaintiffs to the defendants, who have done nothing wrong, there is no doubt it is a hard case on the defendants. There is a legal proverb that hard cases make bad law; but I think there is truth in the retort that it is a bad law which makes hard cases, and I think that before deciding that the construction of the
F statute is such as to make this hardship, we ought to be sure that such is the construction, more especially when the hardship affects not only one individual, but a whole class.

I have, therefore, examined the reasons given by the various judges in the Court of Appeal, with a wish to find that some of them would in my mind
G justify the conclusion to which they have come in favour of the defendants. I have tried to find some ground which had escaped their notice in which I could advise your Lordships to uphold that decision, but for a long time without success. It is quite true that where a duty is imposed by law, if the performance of the duty is rendered impossible by the "act of God, or the King's enemies," the non-performance of the duty is excused. *Paradine* v. *Jane* (7), which is the
H case generally cited for that proposition, is one in which the point did not arise. That case was one in which it was attempted to argue that the duty imposed by the contract to pay rent was subject to a condition that the tenant was not evicted by the "act of God," or other vis major, and the really important part of the decision is that where a contract is made which does not either expressly or implicitly except the "act of God," the courts could not introduce that excep-
I tion by intendment of law. That makes strongly against the supposition that in construing a statute where the legislature might have expressed, but did not express, such an exception, the court should introduce it. There is no case cited, and, as far as I can find, no case exists, in which such a doctrine is laid down. In *Latless* v. *Holmes* (8), where an Act, which received the Royal assent in May, by fiction of law related back to the first day of the session in October, it was held to apply to a transaction occurring between October and May. This was contrary to two legal maxims—that a fiction of law should never be used to work injustice, and that the law compels no one to do an impossibility; but the words of the enactment were too plain, and the court was obliged to work not only

great hardship, but, in the particular case, great injustice. In the present case, if the object of the statute be, as POLLOCK, B., says, and as I think it is, with a view to avoid expense and delay, that the owners of the docks are not to be put to the proof of negligence, or to the proof of how the injury was occasioned, that object would be, to some extent, less effectually carried out by importing such an exception, which is certainly not expressed in terms.

Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the court in putting any meaning on the words, which they will bear in order to avoid it. Both MELLISH, L.J., and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man, damages for which someone is answerable at common law. I have already said that the question whether words can bear a secondary sense different from the usual one is one on which different minds differ. In the present case I feel no doubt that the hardship is great enough to justify putting a considerable strain on the words to avoid it; for I feel certain that if the enactment has the effect of shifting the burthen of a misfortune to the piers from the owners of the property, who at common law would have borne it, to the owners of the ship, who are free from all blame, it is an unforeseen consequence of the words used, which words, if the consequence had been foreseen, would not have been used in the enactment.

I cannot see anything in the language of the Act to justify what was the opinion of some of the judges in the Court of Appeal, and is, I think, adopted by LORD O'HAGAN, that it is confined to cases in which someone is in charge of the ship, even if that exception could save the defendants, which I do not think it would. The defendants were by their servants in possession of the ship when it drove on the bank. It did not strike the pier till the rising tide floated it in, but it was all one transaction; and when it struck the pier it was still a ship, and the defendants were still its owners. It is not necessary to inquire when and under what circumstances that which was once a ship becomes a mere congeries of planks to which the statute would not apply further than to say that this ship cannot be treated as having become such, nor was it, in my opinion, in any sense a derelict.

After much hesitation and doubt I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words "damage done by the ship," as used in this enactment, necessarily include all expenses occasioned by misfortune in which the ship was involved in common with the piers. MELLISH, L.J., seems to have thought that these words might bear the more restricted sense of injuria cum damno. The declared object of the enactment is the protection of the piers, etc., from "injury," which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from "loss." If they can bear that sense we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and, consequently, I agree that the appeal should be dismissed with costs.

LORD GORDON.—The opinion which I have formed in this case differs from that at which the majority of your Lordships, and the lords justices of appeal have arrived. I incline to the opinion of the Court of Queen's Bench. Having regard to the great weight due to the opinions which have been expressed by your Lordships, and also to the great weight due to the opinions of the lords justices in the Court of Appeal, both in their collective and in their individual capacity, I feel great distrust in my own opinion. But I have considered the case with great anxiety, not only in consequence of the views entertained by your Lordships, but also in consequence of the case involving the construction to be put upon a section of an Act of Parliament—a matter which

it is of importance should not be subject to conflicting views, founded upon supposed expediency; and I feel that it is my duty to explain more fully than I should otherwise do the grounds upon which I venture to dissent from the opinions which have been expressed by your Lordships, although I am aware that my doing so will have no practical effect upon the decision of this case.

The question relates to the application of the provisions of an Act passed for consolidating certain provisions usually contained in special Acts authorising the making and improving of harbours, docks, and piers. It is a British statute, applicable to Scotland as well as England, and its provisions are of much importance. The question in this appeal arises out of the leading enactment of s. 74. The enactment is general and express that the owner of every vessel causing damage to harbours, etc., shall be answerable for such damage, except in the single case where the vessel is in charge of a pilot; and the question which your Lordships have to consider is whether the words of the section are to be read and applied in their ordinary common sense meaning, or whether there is to be imported into the statute another exception than the express exception it contains relieving the owner of a ship which at the time the damage occurred was in charge of a duly licensed pilot—an exception, viz., from liability in cases where the damage was caused by the vessel through the "act of God," or, as it is sometimes expressed, vis major. It may be mentioned that this section was the subject of consideration in *Dennis* v. *Tovell* (1). That case, having involved a sum under £50, was decided in the county court, but was taken on appeal before the Court of Queen's Bench who dismissed the appeal. That previous decision of the Queen's Bench prevented that court from reconsidering the section in the present case, but leave was granted by the court to appeal to the lords justices, which led to their Lordships' judgment—the subject of the present appeal to your Lordships' House.

The exemption from liability on the part of the owner when his vessel is under charge of a licensed pilot may, it appears to me, be regarded as strengthening the express words of the leading enactment of s. 74 in accordance with the maxim exceptio probat regulam. The first consideration to be attended to in reading the section judicially is whether the words are express, intelligible, grammatical, and unambiguous. I submit for your Lordships' judgment that they have all these characteristics. In my humble opinion, the word "answerable" is merely an equivalent for "liable," and I observe that their Lordships in the Court of Appeal deal with the expression as having that meaning, and no argument was addressed to your Lordships from the Bar, on the part of the respondents, to show that the word was capable of any other construction. I think the section in question itself shows that the words are synonymous. For while it enacts that the owner shall be "answerable," it likewise enacts that the owner, or person in charge shall, in a case of negligence, "be liable," and then it provides that "nothing herein contained shall extend to impose any liability for any such damage upon the owner" where the vessel shall be in charge of a pilot.

The next matter for consideration is: What are the duty and province of a court of law, when ascertaining what effect is to be given to the section, which, in my opinion, is of the express and unambiguous character already stated; and in expressing an opinion upon this question your Lordships are at present officiating, not in your legislative character, but as the Supreme Court of Appeal, in a judicial capacity. BLACKSTONE, the highest constitutional and legal authority with reference to the law of England, when treating of statute law, states (vol. I., at p. 89): "Where the common law and statute differ, the common law gives place to the statute." Again (ibid. at p. 91):

> "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged

in support of this sense of the rule do no one of them prove that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government."

In *Birks* v. *Allison* (9) BYLES, J., stated that the general rule for the construction of Acts of Parliament is that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe they were not intended to bear that construction, because of some inconvenience, which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such a large sense. JERVIS, C.J., in *Abley* v. *Dale* (10), stated (11 C.B. at p. 391):

"If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the function of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity, or manifest injustice from an adherence to their literal meaning."

CRESSWELL, J., in *Biffin* v. *Yorke* (11) states (6 Scott, N.R. at p. 235):

"It is a good rule in the construction of Acts of Parliament that the judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words."

In a recent case before your Lordships' House (*Hutton* v. *Harper* (12)), where the construction of a statute incidentally arose, LORD O'HAGAN said (1 App. Cas. at p. 474):

"The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates, unmistakably, the purpose of the legislature. When the words are obscure, and the purpose therefore more or less doubtful, it may help to a right understanding of them."

The Court of Appeal, without stating that the leading enactment of s. 74 is not express, or is even ambiguous, gave effect to the present respondents' contention, that the statute must be read as if it contained an express provision that the liability for damage should not attach to the owner where the damage had been caused by what is called the "act of God," which in the present case means stress of weather. Their Lordships proceeded upon the ground that such an exception applies to all cases where a duty is imposed, unless expressly included, and they held that the same rule was applicable to Acts of Parliament, and, further, that it could not have been the intention of the legislature, with reference to the statute in question, to impose what their Lordships regard as an unjust liability upon owners guilty of no fault or negligence. But no authority has been referred to, either by their Lordships or in argument from the Bar, warranting the introduction of such a qualification; and, after a careful search, I have been unable to find any, either in the law of England or of Scotland. It has been argued by the respondents that the introduction of such an extension of the owner's liability must be qualified by the implied condition freeing them from such liability where the damage was occasioned by the "act of God," in order to give what is called a "reasonable construction" to the statute itself.

With regard to the supposed intention of the legislature to express the terms

of the Act subject to the implied condition, I may observe that MELLISH, L.J., said:

> "I think, taking the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law, because, if that is not the intention, it is not easy to see the object of the section at all."

This is very high authority for presuming, in so far as it may be relevant or competent to do so, what was the intention of the legislature in passing the Act, although I submit that, where the terms of an Act are clear and unambiguous in the language of the enacting clause, these terms cannot be controlled by any supposed intention which may be presumed to have influenced the legislature, or by consideration of the injustice of the result of the express terms used in the enacting clause. In the *Sussex Peerage Case* (13), the Committee for Privileges of this House desired the opinion of the judges, which was given, and was unanimous. The opinion was delivered by TINDAL, C.J. In the course of it he said (11 Cl. & Fin. at p. 143):

> "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver."

The opinion delivered by the Lord Chief Justice was approved of by LORD LYNDHURST, L.C., and by LORD BROUGHAM, LORD COTTENHAM, LORD DENMAN, and LORD CAMPBELL. In *Fordyce* v. *Bridges* (14) in this House, with reference to the construction of the Apportionment Act, the provisions of which it was argued were quite inapplicable to the law of Scotland, LORD BROUGHAM stated (1 H.L. Cas. at p. 4):

> "We must construe this statute by what appears to have been the intention of the legislature. But we must ascertain that intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."

I think, in accordance with these authorities, that in such a case as the present, where the words are clear and distinct, we must judge of the intention of the legislature from the words of the Act itself. But, if it were relevant or competent to speculate as to what truly may have been the intention of the legislature in passing s. 74, apart from the words of the statute, it appears to me, with great deference, that it may have been, among others, to give that amount of protection to the owners of piers, etc., which the words of the section clearly imply, and so relieve them from the often difficult questions of evidence whether the damage was caused by the fault or negligence of owners of vessels or their servants, in which cases there would be no doubt of their liability apart from the words of the statute.

It seems to me to be not unimportant, in considering the intention, to consider the course of legislation with reference to Acts for the construction of piers and harbours, prior to the passing of the consolidating Act, with which your Lordships are now dealing. That Act was passed, as the preamble states, because it was expedient to comprise in one Act sundry provisions usually contained in Acts of Parliament authorising the construction or improvement of harbours, docks, and piers, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for insuring greater uniformity in the provisions themselves. In accordance with a

suggestion made in the course of the argument, I have looked into the private Acts which were passed for the construction of piers and harbours during the session immediately preceding that in which the consolidating Act was passed, and I find that there were twelve Acts passed in that session, each of which contained a clause imposing liability for injury done to harbour works in the same general terms as those of s. 74 of the consolidating Act; and I presume, from the apparently stereotyped form of the sections in these Acts, that the Acts passed in previous sessions had contained sections to the like effect. I observe that the appellants obtained a special Act in that session, and it contains the clause to which I have referred making an exception when a pilot is on board. The provision imposing liability for damage to pier and harbour works, must therefore, I think, have been familiar to the legislature, and that appears to me to strengthen the presumption that the legislature did intend by the section your Lordships are considering to impose the liability in the general terms it has done. As the Act affected so great interests as the piers and harbours of the United Kingdom, it is to be presumed that its terms would be thoroughly canvassed, and carefully considered in its passage through Parliament, especially with the view of preventing any limitation in the case of future piers and harbours of rights which had been conferred on owners of piers by previous legislation. The risk of causing damage to piers or harbours is, I apprehend, a risk which it would be competent to owners of vessels to insure against, although it might require an alteration of the existing form of policy, by making an express provision against the risk of such damage. The supposed injustice of the section thus resolves itself into a mere question of payment of money to cover the premium to secure against the risk of such damage.

Applying the authorities to which I have referred to the present case, I am humbly of the opinion, which I entertain with very great hesitation after the opinions which have been expressed by your Lordships, that the statute ought not to be construed as if it contained an exemption from liability for damage where it occurs by the "act of God." The words of s. 74 appear to me to be express and unambiguous, and being so, I think they should be read according to their ordinary construction.

Appeal dismissed.

Solicitors: *J. W. Hickin*, for *Ralph Simey*, Sunderland; *Johnson & Weatherall*, for *E. Haswell*, Sunderland.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

SUGDEN AND OTHERS *v.* LORD ST. LEONARDS AND OTHERS

[Court of Appeal (Cockburn, C.J., Sir George Jessel, M.R., James and Mellish, L.JJ., and Baggallay, J.A.), March 7, 8, 10, 13, 1876]

[Reported 1 P.D. 154; 45 L.J.P. 49; 34 L.T. 372; 24 W.R. 860]

Will—Lost will—Parol evidence of contents—Single witness—Declarations of testator.

Parol evidence of the contents of a lost will (even of a single witness, though interested, whose veracity is unimpeached) may be received as in the case of any other document. Statements and declarations, written or oral, made by a deceased testator as to the provisions of the will can be received as evidence of its contents, whether those statements and declarations were made before the execution of the will or (Mellish, L.J., dissenting) after it.

Quick v. *Quick and Quick* (1), (1864), 3 Sw. & Tr. 442, overruled.

Will—Revocation—Lost will—Will kept in custody of testator—Presumption of destruction animo revocandi—Rebuttal.

Where a will which was kept in the custody of the testator has been lost the presumption arises that the testator destroyed the will animo revocandi, but that presumption, although presumptio juris, is not presumptio de jure, and may be rebutted by evidence, written or oral, of the facts. The presumption will be more or less strong according to the character of the custody which the testator had over the will.

Probate—Grant—Part of will destroyed or lost—Grant in respect of remaining portion.

Where it is known that a portion of a will is wanting the court may grant probate of that which is left, it being satisfied that what is left is substantially correct as far as it goes.

Notes. Followed: *Gould* v. *Lakes* (1880), 6 P.D. 1. Considered: *Woodward* v. *Goulstone*, [1886-90] All E.R. Rep. 234. Followed: *Clark* v. *Dixon* (1891), 8 T.L.R. 11. Considered: *Atkinson* v. *Morris*, [1897] P. 40. Applied: *Read* v. *Price*, [1908-10] All E.R. Rep. 599. Considered: *In the Goods of Phibbs* (1917), 86 L.J.P. 81. Followed: *In the Estate of Macgillivray*, [1946] 2 All E.R. 301. Considered: *In the Estate of Wippermann*, *Wissler* v. *Wippermann*, [1953] 1 All E.R. 764. Referred to: *Krehl* v. *Burrell* (1878), 10 Ch.D. 420; *Gardiner* v. *Courthope* (1886), 12 P.D. 14; *Harris* v. *Knight* (1890), 15 P.D. 170; *Allan* v. *Morrison*, [1900] A.C. 604; *Re Sykes*, *Drake* v. *Sykes* (1907), 23 T.L.R. 747; *Gill* v. *Gill*, [1909] P. 157; *Re Jessop*, [1924] All E.R. Rep. 692; *Barkwell* v. *Barkwell*, [1927] All E.R. Rep. 138.

As to probate and proof of contents of a lost will, see 16 Halsbury's Laws (3rd Edn.) 175, 176; and for cases see 24 Digest (Repl.) 104-109. As to revocation, see 39 Halsbury's Laws (3rd Edn.) 887 et seq.; and for cases see 44 Digest 315 et seq.

Cases referred to:

(1) *Quick* v. *Quick and Quick* (1864), 3 Sw. & Tr. 442; 4 New Rep. 347; 33 L.J.P.M. & A. 146; 10 L.T. 619; 28 J.P. 455; 10 Jur.N.S. 682; 12 W.R. 1119; 164 E.R. 1347; 23 Digest (Repl.) 106, *1067*.

(2) *Brown* v. *Brown* (1858), 8 E. & B. 876; 27 L.J.Q.B. 173; 30 L.T.O.S. 273; 4 Jur.N.S. 163; 120 E.R. 327; 44 Digest 343, *1724*.

(3) *Doe d. Shallcross* v. *Palmer* (1851), 16 Q.B. 747; 20 L.J.Q.B. 367; 17 L.T.O.S. 252; 15 J.P. 689; 15 Jur. 836; 117 E.R. 1067; 44 Digest 313, *1462*.

(4) *In the Goods of Ripley* (1858), 1 Sw. & Tr. 68; 31 L.T.O.S. 26; 4 Jur.N.S. 342; 6 W.R. 460; 164 E.R. 632; 23 Digest (Repl.) 104, *1047*.

(5) *Doe d. Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363; 2 H. & N. 54; 9 L.J.Ex. 27; 3 Jur. 955; 151 E.R. 154; 44 Digest 543, *3609*.

(6) *Wharram* v. *Wharram* (1864), 3 Sw. & Tr. 301; 4 New Rep. 117; 33 L.J.P.M. & A. 75; 10 L.T. 163; 28 J.P. 312; 10 Jur.N.S. 499; 12 W.R. 889; 164 E.R. 1290; 23 Digest (Repl.) 105, *1054*.

(7) *Dickinson* v. *Stidolph* (1861), 11 C.B.N.S. 341; 142 E.R. 828; 44 Digest 357, *1891*.

Also referred to in argument:

Montefiore v. *Montefiore* (1824), 2 Add. 354.

Hill v. *Wilson* (1873), 8 Ch.App. 888; 41 L.J.Ch. 817; 29 L.T. 238; 21 W.R. 757, L.JJ.; 24 Digest (Repl.) 786, *7751*.

Johnson v. *Lyford* (1868), L.R. 1 P. & D. 546; 37 L.J.P.M. & A. 65; 18 L.T. 769; 32 J.P. 663; 16 W.R. 1130; 23 Digest (Repl.) 106, *1068*.

Staines v. *Stewart* (1861), 2 Sw. & Tr. 320; 31 L.J.P.M. & A. 10; 5 L.T. 457; 26 J.P. 7; 8 Jur.N.S. 440; 164 E.R. 1019; 44 Digest 359, *1928*.

Keen v. *Keen* (1873), L.R. 3 P. & D. 105; 42 L.J.P. & M. 61; 29 L.T. 247; 37 J.P. 696; 44 Digest 356, *1883*.

In the Goods of Sykes (1873), L.R. 3 P. & D. 26; 42 L.J.P. & M. 17; 28 L.T. 142; 37 J.P. 183; 21 W.R. 416; 44 Digest 314, *1464*.

Appeal by the defendants from a decree of Sir James Hannen, P., granting probate of a paper put forward as containing an account of the contents of a lost will.

Sir Hardinge Giffard, Q.C., *Dr. Deane, Q.C.*, and *Bayford* for the defendants, descendants of the testator, opposing the will.

Davey, Q.C., *Thesiger, Q.C.*, *George Browne*, and *Keogh* for interveners supporting the will.

Hawkins, Q.C., *Inderwick, Q.C.*, and *Dr. Tristram* for the executors named in the will.

Cur. adv. vult.

Mar. 13, 1876. **COCKBURN, C.J.,** read the following judgment.—This is an appeal against the decree of the president of the Probate Division of the High Court of Justice, granting probate of a paper purporting to contain the substance of the will of the late Lord St. Leonards. The will was last seen on Aug. 20, 1873, and the death of the testator took place on Jan. 29, 1875. The will was kept in a small box placed on the floor of a room, called the saloon, on the ground floor of the house. Upon the death of the testator it was looked for in that box, by the solicitor employed by the executors, and it was found to be gone. Several questions arise upon this state of facts. In the first place, was that will destroyed by the testator animo revocandi or not? Secondly, can secondary evidence be given of its contents? Thirdly, if so, have we satisfactory evidence of the contents? Lastly, if the evidence is satisfactory as far as it goes, but not altogether complete, ought probate to be granted so far as the evidence goes of the contents which we have before us?

Where the will is in the custody of a testator, and is not found, the well-known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but, of course, that presumption may be rebutted by the facts; although presumptio juris, it is not presumptio de jure, and the presumption will be more or less strong, according to the character of the custody which the testator had over the will. Here we have to observe that the custody was anything but a close custody. The box was kept in a room on the ground floor, common not only to the inmates of the house, but to anyone who had obtained access to it. It was kept in a common box, easily opened, and the key was kept in an escritoire not always under lock and key. It is a fact that of the different keys in the house there were no less than five keys by which the

escritoire might be opened, and the will was, no doubt, known to the inmates of the house, or to those who had been its inmates, as being kept in this box, for, as a matter of fact, Lord St. Leonards was constantly, or at all events frequently, engaged in making wills or codicils, testamentary dispositions of one sort or another, and upon all these occasions the servants of the house were called in to witness the execution of the testamentary document, and, therefore, would well know that the box was the place for the deposit of the testamentary papers of Lord St. Leonards.

Next comes the question whether it is or is not probable that the will should have been destroyed by the testator, and here we must look to the position and character of the man. [HIS LORDSHIP reviewed the evidence and continued:] It seems to me utterly impossible to suppose that, under these circumstances, such a man as Lord St. Leonards would voluntarily have destroyed his will, whether for the purpose of revoking it or making another, or for any other purpose that could be conceived. My mind revolts from arriving at any such conclusion, and I feel bound to reject it. The last time the will was seen was by Miss Sugden on Aug. 20, 1873. Lord St. Leonards was taken ill in September, and confined to his room from that time to Christmas, 1873, and during the whole of that time the box was kept by Miss Sugden, as she tells us, in her own room. When he again rejoined the family down stairs, she replaced the box in the saloon, that he might not miss it, and it remained there until his last illness in March, 1874. It was then taken possession of by Miss Sugden, and kept by her until Lord St. Leonards' death. Therefore, it could only have been got at by him between Christmas and March. Long after March, when he was stricken with his last illness, and from which time he was confined to his own bedroom, he again and again referred to the various provisions he had made by the will—in other words, he referred to the will as still subsisting, and this again adds to the vast improbability of his having destroyed the will. The only conclusion I can arrive at is, not that he destroyed it, certainly, but that it was clandestinely got at by somebody and surreptitiously taken away. Who that somebody is, is one of those mysteries which time may possibly solve, but which at present would defy human ingenuity to say.

When the idea of Lord St. Leonards having himself destroyed the will is disposed of, the next question which presents itself is whether, the will having been lost, secondary evidence can be given of its contents. That matter is disposed of by the authority of *Brown* v. *Brown* (2), which, as I think, has been recognised as perfectly sound. There LORD CAMPBELL says (8 E. & B. at p. 886):

> "Parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document."

In that I, for one, entirely concur. The consequence of a contrary ruling would be in the highest degree mischievous, it would enable any person who desired, from some sinister motive, to frustrate the testamentary disposition of a dead man, to prevent the possibility of the will of the deceased being carried into execution. No doubt the absence of the will is a serious fact, and one which may place the court that has to decide whether the parol evidence of the contents is right or wrong in a position of considerable difficulty; but with that difficulty it is the business of the court to grapple, in order that effect may be given to the will of the man who has made his will according to the requirements of the statute, and the will after his death ought to be carried into effect.

I go, then, to the third question, which is whether we have before us sufficient evidence of the contents of the will. This, undoubtedly, depends upon the evidence of Miss Sugden alone. If we had not her evidence, all the other parol evidence in the case, or even the documentary evidence, would not enable us to say that we had ascertained the contents of this will so as to give effect to it.

The will of Lord St. Leonards, as executed in January, 1870, consists of two parts, a will of 1867, and the additions to that will made in January, 1870. The two parts added together constitute his last will and testament. Miss Sugden gives an account of this will of 1870, as compounded of the will of 1867, and the additions to it in 1870. [His Lordship stated the terms of the will in detail.] It is admitted on all hands that the veracity and honesty of purpose of Miss Sugden are beyond all question, and that, whether that lady is strictly accurate or not in the details she has given us, she has spoken only with a desire to speak the simple truth. She may have made mistakes, and I think she must have made some mistakes, the impression on my mind is that she has certainly fallen into some confusion between the contents of the will of 1867 and the additions made to it in 1870. . . . We have to ask ourselves how far, Miss Sugden's veracity and honesty of purpose not being for a single moment questioned, we can place implicit reliance upon that lady's recollection of the various testamentary dispositions contained in the will upon which she has spoken.

No doubt the observation naturally presents itself that in a matter of this kind, with details more or less of a technical character, it is not likely that these things should have impressed themselves upon a lady's mind, or that she should be able to produce them with anything like satisfactory accuracy; but then I think, as Sir James Hannen, P., has pointed out in his luminous judgment, we must look to the particular position of Miss Sugden, and the peculiar training that she had undergone. She lived with, and devoted her life to a great lawyer, who may be said, literally, to have lived in the law, who seems to have devoted his whole life, even to the last, to the study of the law, and to the production of those works which are so highly valued by the legal profession. He was in the habit of employing Miss Sugden as his amanuensis, and, when he was preparing the various editions of his works, employed her to correct the proofs. He was fond of explaining to her the various points of law, as they from time to time presented themselves in going through his works, and explaining to her things which otherwise, no doubt, she would not have been able to understand. Besides that, she had on various occasions an opportunity of reading these two wills of 1867 and 1870. On each occasion, when Lord St. Leonards had completed his will, he read it over to her, and she had other opportunities of seeing the will, and tells us that she read it over three times, besides being called upon by him on different occasions, when he was making the codicil to his will, for the particular information that he wanted. That places her in a very different position from what would have been the case with a lady otherwise circumstanced. Therefore, I am prepared to believe, that with all these advantages she had become familiar with the testamentary dispositions made in these wills by her father. It is true that, when we look at the paper purporting to contain the provisions of the will as propounded, the language may be found to assume a technical character, of which it would be little likely that, even with all her opportunities and advantages, Miss Sugden should have acquired the command. But then the answer to that is given, I think, by Sir James Hannen, P., namely, that her statement is not clothed in that technical and professional form, but is the simple statement of a layman, stating what the provisions in the will were.

It is, nevertheless, open to observation that Miss Sugden is here a very interested party, that she takes very largely under this will. I am glad to think that it has not occurred to anyone to say, or to suggest, that upon that ground Miss Sugden has departed one hair's breadth from the truth intentionally. Nevertheless, a deep interest in the details of a will may lead a person, under the bias which interest so naturally produces, to fancy she recollects something in her own favour which she may not recollect. Therefore, although I am perfectly ready to give implicit credence to everything which Miss Sugden has stated as

to the contents of this will, I should be glad to find for my own satisfaction, and the satisfaction of everyone else, corroboration, in the collateral evidence, of the statements of Miss Sugden; and those statements, it will be observed, have reference partly to the real property left by Lord St. Leonards, and partly to the personalty.

Let us see what confirmation there is of her representations as to the dispositions of the will relating to the real property; and that confirmation is practically, if not entirely, in the codicils made by Lord St. Leonards between the making of the will of 1870 and the August of 1873, when the last codicil was made. These codicils refer again and again to the disposition of the real estate made by Lord St. Leonards in his will; and it has been pointed out in the elaborate and most able judgment of SIR JAMES HANNEN, P., how the various statements of Miss Sugden as to the particular provisions of the devises of the real estate are confirmed by reference to them in the codicils. Then I come to the personalty, where the codicils do not help us, and where, therefore, if Miss Sugden's statement required confirmation, it would be necessary to look for it elsewhere; and here I may say, once for all, that, in my opinion, if there were not one tittle of confirmatory evidence as regards this or the other part of the will, I am so satisfied of the perfect truthfulness, substantially speaking, of the statement of Miss Sugden—I think she may have fallen into confusion upon some matters, and there may have been some omissions from her statement—but I am so satisfied that I only enter into this part of the evidence because it is satisfactory to find statements involving such vast interests to the parties concerned, corroborated by extrinsic independent proof. The corroboration is to be found more immediately in the testamentary papers and statements and verbal declarations of Lord St. Leonards himself; and here the question arises as to the admissibility of these declarations; and although, as I just said, I look upon this part of the evidence as the least important, because I am perfectly satisfied as to the conclusion at which I arrive in my own mind about it, still the question of the admissibility of the evidence is one of considerable importance in a legal point of view, and as I am clear upon it in my own mind, I think it had better be disposed of.

The question presents itself whenever the declarations of the testator can be received as secondary evidence of the contents of the lost will. No doubt, generally speaking, where secondary evidence is admissible, if oral, it must be given on oath; if documentary, it must be verified on oath. Nevertheless, the declarations of deceased persons are in several instances admitted as exceptions to the general rule, when such persons had peculiar means of knowledge, and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands pre-eminently in that position. He must be taken to know the contents of the will he has made. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree—evidence not always to be relied on, yet sufficiently so to make it worth admitting, leaving its effect to be judged of by those who have to decide the case.

It is upon this principle, I presume, that the declarations of a deceased testator have, in more than one instance, been admitted as evidence. Thus they have been admitted, as in *Doe d. Shallcross* v. *Palmer* (3), to negative the presumption, arising from interlineations appearing on the face of a will, that such interlineations have been made subsequently to the execution of the will. In like manner the declarations of a testator have been admitted to show the continuing existence of the will at the time they were made, and so to rebut the

presumption of the will having been destroyed animo revocandi when the will, having remained in the custody of the testator, is no longer forthcoming. So, if a testator were to say: "When I am dead you will find my will in such a place," or: "I have left my estate Blackacre to my son John," or: "I have left £5000 to my daughter Mary," such or similar declarations would be receivable in evidence to show that the will was, so far as was known to the testator, in existence at the time when they were made. The question before us is whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of a will known to have existed, but which at his death is no longer forthcoming. That, morally, such statements and declarations are entitled, when no doubt exists of their sincerity, to the greatest weight, cannot be denied; and I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted on account of the exceptional position of a testator for one purpose, why should it not be for another, where there is an equal degree of knowledge and an equal absence of motive to speak untruly?

Could it be contended that if the testator had given written instructions for his will, or had first made a draft of the will, and had endorsed on the back of it: "This is the draft from which I copied my will," the draft would not have been admissible to prove the contents of the will? Or suppose he had made a copy of the will, indorsing it as such, is our law in such a state that such a copy would be inadmissible to show the contents of the lost will? All the observations made by Lord Campbell in *Doe d. Shallcross* v. *Palmer* (3) as to the mischief which would result from excluding such testimony apply equally here. Lord Campbell said (16 Q.B. at pp. 756, 757):

> "If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ for this purpose from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? What distinction can be drawn between the draft of the will, or the written instructions for the will, and the verbal declarations of the testator's intention, except as to the strength of the evidence which they respectively afford? As to admissibility, they all seem to rest on the same principle; and if the verbal declaration of intention must be rejected, so must the draft of the will with the initials of the testator affixed to it. It would not be very creditable to the law if such evidence were to be excluded; and I am not aware of any principle, rule of law, decided case, or dictum against the admissibility of such evidence."

These observations, in which I entirely concur, appear to be equally applicable to the present case. I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though of course not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. There are, no doubt, cases in which the declarations of a testator are inadmissible. Thus, a statement by a testator that he had duly executed his will could not be received, as was decided in *In the Goods of Ripley* (4), and there is good reason for the decision—viz., that the exercise of the testamentary power being conditional on the observance of the formalities prescribed by statute, a man cannot by his own mere assertion

establish that he has fulfilled the conditions necessary to the exercise of the right. So, where there is a patent ambiguity on the face of the will, arising either from an error in the designation of the person who is to take, or of the property bequeathed, which makes the execution of the will impossible, the instructions or other declarations of the testator cannot be resorted to to remove the difficulty. For here, again, the statute comes in the way and prevents effect being given to the will otherwise than as executed by the testator. So that if, as in *Doe d. Hiscocks* v. *Hiscocks* (5), he has spoken of John, as the eldest son of his son John, when in fact the eldest son of John was Simon, and John was the second son, effect cannot be given to the will by showing that the testator meant Simon when he said John. It would be to make a new will unaccompanied by the statutory requirements.

It is obvious that the present case stands on totally different grounds. Like that of *Doe d. Shallcross* v. *Palmer* (3), it has no reference to an ambiguity to be solved. No difficulty here arises as to making the will speak differently from its language as executed by the testator. There being no question as to the due execution, the statute creates no difficulty. The question is simply one of the admissibility of secondary evidence, and has to be determined by the rules of evidence alone. I am, therefore, decidedly of opinion that all statements or declarations, written or oral, made by a testator prior to the execution of the will are admissible as evidence of its contents—which lets in the memoranda made by the testator as preparation for his will.

The admissibility of declarations made subsequently to the execution of the will creates greater difficulties by reason of a dictum of LORD CAMPBELL in *Doe d. Shallcross* v. *Palmer* (3), and a decision of LORD PENZANCE in *Quick* v. *Quick and Quick* (1). In principle there appears to me to be no distinction. The position of the testator is the same, both as respects peculiar knowledge and motive for speaking the truth, which can be no less than the motives which he has for making statements as to his intentions prior to the execution of the will. In the case of a holograph will, the testator alone may know the contents. In the case of its loss, his statements afford, morally, the best evidence of the contents; yet we are asked to exclude their operation as showing the contents, though it is acknowledged that such evidence is available to rebut the presumption of revocation, and to establish what is called adherence to the will. The adoption of such a rule would, moreover, lead to a very strange anomaly. The great majority of statements made by a testator adduced for the purpose of proving adherence are, in fact, statements as to the contents of the will. But such statements of the contents of the will, assumed to be truthful, having been admitted and acted upon for the purpose of showing that, so far as the testator was concerned, the will was still alive, how is it possible to shut out the evidence when the inquiry as to the contents comes directly in question? It appears to me that if, as an exception to the general rule, the evidence is admissible for the one purpose, it must be equally so for the other. How can we use evidence of the contents of a will for an ulterior purpose, and shut it out when the contents of the will are immediately in question?

As regards the two authorities referred to, it is to be observed that what is said by LORD CAMPBELL in *Doe d. Shallcross* v. *Palmer* (3) is merely an obiter dictum unnecessary to the decision of the case, inasmuch as all the declarations of the testator given in evidence had been made prior to the execution of the will. LORD CAMPBELL says: "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires." In that, for the reasons we have given, we fully concur. He goes on to say: "For the same reason a declaration by the testator after the will was executed that the alteration had been made previously would be inadmissible." This may be more doubtful. But, assuming it to be right, it does not touch the present case. The

question in *Doe d. Shallcross* v. *Palmer* (3) turned on the efficacy or inefficacy of the execution, which, if made after the interlineations, would be valid; if before they were inserted, would be inoperative to cover them. What it comes to is, that the declaration of a testator cannot be used to prove that the execution of the will was such as to give effect to it. The dictum of LORD CAMPBELL does not, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the contents of a will where the execution is not in question. *Quick* v. *Quick and Quick* (1) is, however, an authority directly in point, as the contents of the will were there sought to be proved by declarations of the testator made after the execution of the will. Refusing to act on these, LORD PENZANCE refused probate of the will. Taking a different view of the law, for the reasons I have given, I cannot concur in the judgment of LORD PENZANCE in *Quick* v. *Quick and Quick* (1), and I feel that we are bound to overrule it. I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove the contents of the will.

This being so, the statements of Miss Sugden receive abundant confirmation. The paper in the handwriting of Lord St. Leonards, marked "J.," sets forth the legacies he was about to make, substantially as Miss Sugden has represented them as occurring in the will, with one or two trifling errors easily corrected. The emphatic statement made by the testator to Mr. Frank Sugden that he intended to do more for those of his daughters who had given him the least trouble, and shown him the most affection, and his reiterated statements to everyone about him as to what he had done for Miss Sugden, and that she would not only be a landed proprietor, but would also be wealthy and would enjoy the same comforts and style of living that she had enjoyed when living with him—which certainly would not have resulted from the landed property left to her for life, or the legacies left her in the first will—suffice to confirm the statement that the residue of the personal estate was left to her and two of her sisters, to the exclusion of the other daughters. I am, therefore, of opinion that if the statement of Miss Sugden needed confirmation—which I think it does not—the codicils, the testamentary papers, and the parol evidence of the declarations of Lord St. Leonards abundantly confirm it.

As regards the only remaining question, viz., whether, assuming that we have not before us all the contents of the lost will, probate should be allowed of all we have, so long as we are satisfied that we have the substantial parts of the will made out—I cannot bring myself to entertain a doubt. If part of a will were accidentally burnt, or if a portion of it were torn out designedly by a wrong-doer, it would, nevertheless, in my opinion, be the duty of a court of probate to give effect to the will of the testator so far as that will could be ascertained. It is not because some who would otherwise have benefited by the will may thus fail to profit by the dispositions of the testator that his will shall be frustrated and fail of effect where his intentions remain clearly manifest. It may be that here in the will there were matters which Miss Sugden fails to remember—and I cannot but think that there must have been ultimate remainders which Lord St. Leonards took care to deal with in his will, which Miss Sugden no longer remembers—indeed, she has herself said that there were other remainders which she does not recollect.

So far, therefore, we have the contents of the will before us in a defective form. It may also be that there are some few legacies—there cannot be many—which she does not recollect. They must be few, and they cannot have been of any material consequence. But we have substantial testamentary dispositions brought to our minds, and it would not be right to enable any wrongdoer or any accident—not putting it so high as an intentional wrong—which might happen to a will, and which would prevent the court which had to deal with it from being perfect master of its contents, to prevent the will from being carried into

effect as far as the disposition of the testator had become known. I think we cannot have a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary disposition of the testator, I think that of two evils or two inconveniences it is far better, where the court can see its way to essentially substantial dispositions made in a will, that it should give effect to them, although possibly some of the intentions of the testator in making that will may not be capable of being carried into effect.

For these reasons, I am of opinion that the decree of SIR JAMES HANNEN, P., granting probate of the paper propounded as containing the provisions of the will of the late Lord St. Leonards, was right, and should be affirmed.

SIR GEORGE JESSEL, M.R., read the following judgment.—If this were an ordinary case I should content myself with saying that I concur in the judgment which my Lord has just pronounced, but it is not an ordinary case. It involves legal considerations of great importance, although of great rarity, and I, therefore, think it right to pronounce a judgment of my own.

I will first consider the question of the revocation of the will. As to that, no doubt the law requires that it should be proved satisfactorily that a will has been duly executed and attested. You must also prove destruction of the will with intent to revoke, in order to get rid of the will itself. But there is another rule of law well established. If you trace the will to the possession of the testator, and it is not forthcoming at his decease, and there is no evidence to show what has become of it, that is a sufficient presumption of law that he destroyed it with the intention of revocation; but like all other presumptions of law, it can be rebutted by sufficient evidence. I believe I am right in saying that, like all other presumptions of law, it may be rebutted by what is commonly called parol evidence, but in this case might, more strictly perhaps, be called oral evidence. To determine the first question, therefore, we have only to consider whether there is sufficient evidence to rebut the presumption. After the elaborate judgment delivered by the learned President in the court below, and by the Lord Chief Justice in this court, I am not going to recapitulate the details of that evidence; but I must say I am satisfied that the testator in this case died under the belief that he had left behind him a will disposing in a manner satisfactory to him, of his whole estate. Every act of his life which is proved, every statement which he is proved to have made in respect to his testamentary disposition, in my mind, points to but one conclusion, and to arrive at a contrary conclusion would, in my opinion, be to believe that Lord St. Leonards not only spoke a lie but acted a lie to the last moment of his existence. I think in this case the presumption is not only rebutted, but is completely rebutted, not only by the evidence of Miss Sugden herself, but by all the other evidence in the case which is directed to that portion of the contest.

The next point which we have to consider is one of a very serious character. It is said, and truly said, that, however great may be the reliance you place upon the testimony adduced as to the contents of this will, there is no evidence of the whole of the contents of it; and, further, there is evidence that a portion of the contents is not now known. Upon that there can be no doubt or question, because the principal witness—in fact for certain purposes the only witness in support of the instrument—Miss Sugden, herself tells us, first, as regards the personalty, that there were some small legacies the particulars of which she is unable to recollect; and, secondly, as regards a considerable portion, in fact the larger portion, of the real estate, there were some limitations over after the seven lives—because as to six of them the estates have been in the issue of six of the tenants for life—the particulars of which she does not remember, although she does remember that other estates were left amongst the members of the family. Therefore, we have, on the one hand, no doubt, legacies of comparatively

small amount, trifling in themselves, the particulars of which we are unable to discover; and, on the other hand, we have limitations, remote indeed and unlikely to come into effect, but still which are undoubtedly omitted from the instrument of which probate has been granted. The question which we have to decide is whether under such circumstances as those the will can be admitted to probate at all.

I will consider the argument, first of all, as affecting the personal estate; and, secondly, as affecting the real estate. The argument as to the personal estate was this. It was said, if it is proved to your satisfaction that legacies were omitted, then, by granting probate of the will which disposes of the residue, you are giving a larger proportion of the personal estate to the residuary legatees than was intended for them by the testator, and in so granting probate you are not only not performing the intention, but you are acting contrary to the intention, of the testator. This argument appears to me to be fallacious; it turns on the use made of the word "intention." It seems to me that the testator may be said to have in this respect two intentions. He has a primary intention that the legatee, whether general or specific, shall take the legacy; he has a secondary intention that if by any reason whatever that legacy cannot take effect, then it is not to go to his next of kin, but is to go to his residuary legatee. It may well be that we are not able to give effect to the primary intention, but we certainly are able to give effect to the secondary intention, and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies, the amount of which, and the names of the legatees of which, we do not know.

This is by no means a new version of the law. We are familiar with the law as to personal estate as it existed before the Wills Act, 1837, which has been extended by that Act to devises of real estate. I mean the rule that lapsed or void bequests fall into the residue. That rule, which was established by the judges before the legislature had confirmed it by the Wills Act, 1837, s. 25, meant this—not that the testator whose whole property was, say £11,000, and who gave £10,000 to his son, and the residue to his nephew, not contemplating the fact that the son would die in his lifetime, intended the £11,000 for the nephew, because everybody knows that a testator, in the absence of express provision, contemplates the survival of his legatee; but it was that he intended that particular nephew to take what was left of the personal estate under whatever circumstances the residue was increased. In the case of lapsed bequests the intention was entirely defeated; in the case of void bequests—say that the testator being possessed of £11,000, gives £10,000 to a charity and the residue to A. B., a stranger, it might well have been said that he would not have preferred that stranger to his next of kin had it not been that he died in the belief that the bulk of his fortune would be devoted to charity, and to say that that which the charity cannot take shall go to augment the residue in favour of the residuary legatee, a stranger, is entirely contrary to the intentions which might naturally be imputed to the testator. But the law is clear upon the subject, that the primary intention not being capable of being carried out because the charity could not take, the residuary legatee took it, although that was certainly not the intention of the testator.

The same principle was extended to the case where it was uncertain who the legatee was—the uncertainty might arise in various ways—the handwriting of the testator (and this has happened in holograph wills) might be so bad that it was impossible to read the name of the legatee and there was no other description by which to identify it—in that case the intention of the testator was certainly to benefit the legatee to the extent of the legacy given to him, but in the uncertainty as to the name of the legatee, the sum fell into and augmented the residue. Or an uncertainty might have arisen from other causes; the legatee

might be so imperfectly described that it was impossible to ascertain who he was; there might be two or more persons answering the description and no evidence to distinguish between them. In that case the law did not divide the legacies between those two or more persons, but again held the legacy void for uncertainty, and the amount fell into the residue.

What difference is there in principle between the cases I have mentioned and the cases which have been alluded to by the Lord Chief Justice? Take the case of a candle falling on the will and obliterating the name of the legatee; why should there be more difficulty in the court granting probate with the name omitted by reason of a candle or a chemical liquid having fallen upon the will after the death of the testator than by reason of the illegibility of his handwriting or the impossibility of ascertaining from the description in the will who the legatee was? There is no difference in intention; in all those cases there is a primary intention which is defeated, and a secondary intention to which effect is given. It appears to me that there is no difference at all between those cases. But is there any difference where the loss of legacies arises not from actual obliteration upon the face of the will itself, but from obliteration from the tablets of the memory, so to speak, of the witness whose testimony is admitted as secondary evidence of the contents of the will? It seems to me that in principle it can make no difference whatever, and, therefore, there is no objection upon this ground as regards the personal estate.

Lastly, it does appear to me that there are numerous decisions in the old ecclesiastical courts, which would be followed in the present Court of Probate, which confirm this view—I mean those decisions, many of which are reported, in which probate has been granted of a will although it was proved that one or more codicils existed also. In other words, probate has been granted of part of the whole testamentary instrument, because the will and codicils together make the testamentary instrument, and it does not matter for this purpose whether it is a portion of the will which is lost or a codicil which is lost. I may mention that there are also decisions by which probate has been granted of a codicil or codicils, although the will was lost. Therefore, those decisions show that the mere fact of its being known that a portion of the testamentary instrument is wanting, is not sufficient to prevent the court from granting probate of that which is left, it being satisfied that what is left is substantially correct so far as it goes.

I think this disposes of the argument as to intention as regards the personal estate. As regards the real estate, the matter stands upon a somewhat different footing; as to that we have, assuming the evidence to be reliable, limitations of the real estate, perfect so far as they go. As regards what have been called the principal estates, which are in a sense attached to the peerage, all Miss Sugden says is that there were limitations, after those she has mentioned, among the testator's family, but whereas there were seven lives, it seemed so absurd that she says: "I never thought much about it;" so that what is missing is something which, if it existed and could be proved, would damage the heir-at-law to the extent to which these subsequent limitations could take effect, but, omitting them from the probate cannot, as I said before, injure him, but must benefit him. It does not seem to me, therefore, that he can have any ground of complaint in this respect, there not being any residuary devise as regards these estates. As regards the other properties which are given over on failure of the prior limitations, if one were at liberty to conjecture, one might say it was strange that the whole of the properties were not to accompany the peerage; but upon this point Miss Sugden's evidence is positive, and she has not been further questioned about it. She says as to Kingsdown, Boyle Farm, and Peasemore, that they were left in the manner she mentions on failure of the prior limitations which she mentions, and that the limitations, which she does not remember, had reference only to the other estates. Therefore, in the present state of the

evidence, there is no gap to be filled up as regards any of the estates, except those which were primarily left to accompany the peerage.

It was said that we ought not to grant probate as to the real estate by reason of the change which has taken place in the law of probate since the passing of the Court of Probate Act, 1857 [repealed: see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 20]. I by no means accede to that argument. The Act of 1857, when it is looked at, did not really change the law on the subject; it enabled a tribunal created by that Act to grant probate of wills of real estate and nothing more. Section 62 of the Act says that where a will is proved in solemn form, or its validity otherwise decided upon, the decree of the court is to be binding upon the persons interested in the real estate, and s. 63 says that unless the heir is cited he is not to be bound. What is the effect of that? No doubt it enabled the Court of Probate, and of course it enables the High Court of Justice now, as the successors of that jurisdiction, to bind the heir by proving the will in solemn form, but that was not new; the Court of Chancery always did bind the heir by establishing a will in a suit properly instituted. It no doubt established it after a trial in solemn form, which was called an issue devisavit vel non, but which was as much an issue of probate against the heir as the probate granted by the Probate Court when the will was proved in solemn form and the heir cited. It was not an alteration of law, but it was empowering another tribunal by a similar, and nearly identical, procedure, to establish a will against the heir at the same time that it established the will against the next of kin, and that was all. Indeed, so clearly was that established that the Court of Chancery, as long as it existed, retained its ancient jurisdiction of establishing a will against the heir, in cases where the will related only to real estate. You must have had recourse to the Court of Chancery, and would now have recourse to the Division of the High Court which has inherited, so to speak, the jurisdiction of the Court of Chancery.

In fact, as all real property lawyers know, in ancient times it was customary for great landed proprietors to make, not only separate wills of real and personal estate, but to make several wills of real estate. I have seen as many as three ancient wills of different portions of the real estate of a testator devoting estates to different purposes. One will might devote a portion of the testator's real estate to a charity—that would be a separate will—another might give an estate to one devisee, and a third might give another estate to another devisee. If a testator intended to found two families, he was very often desirous that his will should accompany the muniments of title to each estate, and he made separate wills. If he made, as he sometimes did make, a separate will of personal estate, then you could not, even under the Act of 1857, have gone to the Court of Probate, but you must still have had recourse to the Court of Chancery to establish the will as regards the real estate. It appears to me, therefore, that the Act has no bearing whatever on the question we have to decide, and if it would have been right to establish a will in the Court of Chancery, it would be equally right to grant probate of the real estate.

It was not contested that before the Act, you could have got proof to the satisfaction of a jury of a devise to the plaintiff, who claimed the estate in ejectment, independently of the other devises of the will. He had nothing whatever to do with the other devises. If he claimed to keep a gift of Blackacre in fee by the will, and brought ejectment, all he had to prove was a good will of Blackacre, or, if he claimed as tenant for life only, all he had to prove was that there was a good gift of Blackacre to him for life, and it was immaterial, as far as he was concerned, that the rest of the will had been eaten by rats, as happened in one case, or destroyed by fire, as happened in another, or was torn up by a person who thought himself injured by the will, as happened in another reported case, because he had discharged himself as regards the proof when he showed that the will, as regards the property he claimed, was a valid

testamentary instrument. If that is once admitted, it appears to me that we ought to have no difficulty in establishing a will, or in upholding a will to the extent to which it is proved by evidence to be correct, leaving the ultimate limitation to be established if the real will should ever be discovered, which is the form of probate granted in the present case. Therefore, in this respect the decree or judgment ought to stand, although it is quite true that there are some limitations, the exact terms of which we are unable to discover.

The third point is also one of great importance. Can we admit, as a matter of course, secondary evidence in proof of a will? I should have thought there could be but one answer to that question; and had it not been for the doubt thrown out by a very eminent judge (SIR JAMES WILDE, P.), in *Wharram* v. *Wharram* (6), I should have thought it would have been impossible to argue the question. The meaning of secondary evidence is to supply the loss by accident or otherwise of primary evidence. It was felt at a very early period of the existence of courts of equity, that it was a great grievance that by the then rules of procedure of the common law, the plaintiff could not recover on a lost deed; it was not a rule of the common law, but a rule of the procedure of the common law, which required him to make proof of it in his plea. But where the deed had been lost, the court of equity interfered, and allowed the plaintiff to produce secondary evidence of the deed. He had to prove by other evidence than the deed itself the existence and execution of the deed, and the contents of the deed. After a time the courts of common law altered their procedure—as I said before, not the law, but the procedure—to enable the plaintiff in a common law action to obtain the same advantages as he could previously have obtained in equity.

The whole theory of secondary evidence depends upon this, that the primary evidence is lost, and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. I am at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed in cases where a deed was required. If it is said that a will required execution and attestation, a deed required execution and delivery, and you could not establish the deed until you had shown that it had been executed, sealed, and delivered. Those were peculiar formalities as regarded a deed. As regards some other deeds, such as deeds in the execution of powers, attestation was commonly required, and as regards those deeds, everything that would be required in the case of a will may be proved by secondary evidence as in the like case of a deed. You must prove, then, not only execution, but that the deed of appointment was duly attested. Therefore, on principle, there was no possible distinction between the proof of a deed and the proof of a will.

Besides this there was a long course of undisputed authorities, all pointing in the same direction. No one had doubted, until *Wharram* v. *Wharram* (6), that you could prove a will by secondary evidence, but a doubt was suggested whether that course of procedure should have been allowed after the passing of the Wills Act, 1837, but it seems to me that it is not a question of the requirements of the Act, because there was nothing new as regards the Act in respect of real estate, except that the legislative requirements had been diminished. By the Statute of Frauds you not only required signature, but you required the attestation of three witnesses, to pass your estates. By the new statute, that was, as regards freehold estates, reduced to two witnesses, and there was no alteration, except in the case of the signature, between the requirements of the Statute of Frauds and the requirements of the new Act. Therefore, if you could have proved a will by secondary evidence before the statute, there was no reason, that I can see, why you should not be able to prove it after the statute. As regards personal estate, no doubt there was a difference, because, before the statute, if a will had not been in writing or signed, there was a possibility of saying that that which you call secondary evidence of the will was the will itself, but even that was not quite accurate because our law required the best evidence, and when

the will was in writing, and was not produced, you did not prove it unless you let in secondary evidence. Therefore, in that case also, the decision which let in secondary evidence did go to prove that you could have secondary evidence of a will. It appears to me, therefore, clear, both on principle and authority, not forgetting especially *Brown* v. *Brown* (2), which the Lord Chief Justice mentioned, that you could let in secondary evidence to prove a lost will.

The next point, and one no doubt also of great importance, is what secondary evidence is admissible. In this particular instance there is the evidence of a person who had seen the will, and the real point to be considered and decided is whether that evidence can be confirmed or corroborated by declarations of the testator made either to that witness or to other persons, and, if so, whether those declarations to be admissible in evidence must be limited to declarations made at or before the execution of the will, or may be extended to declarations made after the execution of the will. It might well have been that our law, like the law of some other countries, would have admitted as evidence the declarations of persons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted—that is, where the person who made them had no interest in doing so, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, whether in writing or oral, made by deceased persons, are in our law not admissible in evidence at all. But so inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule.

I will consider, first, what the exceptions are, and what is the principle which guides the court in making exceptions. The exceptions are generally considered to be three principal and three subordinate exceptions. It does not matter in what order I take them. First, there is an exception of a declaration accompanying an act; secondly, of a declaration against interest; and thirdly, of a declaration made by a person in the course of business, which it was his duty to make. Those are the three large exceptions. There are then some smaller exceptions. The first is the proof of matters of public and general interest, one might say of quasi historical interest, not actually historical, where we admit the declarations of persons who may from their position be fairly presumed to have had knowledge on the subject. In the next place we admit evidence which is in its nature very weak indeed, that is matters of pedigree, where we admit declarations of deceased members of a family, on its being shown that the persons were members of the family. I take it that the principle which underlies all these exceptions is the same. In the first place, it must be a case in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested—that is, disinterested in the sense that the declaration was not made in favour of his interest. Thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar knowledge—knowledge not possessed in ordinary cases.

You will find that all these reasons exist both in testifying to matters of public and general interest, and testifying as to matters of pedigree, and that some, if not all of them, exist in other cases to which I have referred. They all exist in this case, that is the case of a testator declaring the contents of his will. Of course, as in the case of pedigree, the courts must be careful and cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination, it is very often produced at second or third hand, and

is, therefore, particularly liable to lose something of its colour in the course of transmission. It is so easily and so frequently fabricated that all courts which dispose of such cases must be especially on their guard. But that only goes to the question as to the weight to be attributed to the evidence when admitted; it does not go to the question of admitting the evidence itself, and I must say it appears to me that, having regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong—not to hold out to the world that any man who is able to get hold of the will of a testator which may disappoint him of his expectations, just or unjust, shall be able if he once destroys it to acquire the property either for himself or for those whom he wishes to benefit—I say if ever there was such a case, it is the case of a lost will, and it is in that case that the court should be anxious, not narrowly to restrict rules of evidence which were made for the purpose of furthering truth and justice, but to be guided by those great principles which have guided other tribunals in other countries in admitting this evidence generally, and at all events to admit it in the special case which we have under consideration.

I should, therefore, entirely concur with the Lord Chief Justice's conclusion that this evidence would be admissible, not only as regards that portion of it was anterior to the execution of the will, but also as regards that portion of it which is posterior to its execution. As regards the portion of it anterior to the execution, it has been admitted, where it has been admitted at all, on a somewhat different ground. It is not strictly evidence of the contents of the instrument, because it is simply evidence of the intention of the person who afterwards executes the instrument. It is, therefore, simply evidence of probability—no doubt of a high degree of probability in some cases, and of a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the instrument. In this case we have that link supplied in the most satisfactory manner as regards the two important documents J. & K. We have the evidence of the witness that they were, to use her words, jotted down at the time when the will was being written, and, therefore, immediately before the execution, and in that case it is not to be presumed for a moment that there was any change in the intention of the testator from the time of jotting down his legacies to the time he signed the will. As regards the earlier document, no doubt that relates to a prior will, the will of 1867, but we have the evidence of Miss Sugden that that was incorporated in the second will, and, therefore, to that extent it brings it down to the time of the execution of the second will. We must also remember that these documents were carefully preserved by the testator, that they were tied up with other documents in the same box which contained his will and codicils, and that it is not likely that he would so carefully have preserved the documents if he had changed his intention between making them and signing his will. If they had no longer represented his final intention he would probably have destroyed them and thrown them away as waste paper. That confirms, to my mind, the value of the documents, and that, although evidence of intention, they are also evidence of intention not changed at the time of the execution of the will. Upon those documents, I think, whatever view may be taken as regards the latter document, full reliance ought to be placed.

I come to the question whether, irrespective of the post-testamentary declarations, as I may call them, there would be any ground for saying that there was not sufficient evidence to sustain the proof of this will. I am clearly of opinion that there would be no such ground. It happens fortunately in this

case that these post-testamentary declarations are of comparatively little value. In the only instance in which confirmation is required they are very vague and general. That instance is the share of the residue given to Miss Sugden. In considering the last head as to the sufficiency of the evidence, I will consider the case, first irrespective of these post-testamentary declarations which the learned judge in the court below considered himself bound, as I think he was bound, by the decision in *Quick* v. *Quick and Quick* (1) to disregard, and I must say I should entirely concur with the learned judge in his conclusion, assuming that I had been bound, as he was bound, by the decision in *Quick* v. *Quick and Quick* (1), to disregard that evidence.

How does the matter stand? The will was read frequently, and under peculiar circumstances of interest, by Miss Sugden. She had not only an opportunity of becoming familiar with its contents, but she had the strongest motive for becoming so familiar. The will interested not only herself, but those who were nearest and dearest to her. It would be no idle curiosity which would induce her to read it and re-read it with attention, and to remember its contents with accuracy and fidelity. Therefore, we have the evidence of a witness to be trusted beyond the average of witnesses, more to be trusted even in this respect, supposing there were no question of interest, than an ordinary solicitor who testifies to the contents of a will. He has other affairs to attend to, he has many wills to read, and he has no special or particular interest in the disposition of the property of the testator. Therefore, we have a witness peculiarly likely to know what the contents of the will were. Besides that, we have a witness of unimpeached and unimpeachable integrity. We have the gratification of knowing, in deciding this case, that no question has been raised as to the credibility of Miss Sugden, and this appears to be an answer to that assumed danger which might apply to other cases in allowing such proof as this to establish wills. It has, in my opinion, nothing to do with the admissibility of the evidence. Where the credibility of a witness is contested, it does not make the witness's testimony less admissible, but it does add enormously to the weight of it, when you find that the opponent does not dispute the honesty and truthfulness, and the entire integrity and veracity of the witness. This case is singular in that respect, and I should think it is very likely to remain singular, and without a parallel in subsequent cases. Therefore, there is no danger in granting probate in this particular case; and I see no reason why we should refuse to do justice because it may induce other persons, not credible witnesses, to attempt to substantiate fictitious wills.

No doubt there is this observation, that Miss Sugden is an interested witness. Here again it is not alleged that the interest was such as to impair her credibility. If it had, I could have understood the objection; but as it is admitted that she is a veracious person, the objection as to interest fails of itself. The law at one time considered it impossible that a person biassed by the smallest interest could tell the truth, but that law was found so utterly opposed to human experience, that it was abrogated by the legislature, and interested witnesses daily give evidence in our tribunals, and, subject to the observation that they may be biassed by their interest so as to some extent to affect the weight of their testimony, their evidence is received without doubt or question. No doubt, in the case even of a credible witness, even in the case of a witness without interest, it is desirable, if possible, to procure confirmation to show the accuracy of the memory of the witness, and for that purpose only. But the moment you admit a witness to be credible, the desirability of the confirmation appears to me to apply just as much to the portion of the evidence as to which she is not interested as to that in which she is interested. Miss Sugden's evidence is confirmed in every material respect, except as to that important portion of the property which comprises the residue of the personal estate. I am not going to repeat the elaborate judgment which has already been given as regards

A the nature of the evidence, but I will take that to be sufficiently established. As regards the residue, if we exclude the post-testamentary declarations, there is no actual confirmation of Miss Sugden's testimony except one, that is the confirmation of probability. I must say that that has had considerable weight with me. In testing the unsupported testimony of a person, especially of an B interested person, the position of the testator, and the probability of the disposition he is said to have made, appear to me to be important elements.

How stands the matter as far as that is concerned? [HIS LORDSHIP considered the terms of the will.] I think, therefore, that Miss Sugden is amply confirmed, and that the extent of the benefit which the testator intended for her has not been exaggerated by her in her testimony, and the point as to her share in the C residue is the only point on which there was no other confirmation. Therefore, if I excluded these testamentary declarations, I should have arrived at the same conclusion. But if we admit them they point still more strongly to the same conclusion. The testator is proved to have told one person that his daughter would be a rich woman, and be able to receive in the same manner as she had done in his lifetime. He told another person that she would be a wealthy D woman after his death. He told her in terms which are affecting, no doubt, and even pathetic, in speaking of her devotion to him, that she was blessed, and ought to be blessed by him as regards the disposition of his property. Can we say that these expressions of the testator have been more than fulfilled by what I may call the modest provision he has made for her by the testamentary instruments which have been admitted to probate? On the whole I express my E entire concurrence in the judgment which my lord has given.

JAMES, L.J.—I agree so entirely with the judgment of the Lord Chief Justice, both in the conclusions at which he has arrived and in the reasons which he has given for those conclusions, that I shall not think it necessary to make more than one or two short remarks.

F First I would corroborate what he has said with regard to the admission of part of an instrument where the rest is not forthcoming, by referring to *Dickinson* v. *Stidolph* (7) decided by a court consisting of SIR WILLIAM ERLE, C.J., WILLIAMS, J., BYLES, J., and WILLES, J. The judgment of the court was delivered by WILLIAMS, J., probably the most eminent authority in our time on matters connected with wills. In the judgment there are the following expres- G sions (11 C.B.N.S. at p. 357):

> "Secondly, it was objected that the testatrix refers to two memorandums, and only one is found. But if she intended to adopt two instruments, and only one is found, the law requires that effect should be given to that which is found; for, either the ordinary presumption must prevail, that the missing H paper was destroyed by the testatrix animo revocandi, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed merely because she made other dispositions of her property which are unknown by reason of the testamentary paper which contained them not being forthcoming. It is on this principle that a subsequent will is no revocation of a former one, if the contents of a subsequent will are I unknown. And the law is the same even if the latter will be expressly found to be different from the former, provided it be unknown in what the difference consists."

That is upon the point whether we can grant probate of a will of which only a part is known.

With regard to the testamentary declarations of the testator, I desire to say that I entirely concur in the conclusion at which the Lord Chief Justice has arrived—that those testamentary declarations are admissible and ought to be admitted, but in this case it is conceded that every one of these declarations was

admissible and was properly admitted for some purpose in the cause, and thereby those declarations of the testator have become legitimately known to me. I believe them to have been made by him, and I believe them to be true, and, having those declarations before me and so believing them, it would be in me a judicial lie if I were to pretend that I did not act upon them in coming to the conclusion that the evidence of the witness and the sworn depositions of the witness as to the actual contents of the will are true.

MELLISH, L.J.—I am also entirely of the same opinion, and I think it is quite unnecessary that I should make any lengthened observations in this case.

The material questions are the two questions of fact as to what are the contents of the will, and whether that will has been proved. On those two main important questions I am perfectly satisfied with the judgment of the judge in the court below; I am also entirely satisfied with the reasons which have been given by the Lord Chief Justice and the Master of the Rolls here, and I say nothing more about them. I am also entirely satisfied with the reasons which have been given upon the question of law whether probate of the whole will ought to be refused, or probate of that portion of the will of which we have evidence ought to be refused, because there may be some other portions upon which we have not sufficient evidence. Even that question, to my mind, does not very seriously arise in this case; because, with regard to the parts that are omitted, it seems to me that we have satisfactory evidence that they do not substantially alter the provisions of which we have evidence.

With reference to the personal estate there is no reason to suppose that any of the missing legacies, if there are any, of which we have no evidence, were given to the next of kin, that is, to the relatives of the testator. He had put down on the paper of which we have evidence the legacies that he intended to give to the different members of his family. The next of kin were all represented by counsel, and no one asked Miss Sugden whether she was confident that there were no legacies given to them, and I think I can clearly come to the conclusion, as a matter of fact, that whatever the small legacies may have been, of which we have no evidence, they were not legacies to any members of his family, and, therefore, no one can possibly be prejudiced, except those persons, whoever they may be, of whom we have no evidence, and who get no benefit whatever. No one can be prejudiced by our granting probate of this will. I do not at all mean, in making that observation, to throw out any doubt respecting the judgment which has been given by the Master of the Rolls, and as to the reasons he has given why probate of a gift of the residue ought to be granted, even although we might not know to whom, or of what amount, or what was the nature of the legacies of personal estate contained in the part of the will of which there is no evidence. Also with reference to the real estate, it is perfectly plain that whatever omissions there may be in the ultimate limitations, those omissions cannot possibly be of any prejudice to the heir-at-law.

The only part of the case upon which I have any doubt, and at all differ from what has been already said, is a part of the case which, it appears to me, is not before us, and which it is not really necessary to decide; because at the time of the argument, not having read the judgment of Sir James Hannen, P., I was under the impression that he might have relied to some extent upon the evidence of the statements of Lord St. Leonards respecting his will, made after the execution of the will with reference to its contents; but having now carefully read through his judgment, I find that he did not rely upon that evidence at all, but that he considered, first, what were the contents of the will, and, in determining what were the contents of the will, did not rely upon and carefully avoided mentioning any of the statements of Lord St. Leonards respecting the contents of his will. I wish to say for myself that I am entirely satisfied with the conclusion to which he came upon that ground. I do not think it

A necessary for us to consider whether those subsequent declarations were admissible.

I wish also to say that I am not myself prepared to say that the decision in *Quick* v. *Quick and Quick* (1) was bad law. If I was asked what I think it would be desirable should be evidence, I have not the least doubt in saying that I think it would be a highly desirable improvement in the law if the rule was made that all statements made by persons who are dead respecting matters of B which they had a personal knowledge, and made ante litem motam, should always be admissible. There is no doubt that, by rejecting such evidence, we do reject a most valuable source of evidence; but the difficulty I have in this case is that I cannot really and satisfactorily to my own mind find any distinction between the statement of a testator as to what the contents of his will were, and any other statement of a person of any fact which was peculiarly within his C knowledge, which, beyond all question, as the law now stands, we are not entitled to receive. The Master of the Rolls has referred to the several exceptions which have been made, and they do not appear to me, any one of them, to be applicable to this case.

I think there is a most material distinction, as pointed out by LORD CAMPBELL D in *Doe d. Shallcross* v. *Palmer* (3), between a declaration made before the making of a will and declarations which are made subsequently. Wherever it is material to prove what was the state of a person's mind, or what was passing in it, and what were his intentions, you may prove what he said, because that is the only means by which you can find out what his intentions were. When a doubt is thrown on the correctness of evidence which has been given as to the contents E of a will, the testator's declarations as to what he intended to put in his will, made either contemporaneously with or prior to the making of his will, are obviously evidence which can corroborate the testimony as to what is contained in his will. But, to my mind, they do not of themselves prove what were the contents of the will; they may corroborate other evidence which has been given of the contents of the will, because the fact that the testator told a person before F he made his will that he intended to make a particular devise or bequest renders it more probable that he did make that devise or bequest. Such declarations show what the testator had in mind when he made the will. But a declaration after he has made his will, in which he states what the contents of his will are, is not a statement of anything which is passing in his mind at the time of the making of the will, but it is simply a statement of a fact which took place, G although, no doubt, within his knowledge, and, therefore, you cannot admit it unless you bring it within some of the exceptions to the general rule, that hearsay evidence is not admissible to prove the fact which is stated in the declaration. It does not come within any of the rules which have hitherto been established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before, and may never happen H again, a case very exceptional in itself, for you then establish an exception which more or less throws a doubt on the law. It appears to me that it would be better to leave it to the legislature to make the improvement, which in my opinion ought to be made, respecting our present rules with regard to the admissibility of evidence of that description. In all other respects I entirely agree with the judgments which have been given.

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BAGGALLAY, J.A.—The judgment which has been pronounced by the Lord Chief Justice has so completely expressed the opinions which I have formed on the several questions which have been raised in the course of the argument on this appeal, that I shall abstain from saying more than that I entirely assent to that judgment, not only as regards its general conclusions, but as regards its details, and I particularly desire to express my concurrence in that portion of the judgment which has reference to the admissibility, as evidence, of the declarations made by the testator in this case, and in the views expressed by the Lord

Chief Justice as to the unsoundness of the decision in *Quick* v. *Quick and Quick* (1).

Appeal dismissed.

Solicitors: *Barlow, Bowling & Williams; W. W. Gabriel; Taylor & Sons; Trollope & Winckworth.*

[*Reported by* E. Stewart Roche, Esq., *Barrister-at-Law.*]

NICHOLS v. MARSLAND

[Court of Appeal (Cockburn, C.J., Mellish and James, L.JJ., Baggallay, J.A., and Archibald, J.), June 13, 14, December 1, 1876]

[Reported 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173]

Nuisance—Rylands v. Fletcher doctrine—Application—Act of God—Flooding after excessive rainfall.

When the law creates a duty and the person on whom the duty is placed is disabled from performing it, without any default of his own, by an act of God (or vis major), or the Queen's enemies, the law will excuse him.

The defendant was the owner of some artificial lakes, which had existed for a long time without causing damage. After a most unusual rainfall dams at the end of the lakes gave way, and water pouring out of the lakes carried away a county bridge. On the trial of an action by the plaintiff, the surveyor of the county, against the defendant to recover for the damage done to the bridge, the jury found that there had been no negligence in the construction or maintenance of the lakes, but that, if the flood had been anticipated, its effect might have been prevented.

Held: it was not the act of the defendant in keeping the lakes, but the supervening vis major of the excessive rainfall, without any fault on the defendant's part, which caused the escape of the water and the consequent damage, and, therefore, the defendant was not liable.

Notes. Distinguished: *Nitro-Phosphate and Odam's Chemical Manure Co.* v. *London and St. Katherine Docks Co.* (1878), 9 Ch.D. 503. Applied: *Box* v. *Jubb* (1879), post. Considered: *Thomas* v. *Birmingham Canal Co.* (1879), 49 L.J.Q.B. 851; *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q.B.D. 418; *Baker* v. *Snell*, [1908-10] All E.R. Rep. 398. Applied: *Rickards* v. *Lothian*, [1911-13] All E.R. Rep. 71. Distinguished: *Greenock Corpn.* v. *Caledonian Rail. Co.*, *Same* v. *Glasgow and South Western Rail. Co.*, [1916-17] All E.R. Rep. 426. Referred to: *Saner* v. *Bilton* (1878), 7 Ch.D. 815; *Barker* v. *Herbert*, [1911-13] All E.R. Rep. 509; *Clinton* v. *J. Lyons & Co., Ltd.*, [1911-13] All E.R. Rep. 577; *Charing Cross, West End and City Electricity Supply Co., Ltd.* v. *London Hydraulic Power Co.*, [1914-15] All E.R. Rep. 85; *A.-G.* v. *Cory*, *Kennard* v. *Same* (1919), 88 L.J.Ch. 410; *Quebec Railway Light, Heat and Power Co.* v. *Vandry*, [1920] A.C. 662; *Job Edwards* v. *Birmingham Navigations Co. of Proprietors*, [1924] 1 K.B. 341; *Ilford U.D.C.* v. *Beal and Judd*, [1925] All E.R. Rep. 361; *Noble* v. *Harrison*, [1926] All E.R. Rep. 284; *Smith* v. *Great Western Rail. Co.*, [1926] All E.R. Rep. 242; *Great Western Rail. Co.* v. *Mostyn (Owners)*, *The Mostyn*, [1927] All E.R. Rep. 113; *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1; *Slater* v. *Worthington's Cash Stores (1930), Ltd.*, [1941] 1 K.B. 488; *Peters* v. *Prince of Wales Theatre*

(*Birmingham*), *Ltd.*, [1942] 2 All E.R. 533; *J. & J. Makin, Ltd.* v. *London and North Eastern Rail. Co.*, [1943] 1 K.B. 467.

As to exclusion of principle of *Rylands* v. *Fletcher*, see 28 HALSBURY'S LAWS (3rd Edn.) 145-149; and for cases see 36 DIGEST (Repl.) 292 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334.*

(2) *Nugent* v. *Smith* (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697; 34 L.T. 827; 41 J.P. 4; 25 W.R. 117; 3 Asp.M.L.C. 198, C.A.; 8 Digest (Repl.) 18, *95.*

Also referred to in argument:

May v. *Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115; E.R. 1213; 36 Digest (Repl.) 189, *1002.*

Vaughan v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, *8.*

Jones v. *Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, *613.*

Madras Rail. Co. v. *Zemindar of Carvatenagarum* (1874), L.R. 1 Ind. App. 364; 30 L.T. 770; 38 J.P. 532; 22 W.R. 865, P.C.; 36 Digest (Repl.) 296, *415.*

Carstairs v. *Taylor* (1871), L.R. 6 Exch. 217; 40 L.J.Ex. 129; 19 W.R. 723; 36 Digest (Repl.) 284, *337.*

Appeal by the plaintiff from a decision of the Exchequer Division (KELLY, C.B., BRAMWELL and CLEASBY, BB.), reported L.R. 10 Exch. 255, making absolute a rule nisi to enter a verdict for the defendant in an action in which the plaintiff, the surveyor of the county of Chester, sued the defendant, the owner of some artificial lakes, for damage caused to a county bridge by reason of the bank of the defendant's lakes giving way. At the trial, before COCKBURN, C.J., at the Chester Summer Assizes, 1874, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to have the verdict entered for her. A rule nisi was obtained for the defendant, and on cause being shown was made absolute. The plaintiff appealed.

Cotton, Q.C., and *McIntyre, Q.C.* (with them *Coxon*) for the plaintiff.

Gorst, Q.C., and *G. B. Lloyd* for the defendant.

Cur. adv. vult.

Dec. 1, 1876. **MELLISH, L.J.**, read the following judgment of the court.—This was an action brought by the county surveyor of the county of Chester against the defendant to recover damages on account of the destruction of a county bridge, which had been carried away by the bursting of some reservoirs. At the trial before the Lord Chief Justice it appeared that the defendant was the owner of a series of artificial ornamental lakes, which had existed for a great number of years, and had never, previous to June 18, 1872, caused any damage. On that day, however, after a most unusual fall of rain, the lakes overflowed; the dams at their end gave way; and the water out of the lakes carried away a county bridge lower down the stream. The jury found that there was no negligence either in the construction, or the maintenance of the reservoirs, but that, if the flood could have been anticipated, the effect might have been prevented. Upon this finding the Lord Chief Justice, acting on the decision in *Fletcher* v. *Rylands* (1) as the nearest authority applicable to the case, directed a verdict for the plaintiff, but gave leave to move to enter a verdict for the defendant. The Exchequer Division have ordered the verdict to be entered for the defendant, and from their decision an appeal has been brought before us by the plaintiff.

The plaintiff relied upon the decision in *Fletcher* v. *Rylands* (1). In that case the rule of law on which the case was decided was thus laid down by BLACKBURN, J., in the Exchequer Chamber (L.R. 1 Exch. at pp. 279, 280):

> "We think the true rule of law is that the person who, for his own purposes, brings on his land and collects, and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps, that the escape was the consequence of 'vis major' or the act of God, but as nothing of the sort exists here it is unnecessary to inquire what excuse would be sufficient."

It appears to me that we have two questions to consider—first the question of law which was left undecided in *Fletcher* v. *Rylands* (1): Can the defendant excuse herself by showing that the escape of the water was owing to "vis major," or as it is termed in the law books, "act of God," and, secondly, if she can, did she in fact make out that the escape was so occasioned? With respect to the first question, the ordinary rule of law is that when the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God, or the Queen's enemies, the law will excuse him, but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity. We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damage was occasioned by the act of the party without more, as where a man accumulates water on his own land, but owing to the peculiar nature of the soil the water escapes and does damage to his neighbour, *Fletcher* v. *Rylands* (1) established that he must be held liable. The accumulation of water in a reservoir is not itself wrongful, but the making it and suffering the water to escape, if damage ensues, constitute a wrong.

The present case is distinguished from *Fletcher* v. *Rylands* (1) in that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening "vis major" of the water caused by the flood, superadded to the water in the reservoir, which of itself would have been innocuous, caused the disaster. A person cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the Queen's enemies destroyed it in conducting some warlike operation, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage that might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse herself by proving that the water escaped through the act of God.

The remaining question is: Did the defendant make out that the escape of the water was owing to the act of God? The jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, it might have been prevented.

This seems to us in substance a finding that the escape of the water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate. In *Nugent* v. *Smith* (2), we held that a carrier might be protected from liability for loss occasioned by the act of God if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it. It was ingeniously argued for the plaintiff that at any rate the escape of the water was not owing solely to the act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood. We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow. On the whole, we are of opinion that the judgment of the Exchequer Division ought to be affirmed.

Appeal dismissed.

Solicitors: *Philpot & Son*, for *Potts & Roberts*, Chester; *E. Byrne*, for *Brocklehurst, Wright & Muir*, Macclesfield.

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

JULIUS *v.* LORD BISHOP OF OXFORD AND ANOTHER

[HOUSE OF LORDS (Earl Cairns, L.C., Lord Penzance, Lord Selborne and Lord Blackburn), March 4, 8, 9, 11, 15, 16, 23, 1880]

[Reported 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 28 W.R. 726]

Statute—Construction—Enabling words—Mandatory construction—"It shall be lawful"—"May."

The words "it shall be lawful" in a statute are, plainly and unambiguously, merely permissive, empowering, and conferring on the person named a right to do a specified thing, but where the object of the enactment is to effectuate a legal right, whether public or private, they are to be construed as compulsory. This is equally the case where the enabling power is given by the word "may."

Per EARL CAIRNS, L.C.: The words "it shall be lawful" do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise that power when called on to do so. The words being, according to their natural meaning, only permissive or enabling, the burden is on those who contend that an obligation exists to exercise the power to show something in the circumstances of the case which creates the obligation.

Ecclesiastical Law—Offence—Commission to inquire into charge—Obligation of bishop to issue—Church Discipline Act, 1840 (3 & 4 *Vict.*, *c.* 86), *s.* 3.

The Church Discipline Act, 1840, s. 3, enacts that in the case of any clerk in holy orders being charged with any ecclesiastical offence "it shall be lawful" for the bishop of the diocese, on the application of any party complaining, to issue a commission to inquire into the grounds of the charge.

Held: there was no private or public right created by the section which required it to be construed as making it compulsory that the bishop should exercise the power given to him, but he had an absolute discretion whether to issue a commission or not.

Notes. Considered: *Loosemore* v. *Tiverton and North Devon Rail. Co.* (1882), 22 Ch.D. 25; *Central Wales and Carmarthen Junction Rail. Co.* v. *London and North Western and Great Western Rail. Co.* (1883), 4 Ry. & Can. Tr. Cas. 211. Applied: *Marquis of Abergavenny* v. *Bishop of Llandaff* (1888), 20 Q.B.D. 460; *Re Baker, Nichols* v. *Baker* (1890), 44 Ch.D. 262. Considered: *River Thames Conservators* v. *Port of London Sanitary Authority*, [1894] 1 Q.B. 647. Applied: *R.* v. *Turner*, [1897] 1 Q.B. 445. Considered: *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works*, [1895-9] All E.R. Rep. 422. Applied: *R.* v. *Mitchell, Ex parte Livesey*, [1913] 1 K.B. 561. Considered: *Mersey Docks and Harbour Board* v. *Hay*, [1923] A.C. 345; *Tate and Lyle, Ltd.* v. *L.N.E.R. Co. and L.M.S.R .Co.* (1926), 43 T.L.R. 49; *Border R.D.C.* v. *Roberts*, [1950] 1 All E.R. 370; *R. Metropolitan Police Comr.*, [1964] 1 All E.R. 821. Referred to: *Fleming* v. *Manchester Corpn.* (1881), 44 L.T. 517; *R.* v. *Barclay* (1881), 8 Q.B.D. 306; *Dormont* v. *Furness Rail Co.* (1883), 11 Q.B.D. 496; *Leduc & Co.* v. *Ward* (1886), 54 L.T. 214; *R.* v. *St. Pancras Vestry* (1890), 62 L.T. 440; *Allcroft* v. *Bishop of London*, [1891-4] All E.R. Rep. 144; *Kirkheaton District Local Board* v. *Ainley*, [1892] 2 Q.B. 274; *Hakes* v. *Cox*, [1892] P. 110; *Emmott* v. *Star Newspaper Co.* (1892), 9 T.L.R. 111; *Russell* v. *Russell*, [1895] P. 315; *Re White* (1898), 42 Sol. Jo. 198; *R.* v. *Locke*, [1910] 2 K.B. 201; *Golden Horseshoe Estates Co.* v. *R.*, [1911] A.C. 480; *R.* v. *Marshland, Smeeth and Fen District Comrs.*, [1920] 1 K.B. 155; *Taylor* v. *Faires* (1920), 65 Sol. Jo. 116; *Sheffield Corpn.* v. *Luxford, Same* v. *Morrell*, [1929] All E.R. Rep. 581; *Kilbane* v. *Whitehaven Colliery Co.* (1933), 26 B.W.C.C. 76; *De Keyser* v. *British Railway Traffic and Electric Co.*, [1936] 1 K.B. 224; *Driscoll* v. *Church Comrs. of England*, [1956] 3 All E.R. 802.

As to the construction of enabling statutes as obligatory, see 36 Halsbury's Laws (3rd Edn.) 433-437; and for cases see 42 Digest 710 et seq. As to the Church Discipline Act, 1840, see 13 Halsbury's Laws (3rd Edn.) 224-227, for cases see 19 Digest (Repl.) 356, and for the Act of 1840, see 7 Halsbury's Statutes (2nd Edn.) 236.

Cases referred to:

(1) *Alderman Backwell's Case* (1683), 1 Vern. 152.

(2) *R.* v. *Barlow* (1693), 2 Salk. 609; 91 E.R. 516; 42 Digest 717, *1363.*

(3) *R.* v. *Steward of Havering Atte Bower* (1822), 5 B. & Ald. 691; 2 Dow. & Ry. K.B. 176, n.; 1 Dow. & Ry. M.C. 205, n.; 106 E.R. 1343; 16 Digest (Repl.) 144, *269.*

(4) *Macdougall* v. *Paterson* (1851), 11 C.B. 755; 6 Exch. 337, n.; 2 L.M. & P. 681; Cox, M. & H. 544; 21 L.J.C.P. 27; 18 L.T.O.S. 139; 15 J.P. 803; 15 Jur. 1108; 138 E.R. 672; 42 Digest 720, *1401.*

(5) *Morisse* v. *Royal British Bank* (1856), 1 C.B.N.S. 67; 26 L.J.C.P. 62; 3 Jur.N.S. 137; 140 E.R. 27; sub nom. *Morris* v. *Royal British Bank*, 28 L.T.O.S. 124; 5 W.R. 138; 42 Digest 776, *2053.*

(6) *R.* v. *Tithe Comrs.* (1849), 14 Q.B. 459; 4 New Rep. Mag. Cas. 31; 19 L.J.Q.B. 177; 14 J.P. 142; 14 Jur. 290; 117 E.R. 179; 42 Digest 712, *1290.*

(7) *Ditcher* v. *Denison*, cited in 4 Q.B.D. at p. 273.

(8) *R.* v. *Bishop of Chichester* (1859), 2 E. & E. 209; 29 L.J.Q.B. 23; 33 L.T.O.S. 301; 23 J.P. 821; 6 Jur.N.S. 120; 7 W.R. 629; 121 E.R. 80; 19 Digest (Repl.) 359, *1523.*

(9) *York and North Midland Rail. Co.* v. *R.* (1853), 1 E. & B. 858; 7 Ry. & Can. Cas. 459; 1 C.L.R. 119; 22 L.J.Q.B. 225; 21 L.T.O.S. 116; 17 Jur. 690; 1 W.R. 358; 17 J.P. Jo. 309; 118 E.R. 657, Ex. Ch.; 42 Digest 716, *1347*.

(10) *Crake* v. *Powell* (1852), 2 E. & B. 210; 21 L.J.Q.B. 183.

(11) *Davidson* v. *Sinclair* (1878), 3 App. Cas. 765.

(12) *Re Newport Bridge* (1859), 2 E. & E. 377; 29 L.J.M.C. 52; 24 J.P. 133; 6 Jur.N.S. 97; 121 E.R. 142; sub nom. *R.* v. *Monmouthshire Justices*, 1 L.T. 131; 8 W.R. 62; 42 Digest 718, *1372*.

(13) *Supervisors* v. *United States*, 4 Wall. 435.

(14) *Jones* v. *Harrison* (1851), 6 Exch. 328; 2 L.M. & P. 257; Rob. L. & W. 565; Cox, M. & M. 489; 20 L.J.Ex. 166; 17 L.T.O.S. 41; 15 Jur. 337; 155 E.R. 567; 42 Digest 626, *270*.

(15) *R.* v. *Rotherham Local Board* (1858), 8 E. & B. 906; 27 L.J.Q.B. 156; 30 L.T.O.S. 271; 22 J.P. 641; 4 Jur.N.S. 261; 6 W.R. 248; 120 E.R. 338; 38 Digest (Repl.) 712, *1482*.

(16) *Worthington* v. *Hulton* (1865), L.R. 1 Q.B. 63; 6 B. & S. 943; 35 L.J.Q.B. 61; 13 L.T. 463; 12 Jur.N.S. 73; 14 W.R. 632; 122 E.R. 1441; sub nom. *Worthington* v. *Sudlow*, 30 J.P. 22; 38 Digest (Repl.) 713, *1485*.

(17) *Maidman* v. *Malpas* (1794), 1 Hag. Con. 205; 161 E.R. 526; 7 Digest (Repl.) 562, *135*.

(18) *R.* v. *Stacey* (1785), 1 Term Rep. 1; 99 E.R. 938; 16 Digest (Repl.) 407, *2028*.

(19) *R.* v. *Parry* (1837), 6 Ad. & El. 810; 2 Nev. & P.K.B. 414; Will. Woll. & Dav. 703; 1 J.P. 247; 112 E.R. 311; 16 Digest (Repl.) 397, *1918*.

(20) *R.* v. *Rector of Lambeth* (1838), 8 Ad. & El. 356; 3 Nev. & P.K.B. 416; 1 Will. Woll. & H. 398; 2 J.P. 423; 2 Jur. 566; 112 E.R. 873; 19 Digest (Repl.) 290, *562*.

(21) *R.* v. *Ward* (1873), L.R. 8 Q.B. 210; 42 L.J.Q.B. 126; 28 L.T. 118; 37 J.P. 453; 21 W.R. 632; 16 Digest (Repl.) 403, *1988*.

(22) *R.* v. *Surrey Justices* (1870), L.R. 5 Q.B. 466; 39 L.J.M.C. 145; 34 J.P. 614; 16 Digest (Repl.) 473, *2926*.

Also referred to in argument:

Caudrey's Case (1591), 5 Co. Rep. 1 a.; 77 E.R. 1; sub nom. *Cawdry* v. *Atton*, Poph. 59; 19 Digest (Repl.) 242, *16*.

Hall's Case (1604), 5 Co. Rep. 51 a.; 77 E.R. 132; 19 Digest (Repl.) 246, *50*.

Harper v. *Forbes and Sisson* (1859), 5 Jur.N.S. 275; 7 Digest (Repl.) 565, *164*.

Pelling v. *Whiston* (1714), 1 Com. 199; 1 Hag. Con. 433, n.; sub nom. *Whiston's Case*, Brod. & F. 326; 92 E.R. 1033; 19 Digest (Repl.) 355, *1469*.

Sherwood v. *Ray* (1837), 1 Moo. P.C.C. 353; 12 E.R. 848, P.C.; 37 Digest 232, *242*.

H.M. Procurator General v. *Stone* (1808), 1 Hag. Con. 424; 161 E.R. 604; 19 Digest (Repl.) 455, *2733*.

Carr v. *Marsh* (1814), 2 Phillim. 198; 19 Digest (Repl.) 281, *453*.

Argar v. *Holdsworth* (1758), 2 Lee, 515; 161 E.R. 424; 19 Digest (Repl.) 457, *2767*.

Duke of Portland v. *Bingham* (1792), 1 Hag. Con. 209, n.; 19 Digest (Repl.) 349, *1383*.

Lee v. *Matthews* (1830), 3 Hag. Ecc. 169; 162 E.R. 119; 19 Digest (Repl.) 277, *416*.

Jarman v. *Bagster* (1830), 3 Hag. Ecc. 356; 162 E.R. 1185; 15 Digest (Repl.) 802, *7619*.

Hill v. *London and County Assurance Co.* (1856), 1 H. & N. 398.

Re Neath and Brecon Rail. Co. (1874), 9 Ch.App. 263; sub nom. *Ex parte Neath and Brecon Rail. Co.*, 43 L.J.Ch. 277; 30 L.T. 3; 22 W.R. 242, L.JJ.; 42 Digest 716, *1346*.

Mason v. *Fearson*, 9 Howard, 248.

Huet v. *Dash* (1758), 2 Lee, 511.

Taylor v. *Morley* (1837), 1 Curt. 470; 19 Digest (Repl.) 352, 1417.

Head v. *Sanders* (1842), 4 Moo. P.C.C. 186; Brod. & F. 30; 6 Jur. 1071; 13 E.R. 273, P.C.; 19 Digest (Repl.) 360, *1534*.

Ex parte Denison (1854), 4 E. & B. 292; 3 C.L.R. 247; 24 L.J.Q.B. 34; 1 Jur.N.S. 517; 119 E.R. 113; sub nom. *Re Archdeacon of Taunton*, 24 L.T.O.S. 140; sub nom. *Re Vicar of East Brent*, 18 J.P. 808; sub nom. *R.* v. *Archbishop of Canterbury*, 3 W.R. 105; 19 Digest (Repl.) 359, *1522*.

Martin v. *Mackonochie* (1868), L.R. 2 P.C. 365; 5 Moo. P.C.C.N.S. 500; Bro. Ecc. Rep. 103; 38 L.J.Eccl. 1; 19 L.T. 503; 33 J.P. 35; 17 W.R. 187; 16 E.R. 603, P.C.; 19 Digest (Repl.) 479, *3053*.

Elphinstone v. *Purchas* (1870), L.R. 3 P.C. 245; 7 Moo. P.C.C.N.S. 17; 39 L.J.Eccl. 124; 23 L.T. 285; 34 J.P. 820; 17 E.R. 7; sub nom. *Ex parte Hebbert*, *Elphinstone* v. *Purchas*, 18 W.R. 1073; sub nom. *Hebbert* v. *Purchas*, Bro. Ecc. Rep. 200; 19 Digest (Repl.) 334, *1157*.

R. v. *Adamson* (1875), 1 Q.B.D. 201; 45 L.J.M.C. 46; 24 W.R. 250; sub nom. *R.* v. *Tynemouth Justices*, 33 L.T. 840; 40 J.P. 182; 33 Digest (Repl.) 333, *1580*.

Ex parte Edwards (1873), 9 Ch. App. 138; 43 L.J.Ch. 350; 29 L.T. 529, 711; 38 J.P. 277; 22 W.R. 143, L.C. & L.J.; 19 Digest (Repl.) 359, *1525*.

R. v. *York Corpn.* (1853), 1 E. & B. 588.

Re Bridgman (1860), 1 Drew. & Sm. 164; 29 L.J.Ch. 844; 8 W.R. 598; 62 E.R. 340; 42 Digest 716, *1350*.

Appeal from a decision of the Court of Appeal (Bramwell, Baggallay and Thesiger, L.JJ.), reported 4 Q.B.D. 425, reversing the judgment of the Queen's Bench Division (Cockburn, C.J., Field and Manisty), in the matter of an application under the Church Discipline Act for a mandamus to the Bishop of Oxford to take proceedings against the Rev. Mr. Carter, the rector of Clewer, for practices in the celebration of the Holy Communion alleged to be at variance with the rubrics of the Book of Common Prayer. The application to the bishop was under s. 3 of the Church Discipline Act, 1840, which enacts:

> "In every case of any clerk in holy orders of the United Church of England and Ireland who may be charged with any offence against the laws ecclesiastical or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission under his hand and seal to five persons . . . for the purpose of making inquiry as to the grounds of such charge or report . . ."

The contention on the part of the applicant was that this enactment was compulsory and obligatory in its nature, and imposed an absolute legal duty on the bishop, if a prima facie case was made out, to institute the proceedings. On behalf of the respondents, the bishop of Oxford and Mr. Carter, it was argued that the statute gave a discretionary power to the bishop to proceed or not, as he might think fit. Although the complaint against Mr. Carter asserted that he had committed offences against the ritual, the bishop refused to proceed, the ground for his decision being that Mr. Carter was in advanced years, that he was much respected, and that the complaint was preferred against the wish of the majority of his parishioners. The appellant thereupon applied to the Queen's Bench Division for a mandamus directing the bishop to proceed, and his application was granted by the Queen's Bench, their decision being reversed by the Court of Appeal. The appellant appealed to the House of Lords.

Herschell, *Q.C.*, *Jeune*, and *Chalmers* for the appellant.

Charles, *Q.C.*, *Phillimore*, and *Muir-Mackenzie* for the respondents.

Their Lordships took time for consideration.

Mar. 23, 1880. The following opinions were read.

EARL CAIRNS, L.C.—In this case Dr. Frederick Guilder Julius, of Clewer, in the county of Berks, preferred a complaint to the Bishop of Oxford against the Rev. Thomas Thellusson Carter, rector of the parish, in respect of unauthorised deviations from the ritual of the Church in the Communion Service, and the use of unauthorised vestments, and required the bishop to issue a commission under the Church Discipline Act, 1840, to inquire into this charge. This commission, the bishop, in the exercise of his discretion, declined to issue. The Court of Queen's Bench, on the application of Dr. Julius, directed a writ of mandamus to issue, commanding the bishop either to issue the commission which Dr. Julius had applied for, or to send the case by letters of request to the Court of Appeal of the province under the statute. The question is: Was the Court of Queen's Bench right in awarding this mandamus. The Court of Appeal have reversed the decision of the Court of Queen's Bench. The Court of Queen's Bench, in awarding the mandamus, and the Court of Appeal in reversing this decision, were both unanimous, and it is for your lordships now to decide between them.

The case appears to me to turn upon the use of the words "it shall be lawful" in s. 3 of the Church Discipline Act. I cannot think that the practice of the ecclesiastical courts before the Act need be the subject of much examination. The Act states in the preamble that "the manner of proceeding in cases for the correction of clerks requires amendment." Whether, therefore, the office of the judge could before the Act be promoted by any person as of right, or whether a discretion could be exercised by the judge as to allowing himself to be put in motion, or as to the terms on which he could be put in motion, is not, as it seems to me, of much importance, inasmuch as the practice in this respect may have been just one of the matters which the Act was intended to amend. Section 3 of the Act enacts:

> "In every case of any clerk . . . who may be charged with any offence against the laws ecclesiastical . . . it shall be lawful for the bishop of the diocese within which the offence is alleged . . . to have been committed, on the application of any party complaining thereof . . . to issue a commission . . . for the purpose of making inquiry as to the grounds of such charge. . . ."

The question is, under these words "it shall be lawful. . . ." Is the bishop bound on the application of any party to issue a commission, or has he a discretion as to whether he will issue it or not?

The question has been argued, and has been spoken of by some of the learned judges in the courts below, as if the words "it shall be lawful" might have a different meaning, and might be differently interpreted, in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide on an application for a mandamus. The words "it shall be lawful" being, according to their natural meaning, permissive or enabling words only, it lies upon those,

as it seems to me, who contend that an obligation exists to exercise this power to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation. A

I think that, if these principles are kept in mind, it will be found that all the cases on this subject are easily understood and reconciled, and I will refer shortly to the most important of those which were mentioned to your Lordships before examining further the circumstances connected with the present case. The earliest case which is generally referred to is *Alderman Backwell's Case* (1), before Lord Keeper NORTH. The creditors of Alderman Backwell petitioned for a commission of bankruptcy against him, and they would have been obviously exposed to prejudice and hazard if it was not granted. The words of the statute were that the Chancellor "may grant a commission," and the Lord Keeper held that he was bound to exercise the power which was in effect reposed in him for the benefit of those who asked for its exercise. The next case is *R.* v. *Barlow* (2). That was not a mandamus, but an indictment under the Poor Relief Act, 1662 [repealed by Poor Law Act, 1927], against the churchwardens for not making a rate to reimburse the constables. The statute appears to have used the words "may make a rate," but it was naturally held that the constables were entitled to be reimbursed, and that the churchwardens, being made the depositaries of a power for that purpose, could not refuse to exercise it. B C D

R. v. *Steward of Havering Atte Bower* (3) was the case of a mandamus in reference to a power granted by Royal Charter to the steward and suitors of a manor giving them authority to hear and determine civil suits. It was held that this was in effect the establishment of a court for the public benefit, and that the steward and suitors of the manor were bound to hold the court. In *Macdougall* v. *Paterson* (4) the question was whether the plaintiff in a county court action who had recovered his debt should not have his costs taxed and allowed in a particular way. The statute had provided there that, under the circumstances in which the plaintiff stood, the court might by rule or order direct that he might recover his costs; and JERVIS, C.J., delivering the opinion of the court, stated that the conclusion to be drawn from the cases was that, when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. *Morisse* v. *Royal British Bank* (5) was a case of the same kind, and decided that, under the words "it shall be lawful for the court," a creditor who had obtained judgment against a joint-stock banking company and had failed to recover his debt against the company was entitled as of right to execution against a shareholder on complying with the conditions imposed by the statute. E F G

The only other case that I will refer to is one which was decided in the Court of Queen's Bench in 1849—*R.* v. *Tithe Comrs.* (6). A power was there given (by s. 7 of the Tithe Act, 1842 [repealed]) to the tithe commissioners in dealing with certain landowners to confirm agreements for commutation of tithe under certain special circumstances and conditions which I need not refer to at length. The court held, upon the construction of the whole statute, that if a case occurred coming within the terms of the statute the commissioners were bound to confirm the agreements there mentioned. In delivering the opinion of the court COLERIDGE, J., uses these words (14 Q.B. at p. 474): H I

> "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom that in public statutes words only directory, permissory, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice."

To the rule thus guardedly expressed there is not, perhaps, much to object, and

I only refer to the words for the purpose of pointing out that I am unable to see that they justify the expressions of the Lord Chief Justice of the Queen's Bench in the present case, who speaks of them thus:

> "Now, finding nothing in the enactments or language of s. 3 or other parts of the Church Discipline Act which should have the effect of controlling or qualifying the words 'it shall be lawful,' but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to these words any other than the meaning which the established canon of construction has assigned to them—a canon of construction so thoroughly settled, that COLERIDGE, J., speaks of it as an axiom—by which, in construing this statute, we deem ourselves absolutely bound."

The only axiom COLERIDGE, J., spoke of was that, under certain circumstances, enabling words might have a compulsory force.

The cases to which I have referred appear to decide nothing more than that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised.

I now turn to the Church Discipline Act, 1840, for the purpose of considering whether it is possible to suppose that an absolute and unconditional right was given by it to put in motion the bishop of the diocese, irrespective of any judgment or discretion of his own. Section 3 provides that:

> "In every case of any clerk in holy orders . . . who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or if he shall think fit of his own mere motion, to issue a commission to five persons . . . for the purpose of making inquiry as to the grounds of such charge or report."

The first observation which occurs upon this section is, that the words "any party" are words of the most general kind, and must, as was admitted in the argument of the appellant, extend to any natural-born subject of the Queen. The appellant, who in the case before your Lordships invokes the action of the bishop, is a parishioner of the parish of Clewer and a member of the Church of England; but, if he is right in his construction of the statute, the aid of the bishop might be invoked equally by one who never had entered the parish, who never had been in England, who was ignorant, perhaps, of the language, who was not a member of the Church of England, and who was not, possibly, a believer in Christianity. If under the statute any person has an absolute right to put the bishop in motion, a person may do so who is a pauper or wholly unable to answer the costs of the suit. No authority is given to the bishop to require security for costs, and the clerk may be ruined by litigation from which he emerges as the victor. Again, the offence charged may be an offence against the laws ecclesiastical, but it may be of so trifling and insignificant a nature that no one having any discretion in the matter ought to allow it to be the subject of litigation. Or the charge or the report may be one which within the knowledge of the bishop is unfounded. Or, again, the clerk may have been chargeable with a departure from authorised ritual, and on the remonstrance of the bishop may have admitted his fault and have promised to discontinue the wrong practice, and may have faithfully kept such promise, and yet, an offence having once being actually committed, the bishop, if the argument of the appellant be right, may

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be called upon to proceed against the clerk, with whose conduct in the matter he has every reason to be satisfied. A

The illustrations of the effect of the appellant's argument which I have suggested (and many more might be added) appear to have been felt by the Queen's Bench to press against the argument. In some of the cases which I have suggested the difficulty is met by the Court of Queen's Bench by saying that if the bishop refused to act the court might in its discretion refuse to grant a mandamus to make him act. But this is only saying that the court will take upon themselves to exercise a discretion which they refuse to allow to the bishop. It is further to be observed on this part of the case that the bishop of the diocese cannot, in my opinion, be looked upon merely as a ministerial officer through whose hands process is to pass as a matter of form. He is charged with the oversight of his diocese, and with a vigilant attention to its discipline; and if discretion as to proceedings in respect of the discipline of clerks is to be reposed anywhere, it is in the bishop that you would expect to find it. But, in truth, a most conspicuous instance of the reposing of this discretion in the bishop is found in another part of this statute. B C

Section 3 allows the bishop of a diocese in which an act of immorality has been committed by a clerk having preferment in another diocese to issue a commission to inquire into the grounds for a formal charge. I will suppose that the bishop of diocese A. issues such a commission of his own authority against X., a beneficed clergyman of diocese B. The commission report that there are prima facie grounds for proceeding against the party accused. The bishop of diocese A. is thereupon, under s. 5, to transmit a copy of this report and of the depositions to the bishop of diocese B. Thereupon, under s. 7, the bishop of diocese B. may proceed in due form of ecclesiastical law against X. up to punishment; but it is quite clear under s. 7 that it is discretionary with the bishop of diocese B. whether he will do this or whether he will allow the whole proceedings, even after the commissioners had found that there is a prima facie case, to drop. If the statute had singled out particular individuals who might naturally be supposed to have a personal interest—the churchwardens, for example, or even certain communicants or parishioners—and had laid down conditions as to costs, or otherwise, which they were to comply with before calling on the bishop to take proceedings, there might have been a ground for contending, on the authorities I have referred to, that the power of the bishop was one which, under those circumstances, he could not refuse to exercise. This, however, is not the frame or character of the enactment; and, indeed, having regard to the various matters to which the Act applies, and the various dioceses in which it might have to be put in force, it is difficult to see how the enactments could have taken that shape. D E F G

I ought to mention an argument which was much dwelt upon before your Lordships and in the courts below—viz., the argument that the words "if he shall think fit" in s. 3, in the alternative power to the bishop to proceed of his own mere motion, rather imply that on the application of a third party he is to proceed whether he thinks fit or not. I do not think that the words "if he shall think fit" have any such effect. They appear to me to be, where they occur, mere surplusage, as, indeed, is proved by the circumstance that if they were altogether omitted that clause of the section would mean just exactly what it means with those words inserted. But the words, in fact, appear to me to be introduced merely to mark more clearly that an alternative power is conferred upon the bishop, and that he is left free to proceed without anyone to put him in motion, if he chooses to do so. H I

I am satisfied upon these short grounds, and, without going into many of the topics which were so elaborately considered in the courts below, that the judgment under appeal is correct and ought to be affirmed, I will only add that if I am right in holding that the bishop has, under the statute, a discretion as

to proceeding or not proceeding in the way in which the appellant calls upon him to do, your Lordships have not, as it seems to me, any occasion, or, indeed, any right, to examine into the manner in which, or the principles upon which, that discretion has been exercised. For the exercise of that discretion the bishop, and the bishop alone, is responsible, and it would, in my opinion, be inconsistent to hold that his discretion is an answer to the application for a mandamus, and at the same time on that application to criticise the grounds upon which that discretion has been exercised. I move that the appeal should be dismissed.

LORD PENZANCE.—The considerations upon which the decision of this case should be based are, in my judgment, much more limited than those which have been advanced in argument. The state of the law before the Church Discipline Act, 1840, passed, though not perhaps wholly immaterial, can go for very little in the interpretation of that Act when it is borne in mind that the preamble declares that "the manner of proceeding in causes for the correction of clerks requires amendment." In the face of such a preamble it would be difficult to contend that any particular change in the "manner of proceeding" could not have been intended; and the change actually made, whereby the bishop is substituted for the judge, renders the practice which existed at the time when the whole proceeding was in the hands of the judge a matter of very slender and remote consideration. If it were otherwise I should not hesitate to say that, in my opinion, the judge always had a right and power to refuse to permit his office to be promoted if he thought fit, and that the statements of the law on the subject by Lord Stowell and Sir John Nicholl far outweigh the language attributed to Dr. Lushington in the single case of *Ditcher* v. *Denison* (7). Nor do I think the question raised in the present proceeding has been in any binding sense concluded by previous authority. There are numerous dicta on the interpretation of the clause in the Church Discipline Act which is now in controversy; but there has been one decision, and one only, which proceeded up the proper effect to be given to that clause. I allude to *R.* v. *Bishop of Chichester* (8), in which Wightman, J., with, I think, probably the approval of Lord Campbell, decided the case and acted upon the principle which the Court of Appeal in the present case has affirmed. The contention of the appellant, therefore, is one which, I think, may and ought to be considered by your Lordships on its merits; and I proceed to consider what those merits are.

In the outset I entirely agree with what has fallen from the Lord Chancellor as to the proper and legitimate way of stating the question here involved. The words "it shall be lawful" are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing; and the true question is, not whether they mean something different, but whether, regard being had to the person so enabled, to the subject-matter, to the general objects of the statute, and to the person, or class of persons, for whose benefit the power may be intended to have been conferred, they do or do not create a duty in the person on whom it is conferred to exercise it. This, in my judgment, is the true question; and I confess that I hardly think that it receives a satisfactory solution from the somewhat loose definition attributed to Coleridge, J., in *R.* v. *Tithe Comrs.* (6), which has been referred to as a binding statement of the law upon this subject. It is surely not enough that the thing empowered to be done should be for the public benefit in order to make it imperative to exercise that power on all occasions falling within the statute. It may be assumed that all powers conferred by statute on individuals in general public Acts are for the public benefit, or they would not have been conferred. But had the words been more precise they would hardly justify the use that has been made of them, for what Coleridge, J., said was, not that permissory or enabling words are to be held to "have a

compulsory force where the thing to be done is for the public benefit," &c., but only that such words "may" in some cases have that effect.

If the matter were to be decided by previous definitions, I should prefer that of JERVIS, C.J., who said, in *York and North Midland Rail. Co.* v. *R.* (9), that such words as "it shall be lawful" were to be understood as permissive only, unless some "absurdity or injustice" would follow from giving them that, their natural meaning. Neither, however, of these definitions goes so far as that which is to be found in the judgment of the Lord Chief Justice in the present case. He said:

> "It is an established canon of construction that in statutes of a certain class such words as 'it shall be lawful' have acquired a settled meaning, unless controlled by the context of the particular enactment or by the sense in which they are used in other parts of the statute, or by what on the purview of the statute is its apparent purpose."

That is to say, these words, in a certain class of statutes, import prima facie, not permission, but obligation; and must be so construed unless the conclusion that they were so intended can be displaced. No specific authority is cited for this proposition, nor have I been able to find any.

Passing, therefore, from definitions which are apt not to be uniform, and are with difficulty so framed as to be applicable to all cases, I think it far more satisfactory that your Lordships should look at what the courts in previous cases have done rather than to what the learned judges may have said, and I invite your Lordships' attention to the cases cited in argument where the courts have actually held that the power conferred, though by permissive words only, was one which the individual was bound to exercise, and to compare those cases with the case now under consideration. In *Alderman Backwell's Case* (1) the power conferred was that of issuing a commission of bankrupt, and it was conferred on the Lord Chancellor. In *R.* v. *Barlow* (2) power was conferred on certain persons to raise a rate to reimburse a constable for expenses lawfully incurred. In *R.* v. *Steward of Havering Atte Bower* (3) power was conferred to hold a court for recovery of debts in a manor. The power had been exercised, but had for fifty years been disused; the exercise of it by holding the court was enforced by mandamus on the application of one entitled to sue in it. In *Macdougall* v. *Paterson* (4) and *Crake* v. *Powell* (10), the superior courts were empowered to direct that a person entitled to costs should recover them; and in *R.* v. *Tithe Comrs.* (6), in which the expressions above quoted of COLERIDGE, J., are to be found, power was conferred on the tithe commissioners to confirm agreements with respect to tithes not legally binding when it appeared to them that such agreements gave a fair equivalent for the tithe. In *Morisse* v. *Royal British Bank* (5) power was conferred upon the courts to grant execution against a shareholder to a creditor who had obtained judgment against the company and issued execution against it without effect. In all these instances the courts decided that the power conferred was one which was intended by the legislature to be exercised, and that, although the statute in terms had only conferred a power, the circumstances were such as to create a duty.

In other words, the conclusion arrived at by the courts in these cases was that, regard being had to the subject-matter, to the position and character of the person empowered, to the general objects of the statute, and, above all, to the position and rights of the person or class of persons for whose benefit the power was conferred, the exercise of any discretion by the person empowered could not have been intended. Thus the right of a creditor to have his debtor made a bankrupt, though the person empowered to issue the commission was the Lord Chancellor, and, therefore, a person in whom a discretion (if the subject had admitted of one) might well have been reposed, was held to be one that justice required should be exercised without discretion. The right of the con-

A stable to be reimbursed his expenses stood on the same footing. The same may be said of the right of the suitor to have his case heard in the manor court. When once it was plain that a plaintiff had a right to his costs, it could not be intended that the legislature had conferred a discretion on the courts whether they would enable him to get them or not; and the same reason applies to a creditor's remedy against the member of a company which was indebted to him. If the B idea of a discretion had not been excluded in these cases by the requirements of justice and other general considerations, the courts could not have held that to be compulsory which the legislature had described in terms enabling and permissive only.

The question then arises whether in the present case there are any considerations sufficiently cogent to exclude the idea that the legislature intended C a discretion. If we look at the subject-matter to which the enactment in question relates, we find that it involves nothing less than the entire discipline of the clergy, and the enforcement of all ecclesiastical punishments and penalties. Did the legislature intend, then, that ecclesiastical offences should be a matter for wholesale and indiscriminate prosecution, without regard to their nature, the circumstances under which they may have been committed, the conduct by which D they may have been atoned, or the guarantees that may exist that they will not be repeated? It must be borne in mind that the offences that we are considering are not necessarily offences against the criminal law, or even the laws of morality understood in their widest sense. They may, some at least of them, be committed innocently from inattention, or carelessness, or a wrongful conception of obligation, such, for instance, as are trifling and perhaps inadvertent E departures from the authorised ritual of the Church. I cannot see my way to a conclusion that the legislature plainly intended that all these offences should be made the subject of prosecution without discretion or limit. Still less can I perceive with any certainty that the public benefit, the rights or benefit of individuals, or the requirements of justice—to say nothing of the due and efficient F discipline of the clergy, and the best interests of the church—require the indiscriminate prosecution of everything in the conduct of every clergyman which may legally constitute an ecclesiastical offence.

So far, then, from the nature of the subject excluding the intention of conferring a discretion, it is one, in my opinion, in which a discretion is loudly called for, and would naturally be expected. The language of the clause itself, G both in the provisions it contains and still more in what it omits, points in the same direction. I cannot do better here than quote Bramwell, L.J. He says:

> "There is no provision regulating who is to be the complainant; it may be anyone—man, woman, or child, churchman or other, for aught I can see. There is no provision how the complaint is to be made, by writing or H verbally; no provision how, if at all, it is to be verified; no provision that the complainant shall undertake to prosecute, or shall be liable to costs; no provision as to the character or nature of the offence, how far its prosecution may be desirable in the interests of religion or morality; not a word as to its being possibly an isolated offence, and unintentional, and atoned for; nothing as to the motives or object of the complaint."

I agree with the lord justice, that the absence of all provision and limitation on these heads points strongly to the probable intention that a discretion should be vested in some one as to the cases in which a commission should issue, and that such a discretion should be reposed in the bishop, whose office it is to guide, correct, and control the clergy, is exactly what might have been expected in an Act for the regulation of church discipline. He is the person who, above all others, has the means and opportunity of knowing the character and conduct of an offending clergyman; the condition and circumstances of his parish; and the probable motives of those who charge the offence; and, above all, whose

position may enable him to interpose admonition and advice which may render recourse to the law unnecessary. But (still comparing the present case with the authorities above cited) the strongest point of contrast remains to be stated. For in place of a duty being inferred and enforced, as in those cases, in order to do justice to the legal rights of an individual, if a duty be inferred at all from the provisions of this statute, its exercise may be called for at the instance of a complainant who has not only no legal right, but, perhaps, no interest, immediate or remote, in the exercise of the bishop's power, inasmuch as the statute makes it possible for any man to be a complainant, no matter where resident, and no matter whether Churchman, Nonconformist, Roman Catholic, Christian, Jew, or Mohammedan. I cannot think that the intention of this statute was to maintain the discipline of the clergy by vesting the power of legal prosecution without limit in the community at large.

The conclusion, then, at which I arrive is that the appellant has not established his case. The words "it shall be lawful" are permissive and enabling only. It devolved upon him to show that the legislature intended the exercise of the power thus conferred to be a duty, in the performance of which the bishop was not intended to have any discretion, and he has, in my opinion, failed to show it. With regard to the particular circumstances of the present case I forbear to make any remark. Being of opinion that the permissive words of the statute ought not to be held to have created any duty in the bishop to issue a commission without discretion in the matter, I forbear to inquire whether that discretion has been well exercised. It may be that it has not; and I am not insensible to the weight of the argument that, if bishops have a discretion in such matters, it is a discretion without appeal, and free from legal control. It may, therefore, be abused; but so may a discretion in whomsoever vested; and in the possibility of abuse I see no reason to believe it unlikely that the legislature intended to confide the discipline of the clergy to the good sense and good faith of the bishops upon whom in the earlier history of the Church the task of correction exclusively devolved.

LORD SELBORNE.—The use of inexact language in the statement of reasons for judicial decisions, though nothing may turn upon it in particular cases determined upon sound principles, is sometimes liable to become a point of departure, in other cases, towards erroneous conclusions. This appears to me to have happened in the court of first instance in the present case. The language certainly found in authorities entitled to very high respect—which speaks of the words "it shall be lawful," and the like, when used in public statutes, as ambiguous, and susceptible, according to certain rules of construction, of a discretionary or an obligatory sense—is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me that the meaning of such words is the same whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never in themselves significant of any obligation. The question whether a judge or a public officer to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power.

The present question is whether it can be shown, from any particular words or provisions of the Church Discipline Act, or from the general scope and objects of that statute, that it is the duty of a bishop, whenever a complaint is made to him under s. 3 of the Act, to issue a commission of inquiry, with a view to penal proceedings if a prima facie case should be made out? The words "it shall be lawful," etc., give him the power to do so; but this is a power, not in aid of any private right, nor for the due course and administration of justice after the commencement of any prosecution or suit; it is altogether initiatory and

preliminary. The argument from the collocation of the words, "if he shall think fit," in the immediate context, is, in my opinion, much too slender and uncertain to justify the inference that, in the earlier branch of the sentence, where these words do not occur, obligation, and not mere power, must have been intended. Apart from those words, the only proof offered of the alleged duty consists in the assumption that the public must always have an interest in the punishment of every clergyman offending against any part of the ecclesiastical law. I cannot make that assumption. The legislature did, no doubt, give the power in question to the bishop, in trust and confidence that every person chosen to fill, and who had accepted, so high an office, would be properly sensible of the duty of maintaining the authority of the law, and would, in proper cases falling within his jurisdiction, use the powers entrusted to him for the correction of offences against that law for the purposes for which they were given. But it is perfectly consistent with that proposition that it may have been intentionally left to the discretion of the bishop to judge what were proper cases for the exercise of those powers.

I cannot accede to the suggestion made at the Bar that a bishop, if he had such a discretion, might be supposed liable to use it in opposition to the authority of the law, or as a means of dispensing with obedience on the part of his clergy to any requirements of the law which might not be in accordance with his private views. The legislature, in my opinion, neither contemplated nor provided against any such case, the occurrence of which was not when the Act was passed, and is not now, within the bounds of reasonable probability. The very great preponderance both of practical reason and of public convenience, and of the inferences to be drawn from what is and what is not contained in the statute itself, seems to me to be against the supposition that the legislature did intend by this Act to make it the duty of a bishop to inquire, by commission, into every imputation of an ecclesiastical offence, or of a scandal or evil report of such an offence, against a clergyman which might be brought before him, in the way of complaint, by any person whomsoever. It is, at least, not obvious that it would be for the interest either of the Church or of the State to open or leave open so very wide a door to private intolerance, contentiousness, uncharitableness, or folly. Every passage in a book or sermon to which any individual of different doctrinal views might in proper form impute heresy or inconsistency with the Thirty-nine Articles—every trivial omission or irregularity in the conduct of Divine service, even on points where the law might be in practical desuetude—every venial act of misconduct, atoned for by the offender, and condoned by every one having any real interest in his ministrations—every impertinent and groundless scandal, believed in by nobody whose judgment was of any value, might thus be made the subject of an enforced inquiry, which from the beginning might be seen to be vexatious and useless, and perhaps very costly and mischievous, and that at the instance of a person without either private interest or public responsibility.

The bishop would be called in by the statute, for the first time, instead of a court or judge, not to exercise his episcopal judgment with any view to the good of the Church, the peace or good order of the diocese, or the general spiritual interests of his clergy or laity, but as a passive ministerial officer, to do what he might have the strongest reasons in the world to disapprove. He might have read the book or sermon, and have found it perfectly unobjectionable; he might have received the most unreserved submission to his own judgment in the supposed case of ritual irregularity, and such irregularity might have been wholly discontinued; he might be convinced on the best possible grounds that ample reparation had been made for any other kind of error, or that any alleged scandal was merely malicious and contemptible; and yet he would be compelled to proceed. The complainant might be, not, like the appellant in this case, a parishioner, but a stranger, neither answerable in costs nor even offering to

substantiate his own accusation. The statute makes no regulation itself, nor enables any to be made, either as to the form or manner of the complaint, or as to its verification, or as to any costs of the inquiry demanded. I cannot collect, nor can I presume, that this was the purpose of the legislature. I do not think it reasonable; and I agree that the present appeal should be dismissed, with costs.

LORD BLACKBURN.—The question before this House depends upon the construction of the Church Discipline Act, 1840, for, if the legislature cast on the bishop of a diocese the absolute duty of forwarding inquiry in one or other of those two ways, there can be no question that the bishop has not fulfilled that duty, and there can equally be no question that there is a power by mandamus to require him to fulfil a duty cast upon him by a statute. But if the legislature gave the bishop power to further inquiry in one of those two ways, trusting that he would always do so where it was proper, but leaving it open to him when convinced that it was not proper to decline to act—if, in short, the intention of the legislature was to make it lawful for him to act if convinced that it is expedient, but to leave it to his discretion to say whether it is expedient, the mandamus will not lie. The court of law does not sit as a court of appeal from the bishop to say whether he has exercised his discretion, if he has one, wisely or not; though, if he has no discretion, it may compel him to fulfil his duty, and act.

The question as to the construction of this particular Act was directly raised in *R.* v. *Bishop of Chichester* (8), and there WIGHTMAN, J., thought that the bishop had a discretion, and made that the ground of his decision. But the Court of Queen's Bench did not so decide. HILL, J., who was the only other member of the court at the time the decision was made, based his judgment entirely on the discretionary power of the court to refuse a writ of mandamus. LORD CAMPBELL, C.J., and ERLE, J., who had been members of the court when the rule was argued, but had ceased to be so before it was decided, authorised WIGHTMAN, J., to state that they were of opinion that the rule should be discharged, but he did not state on which ground. It seems probable that LORD CAMPBELL would have decided on the ground that he agreed with WIGHTMAN, J., on the construction of the Act, and ERLE, J., on the narrower ground taken by HILL, J.

There have, since that time, been several expressions of judicial opinion on the construction of this statute, none of them decisions, but dicta, not irrelevant to the subject under consideration, of weight as authorities, though none, I think, of so much weight as the opinion of WIGHTMAN, J., because in none of them was it the ratio decidendi, as it was with him. BRAMWELL, L.J., says:

> "I cannot but think we are concluded. The decisions and opinions are such, and so many that we ought to follow them. This is my conviction. I think at least none but the ultimate court of appeal should overrule opinions so expressed, even if that should, as to which I content myself with observing, that where the law has been laid down, and generally supposed to be correctly laid down, and acted upon, great judges have doubted much whether, if wrong, the only remedy was not in the legislature."

I quite agree that where, from the nature of the decision, there is reason to believe that rights have been regulated, and arrangements as to property made on the faith that the law was as laid down, it may be right to follow the decision, even if wrong. On this I had occasion to express my views in *Davidson* v. *Sinclair* (11). But I do not think that this is such a case. While I agree with what I understand to be the opinion of THESIGER, L.J., that the preponderance of authority in favour of the view that under this statute the bishop has a discretion is great, I cannot think with BRAMWELL and BAGGALLAY, L.JJ.,

that the question was, even in the Queen's Bench Division, concluded by authority, and still less that it is so in this, the highest court of appeal. I agree that, before deciding that such a preponderance of authority was based on a mistake, the case should be considered carefully; and I have no doubt that the judges of the Queen's Bench Division did so consider it. I have myself come to the conclusion, independently of those opinions, that, applying the general principles of law as to the construction of statutes to this statute, there is no duty cast on the bishop enforceable by mandamus, unless, perhaps, a duty to hear and consider the application of the party complaining, which in this case the bishop has done.

The case has now been so carefully and elaborately argued that I think I may properly at once proceed to the point where what is, in my opinion, the fundamental error, that which I consider the fallacy in the judgment of the Queen's Bench Division, lies. That judgment treats the words "it shall be lawful" as ambiguous words, capable of bearing several meanings, and then says:

> "We start with an established canon of construction, namely, that in statutes of a certain class, of which the statute under consideration is one, these words have acquired a settled meaning."

After referring to *Re Newport Bridge* (12), where it had been laid down that the words "it shall be lawful" prima facie import a discretion, the judgment proceeds:

> "but though the rule thus laid down may hold good in the general run of statutes, in those of the class to which the Church Discipline Act belongs a different rule has prevailed for a very great length of time, and is now fully established."

Cases are cited in support of this position: *R.* v. *Barlow* (2), *Macdougall* v. *Paterson* (4), *Morisse* v. *Royal British Bank* (5), *Crake* v. *Powell* (10), *R.* v. *Tithe Comrs.* (6), and an American case of *Supervisors* v. *United States* (13). It then comes to the conclusion that they establish that the words, which the judgment considers ambiguous and in an ordinary statute prima facie only, are in a statute relating to public justice and of general interest and concern to be deemed prima facie obligatory.

If this were the established canon of construction it would not conclusively show that the words were in this statute obligatory, but it would be a very important step in that direction. But I think that there is no such established canon of construction. I am not aware that it has ever, in any previous judgment, been laid down, and I think that all of the cases which in the judgment are cited in support of the position so laid down, and all the other cases of which I am aware in which words in terms empowering have been held to be imperative, are to be supported on a different principle. I do not think the words "it shall be lawful" are in themselves ambiguous at all. They are apt words to express that a power is given; and as prima facie the donee of a power may either exercise it, or leave it unused, it is not inaccurate to say that prima facie they are equivalent to saying that the donee may do it; but if the object for which the power is conferred be for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Where there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that, because there is a duty cast on the donee of a power to exercise it, a mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee.

The earliest case in point in which I find this doctrine touched on is *Alderman Backwell's Case* (1). The statute 13 Eliz. c. 7, s. 2 [Bankrupts Act,

1571: repealed], enacted that the Lord Chancellor or Lord Keeper, upon every complaint made to him in writing against such person, being bankrupt, "shall have full power and authority by commission under the great seal of England" to issue a commission; and this power was by 1 Jac. 1, c. 15, s. 3 [Bankrupts Act, 1603: repealed] extended to bankrupts under that Act. When the Exchequer was closed in 1676, many bankers who had deposited their money there were unable, in consequence of the bad faith of the government, to meet the demands of their own creditors. Alderman Backwell, who was one, fled to Holland, leaving his son to make what terms he could with the creditors, and apparently the government helped him. Lord Keeper North seems to have done all he could, and a great deal more than he ought, and kept the creditors at bay for seven years. But at last, in 1683, even he could not delay longer, and, according to the report,

> "the Lord Keeper declared, though the words in the Act of Parliament were that the Chancellor may grant a commission of bankrupt, yet that *may* was in effect *must*, and it had been so resolved by all the judges, and the granting of a commission was not a matter discretionary in him, but that he was bound to do it."

I have already pointed out that the word "may" does not occur in the statute; but, as I have already said, it is not inaccurate to say that the words conferring a power are equivalent to "may."

In the County Courts Act, 1850, s. 13, the words used were that, on its being proved by affidavit by the plaintiff that the case was one in which there was concurrent jurisdiction, the court in which the action was brought, or a judge at chambers,

> "may thereupon, by rule or order, direct that the plaintiff shall recover costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this Act had not passed."

The Court of Exchequer had, in *Jones* v. *Harrison* (14), construed this as giving the court a discretionary power to refuse the rule. That, being a decision on which no appeal lay, was not binding on a court of co-ordinate jurisdiction, and the Court of Common Pleas in *Macdougall* v. *Paterson* (4), and the Court of Queen's Bench afterwards in *Crake* v. *Powell* (10), held a contrary opinion. In the judgment of the Common Pleas, Jervis, C.J., says that "may" was, "as we think, aptly and properly used to confer on the court an authority," and later states the rule to be "that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application." In *Crake* v. *Powell* (10), Lord Campbell, C.J., says (2 E. & B. at p. 212):

> "If the plaintiff be entitled to costs, and the court or judge is empowered to make a rule or order for that purpose ex debito justitiæ, he may call upon the court or judge to do so."

Morisse v. *Royal British Bank* (5) was on the same principle.

But there are cases in which the authority or power given is not to do a judicial act, and yet there is a duty on the donee to exercise the power if it appears to be given to him for the purpose of making good a right, and he is called upon by those who have that right to exercise the power for their benefit. The Act 14 Car. 2, c. 12 [Poor Relief Act, 1662: repealed, Poor Law Act, 1927], s. 18, reciting that constables, etc., may be at charges in enforcing the poor law, and as yet have no power to make rates to reimburse themselves, enacts that

A "all constables, etc., so out of purse as aforesaid, together with the churchwardens and overseers of, etc., poor and other inhabitants of the parish, shall hereby have power and authority to make an indifferent rate, and to tax all the inhabitants, etc."

The inhabitants of several parishes of Derby seem to have combined to refuse B to make any rates for this purpose; an indictment was preferred against them, which was removed into the King's Bench, and on motion to quash it the court refused to do so. The case is reported under the name of *R.* v. *Barlow* (2) in the following words:

C "Exception was taken that the statute only puts it in their power to do so by the word 'may,' etc., but does not require the doing of it as duty for the omission of which they are punishable, sed non allocatur. For where a statute directs the doing of a thing for the sake of justice and the public good, the word 'may' is the same as the word 'shall'; thus 23 Hen. 6, c. 9 [repealed], says the sheriff may take bail. This is construed he shall, for he is compellable so to do."

D The word "may" does not occur in the Poor Relief Act, 1662, nor in the 23 Hen. 6, c. 9, where in the Norman French version the words are "lesseront hors de prison," and in the English version "shall let out of prison"; but both are apt illustrations of the rule that, though giving a power is prima facie merely enabling the donee to act, and so may not inaccurately be said to be E equivalent to saying he may act, yet, if the object of giving the power is to enable the donee to effectuate a right, then it is his duty to exercise the power when those who have the right call upon him to do so.

This is equally the case where the power is given by the word "may" if the object be clear. Thus, in the Public Health Act, 1848, s. 89 [repealed, Public Health Act, 1875], the words are:

F "The Local Board of Health may make rates prospectively, in order to raise money for the payment of future charges and expenses which may have been incurred at any time within six months before the making of the rate."

Yet, on the application of a judgment creditor, a mandamus will go to compel G the making of a rate for the purpose of satisfying a judgment within six months after the judgment has been obtained: *R.* v. *Rotherham Local Board* (15); *Worthington* v. *Hulton* (16). In *R.* v. *Tithe Comrs.* (6) Coleridge, J., in delivering the considered judgment of the court, says (14 Q.B. at p. 474):

H "The words undoubtedly are only empowering, but it has been so often decided as to become an axiom that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit, or in advancement of public justice."

The only part of this to which exception can be taken is the use of the word "public," if by that it is to be understood either that enabling words are I always compulsory where the public are concerned, or are never compulsory except where the public are concerned. I do not think either was meant. The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right. It is far more easy to show that there is a right where private interests are concerned than where the alleged right is in the public only; and in fact in every case cited, and in every case that I know of where the words conferring a power are enabling only and yet it has been held that the power must be exercised, it has been on the application of those whose private rights required the exercise of the power. The personal liberty of the person arrested by the sheriff, the rights of the creditors of the

bankrupt to their debts, the right of the plaintiff who had recovered judgment to his costs, the right of the constable out of pocket to be paid by the parish, the right of the creditor of the bank or of the local board to be paid, were all private rights.

I do not, however, question that there may be a right in the public such as to make it the duty of those to whom a power is given to exercise that power. I should say, for instance, that if by enabling words a court is empowered to pass sentence on one convicted of a crime, it would be the duty of the court to pass that sentence. But I cannot agree with the Court of Queen's Bench that whenever the statute is for the public good and of general interest and concern powers conferred by enabling words are, prima facie to be considered powers which must be exercised. And I cannot agree that in the statute now in question there is either a private or a public right requiring that this power given to the bishop must be exercised. No doubt, it is very desirable that the ecclesiastical law should be observed; and both with the view that it should be observed, and with the view to punish those who have transgressed, it is very desirable that there should be the means of bringing to trial, and on conviction of punishing, transgressors against the law. But does it follow that it is desirable that it should be in the power of any individual to insist on a prosecution in every case? The author of THE APOLOGY, said to be the Dean of Arches in the reign of Elizabeth, did not think so. He says that the proceedings must be by the office of the judge, and "the judge need not lend his assistance but where he sees good and probable inducements to ground it upon."

LORD STOWELL uses language in *Maidman* v. *Malpas* (17) often quoted, so like that used in THE APOLOGY as to make me think he had that passage in his mind. It is true that where due security for costs was given the judge did not, in practice, refuse his assent, so that there was not a practical check on the improper institution of criminal proceedings in the ecclesiastical courts. It is also true that in prosecutions for temporal crimes in the temporal courts any private person may institute a prosecution, and that the only check provided by the common law is that the Attorney-General may take the prosecution out of his hands, or enter a nolle prosequi. It is also true that in England that power is rarely exercised. But everyone who has had experience in criminal courts must know that cases do occur in which everyone thinks that it would be much better that there should be no prosecution; and some (I allude more particularly to prosecutions for bigamy) in which, though there was a conviction, the judge has said that the prosecution was so improper that he would not allow costs. I do not say that in all these cases the judge was right and the private prosecutor wrong—far from it; but in every such case the judge must have thought that it was not for the public benefit that the prosecution should be instituted, though there was a breach of the law.

At common law the master of the Crown Office, being the Queen's Coroner and Attorney in the Queen's Bench, could file ex officio informations in that court for any misdemeanours; and a practice had arisen before the Revolution by which he allowed anyone to file an information in his name. This was very analogous to promoting the office of the judge in an ecclesiastical court. By 4 Will. & Mar. c. 18, s. 2 [relating to malicious informations in the King's Bench: repealed by Administration of Justice (Miscellaneous Provisions) Act, 1938], he was forbidden to do so "without express order, to be given by the court in open court." At first it seems to have been thought that the court ought to grant that leave if it was shown that there was a breach of the law; but it has been long held discretionary. In *R.* v. *Stacey* (18) LORD MANSFIELD says (1 Term Rep. at p. 2), speaking of quo warranto informations:

"But now since these matters have come more under consideration, it is

A no longer a motion of course, and the court is bound to consider all the circumstances of the case before they disturb the peace and quiet of any corporation."

This has been acted on repeatedly: see *R.* v. *Parry* (19); *R.* v. *Rector of Lambeth* (20); and *R.* v. *Ward* (21).

B It is difficult in the face of these authorities to say that it is impossible to suppose that the legislature could have intended to leave the bishop power to consider all the circumstances of the case before he takes a step which may disturb the peace and quiet of the Church and of his diocese. And at common law the prerogative writs of mandamus, prohibition, and certiorari were not writs of course. The court when called on to issue them always exercised C a discretion: see the authorities collected in *R.* v. *Surrey Justices* (22). It is true that the courts always thought it their duty to grant the writ where the party applying had a special interest in asking it; and those who framed the Church Discipline Act, 1840, seem to have had this in view, as they have, by s. 19, said:

D "Nothing shall prevent any person from instituting as voluntary promoter, or from prosecuting, in such form and manner and in such court as he might have done before the passing of this Act, any suit which, though in form criminal, shall have the effect of asserting, ascertaining, or establishing any civil right."

This goes far to show that it was thought that, but for this section, the E prosecution even in such a case would have been subject to the control of the bishop. It is also true that in exercising their discretion the courts have thought it very material to inquire whether the applicant was a mere busybody and makebate, or was a person who had an interest, though it fell short of what would fall within the terms of s. 19.

F I am far from saying that the bishop should not, in this case, have considered, as one of the elements to guide his discretion, that the applicant was a parishioner. But it was only one element. The Act is general. It allows prosecutions for immorality, in which a parishioner is hardly more grieved than any neighbour. And it applies to clerks who have no preferment, and consequently can have no parishioners; and if the bishop has no discretion, he must in every case act on the application of any party. I certainly cannot see any G sufficient ground for saying that the object of the statute is such as to lead to the conclusion that the legislature must have intended to oblige the bishop to exercise the power which prima facie he is entitled to refuse to exercise, and certainly, if discretion is to be entrusted to any one, the bishop is the fittest person to whom to trust it. It is very true that bishops are but men, and being human may misuse any discretion entrusted to them; but so are H judges, and so are the parties who make a complaint. And it seems strange to say that the legislature, which has not provided that there shall always be a prosecution, but has left that to the discretion of anyone who likes to interfere, could not trust any discretion to a bishop, who, to say the least, is not more likely to err than any voluntary prosecutor. I do not think it necessary to examine the words and clauses and the history of the Act. I have considered I them, and find nothing to lead me to think that it was intended to make the exercise of the power conferred on the bishop imperative in all cases, though conferred by words prima facie discretionary. I see no reason for departing from the rule by which costs are given to the successful party.

Appeal dismissed.

Solicitors: *James Girdlestone; Cunliffe, Beaumont & Davenport; Brooks, Jenkins & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HILL AND ANOTHER *v.* CROOK

[House of Lords (Lord Chelmsford, Lord Colonsay and Lord Cairns), May 2, 5, 6. 27, 1873]

[Reported L.R. 6 H.L. 265; 42 L.J.Ch. 702; 22 W.R. 137]

Will—Children—Illegitimate child—Inclusion—Need for clear evidence of testator's intention—Description of children to be benefited—Implication from terms of will—Impossibility of legitimate children taking—Exclusion—Children unborn at death of testator—Class gift—Validity—Gift to illegitimate children of named mother.

The words "child" or "children" in a will mean legitimate child or children unless there is clear evidence of a contrary intention of the testator which may be shown by actual description of the children to be benefited, or by necessary implication from the terms of the will, or by its being impossible from the circumstances of the parties that any legitimate child could take under the bequest. A gift to illegitimate children as a class is good provided that these conditions are fulfilled. But no gift, however express, to children unborn at the date of the testator's death can be valid.

Circumstances in which a devise to the children of a named mother as a class **held** to apply to illegitimate children by actual description and to be valid although the class included possible lawful children.

Notes. A gift to a sufficiently designated illegitimate child who is en ventre sa mère at the date of the will or that of the testator's death has been held to be valid: see *Gordon* v. *Gordon* (1816), 1 Mer. 141; *Evans* v. *Massey* (1819), 8 Price, 22; *Re Loveland*, [1906] 1 Ch. 542.

Considered: *Re Brown's Trust* (1873), L.R. 16 Eq. 239; *Occleston* v. *Fullalove* (1874), 9 Ch. App. 147; *Dorin* v. *Dorin*, post, p. 71. Applied: *Laker* v. *Hordern* (1876), 1 Ch.D. 644. Explained: *Re M'Naughtan's Trusts* (1876), 33 L.T. 774. Applied: *Perkins* v. *Goodwin*, [1877] W.N. 111. Distinguished: *Levy* v. *Solomon* (1877), 37 L.T. 263; *Ellis* v. *Houstoun* (1878), 10 Ch.D. 236. Explained: *Megson* v. *Hindle* (1880), 15 Ch.D. 198. Applied: *Re Humphries, Smith* v. *Millidge* (1883), 24 Ch.D. 691; *Re Haseldine, Grange* v. *Sturdy* (1886), 31 Ch.D. 511. Considered: *Re Bolton, Brown* v. *Bolton* (1886), 31 Ch.D. 542; *Re Horner, Eagleton* v. *Horner* (1887), 37 Ch.D. 695; *Re Jodrell, Jodrell* v. *Seale* (1890), 44 Ch.D. 590. Applied: *Re Lowe, Danily* v. *Platt* (1892), 61 L.J.Ch. 415. Considered: *Re Deakin, Starkey* v. *Eyres*, [1894] 3 Ch. 565; *Re Fish, Ingham* v. *Rayner*, [1894] 2 Ch. 83; *Re Harrison, Harrison* v. *Higson*, [1894] 1 Ch. 561; *Re Parker, Parker* v. *Osborne*, [1897] 2 Ch. 208; *Re Du Bochet, Mansell* v. *Allen*, [1901] 2 Ch. 441; *Re Wood, Wood* v. *Wood*, [1901] 2 Ch. 578. Applied: *Re Corsellis, Freeborn* v. *Napper*, [1906] 2 Ch. 316; *Re Eve, Edwards* v. *Burns*, [1908-10] All E.R. Rep. 131. Considered: *Ebbern* v. *Fowler*, [1908-10] All E.R. Rep. 673. Applied: *Re Pearce, Alliance Assurance Co., Ltd.* v. *Francis*, [1911-13] All E.R. Rep. 1067. Considered: *Embury, Bowyer* v. *Page (No. 2)* (1914), 111 L.T. 275. Applied: *Re Helliwell, Pickles* v. *Helliwell*, [1916] 2 Ch. 580; *Re Bleckly, Sidebotham* v. *Bleckly*, [1920] 1 Ch. 450. Explained: *Re Taylor, Hockley* v. *O'Neal*, [1925] All E.R. Rep. 662. Considered: *Re Dicker*, [1947] 1 All E.R. 317; *Re Wohlgemuth's Will Trusts, Public Trustee* v. *Wohlgemuth*, [1948] 2 All E.R. 882; *Re Fletcher, Barclays Bank, Ltd.* v. *Ewing*, [1949] 1 All E.R. 732. Applied: *Re Gilpin, Hutchinson* v. *Gilpin*, [1953] 2 All E.R. 1218. Considered: *Re Makein, Makein* v. *Makein*, [1955] 1 All E.R. 57. Referred to: *Re Hastie's Trusts* (1887), 35 Ch.D. 728; *Re Browne, Raggett* v. *Browne* (1889), 61 L.T. 463; *In the Goods of Ashton*, [1892] P. 83; *Re Jeans, Upton* v. *Jeans* (1895), 72 L.T. 835; *Re Walker, Walker* v. *Lutyens*, [1897] 2 Ch. 238; *Re De Wilton, De Wilton* v. *Montefiore*, [1900] 2 Ch. 481; *Re Loveland, Loveland* v. *Loveland* (1906),

75 L.J.Ch. 314; *Ward* v. *Van Der Loeff*, *Burnyeat* v. *Van Der Loeff*, [1924] All E.R. Rep. 542; *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A.C. 529.

As to the capacity of illegitimate relations to take under a will, see 39 HALSBURY'S LAWS (3rd Edn.) 1070-1075; and for cases see 44 DIGEST 222-225.

Case referred to:

(1) *Wilkinson* v. *Adam* (1813), 1 Ves. & B. 422, L.C.; affirmed (1823), 12 Price, 470; 147 E.R. 780, H.L.; 44 Digest 807, *6607*.

Also referred to in argument:

Owen v. *Bryant* (1852), 2 De G.M. & G. 697; 21 L.J.Ch. 860; 20 L.T.O.S. 45; 16 Jur. 877; 42 E.R. 1045, L.JJ.; 44 Digest 814, *6662*.

Swain v. *Kennerley* (1813), 1 Ves. & B. 469; 35 E.R. 182, L.C.; 44 Digest 807, *6605*.

Cartwright v. *Vawdry* (1800), 5 Ves. 530; 31 E.R. 719, L.C.; 44 Digest 807, *6604*.

Snelham v. *Bayley* (1822), 5 Ves. 534, n.; 31 E.R. 721; sub nom. *Bayley* v. *Snelham*, 1 Sim. & St. 78; sub nom. *Bailey* v. *Snelham*, 1 L.J.O.S.Ch. 35; 44 Digest 812, *6650*.

Godfrey v. *Davis* (1801), 6 Ves. 43; 31 E.R. 929; 44 Digest 820, *6711*.

Osmond v. *Tindall* (1825), 5 Ves. 534, n.; 31 E.R. 723, L.C.; 44 Digest 812, *6647*.

Lord Woodhouselee v. *Dalrymple* (1817), 2 Mer. 419; 35 E.R. 1000; 44 Digest 811, *6638*.

Harris v. *Lloyd* (1823), Turn. & R. 310; 37 E.R. 1119, L.C.; 44 Digest 807, *6606*.

Mortimer v. *West* (1827), 3 Russ. 370; 5 L.J.O.S.Ch. 181; 38 E.R. 615, L.C.; 44 Digest 224, *486*.

Bagley v. *Mollard* (1830), 1 Russ. & M. 581; 8 L.J.O.S.Ch. 145; 39 E.R. 223; 44 Digest 807, *6608*.

Gill v. *Shelley* (1831), 2 Russ. & M. 336; 9 L.J.O.S.Ch. 68; 39 E.R. 422; 44 Digest 815, *6676*.

Fraser v. *Pigott* (1831), You. 354; 159 E.R. 1029; 44 Digest 808, *6609*.

Dover v. *Alexander* (1843), 2 Hare, 275; 12 L.J.Ch. 175; 7 Jur. 124; 67 E.R. 114; 44 Digest 820, *6712*.

Meredith v. *Farr* (1843), 2 Y. & C. Ch. Cas. 525; 7 Jur. 797; 63 E.R. 235; 44 Digest 813, *6660*.

Durrant v. *Friend* (1852) 5 De G. & Sm. 343; 21 L.J.Ch. 353; 19 L.T.O.S. 152; 16 Jur. 709; 64 E.R. 1145; 44 Digest 817, *6687*.

Re Davenport's Trusts (1852), 1 Sm. & G. 126; 20 L.T.O.S. 165; 17 Jur. 314; 1 W.R. 103; 65 E.R. 55; 44 Digest 873, *7299*.

Pratt v. *Mathew* (1856), 22 Beav. 328; 25 L.J.Ch. 409; 27 L.T.O.S. 74; 2 Jur.N.S. 364; 4 W.R. 418; 52 E.R. 1134; on appeal, 8 De G.M. & G. 522, L.JJ.; 44 Digest 874, *7305*.

Re Overhill's Trust (1853), 1 Sm. & G. 362; 22 L.J.Ch. 485; 20 L.T.O.S. 290; 17 Jur. 342; 1 W.R. 208; 65 E.R. 159; 44 Digest 808, *6612*.

Evans v. *Massey* (1819), 8 Price, 22; 146 E.R. 1119; 44 Digest 225, *498*.

Mason v. *Baleson* (1859), 26 Beav. 404; 28 L.J.Ch. 391; 33 L.T.O.S. 85; 5 Jur.N.S. 400; 7 W.R. 225; 53 E.R. 953; 44 Digest 223, *471*.

Dilley v. *Matthews* (1865), 12 L.T. 488; 11 Jur.N.S. 425; 13 W.R. 676; 44 Digest 812, *6641*.

Howarth v. *Mills* (1866), L.R. 2 Eq. 389; 14 L.T. 544; 30 J.P. 759; 12 Jur.N.S. 794; 44 Digest 223, *473*.

Re Standley's Estate (1868), L.R. 5 Eq. 303; 44 Digest 820, *6717*.

Clifton v. *Goodbun* (1868), L.R. 6 Eq. 278; 44 Digest 811, *6635*.

Re Well's Estate (1868), L.R. 6 Eq. 599; 37 L.J.Ch. 553; 18 L.T. 462; 16 W.R. 784; 44 Digest 813, *6656*.

Holt v. *Sindrey* (1868), L.R. 7 Eq. 170; 38 L.J.Ch. 126; 19 L.T. 669; 33 J.P. 260; 17 W.R. 249; 44 Digest 813, *6655*.

Lepine v. *Bean* (1870), L.R. 10 Eq. 160; 39 L.J.Ch. 847; 22 L.T. 833; 18 W.R. 797; 44 Digest 814, *6669*.

Pearson v. *Rutter* (1853), 3 De G.M. & G. 398; 1 W.R. 421, L.C.; affirmed sub nom. *Grey* v. *Pearson* (1857), 6 H.L.Cas. 61; 26 L.J.Ch. 473; 29 L.T.O.S. 67; 3 Jur.N.S. 823; 5 W.R. 454; 10 E.R. 1216, H.L.; 44 Digest 533, *3502*.

Gabb v. *Prendergast* (1855), 1 K. & J. 439; 3 Eq. Rep. 648; 24 L.J.Ch. 431; 26 L.T.O.S. 47; 1 Jur.N.S. 900; 3 W.R. 395; 69 E.R. 531; 44 Digest 812, *6644*.

Barlow v. *Orde* (1870), L.R. 3 P.C. 164; 6 Moo. P.C.C.N.S. 437; 13 Moo. Ind. App. 277; 18 W.R. 737; 16 E.R. 790, P.C.; 44 Digest 816, *6679*.

Smith v. *Lidiard* (1857), 3 K. & J. 252; 69 E.R. 1102; 44 Digest 822, *6729*.

Earle v. *Wilson* (1811), 17 Ves. 528; 34 E.R. 205; 44 Digest 225, *496*.

Hart v. *Durand* (1796), 3 Anst. 684; 145 E.R. 1006; 44 Digest 817, *6688*.

Worts v. *Cubitt* (1854), 19 Beav. 421; 2 W.R. 633; 52 E.R. 413; 44 Digest 817, *6691*.

Beachcroft v. *Beachcroft* (1816), 1 Madd. 430; 56 E.R. 159; 44 Digest 811, *6637*.

Gordon v. *Gordon* (1816), 1 Mer. 141; 35 E.R. 1119, L.C.; 44 Digest 225, *497*.

Savage v. *Robertson* (1868), L.R.Eq. 176; 44 Digest 818, *6694*.

Owen v. *Bryant* (1852), 2 De G.M. & G. 697; 21 L.J.Ch. 860; 20 L.T.O.S. 45; 16 Jur. 877; 42 E.R. 1045, L.JJ.; 44 Digest 814, *6662*.

Evans v. *Davies* (1849), 7 Hare, 498; 18 L.J.Ch. 180; 68 E.R. 206; 44 Digest 813, *6661*.

Barnett v. *Tugwell* (1862), 31 Beav. 232; 31 L.J.Ch. 629; 7 L.T. 121; 26 J.P. 627; 8 Jur.N.S. 787; 10 W.R. 679; 54 E.R. 1127; 44 Digest 223, *472*.

Grant v. *Grant* (1870), L.R. 5 C.P. 727; 39 L.J.C.P. 272; 22 L.T. 829; 18 W.R. 951, Ex. Ch.; 44 Digest 822, *6735*.

Appeal from an order of JAMES and MELLISH, L.JJ., reported 6 Ch. App. 311, discharging an order of STUART, V.-C., allowing a demurrer for want of equity put in by the appellants to the bill of the respondents, and overruling the demurrer.

The testator, John Hill, by his will devised to trustees leasehold property to pay the rents and profits to his daughter Mary Crook, "the wife of John Crook," for her life, and he directed that after her death the property was to be held on trust "for the benefit of all and every . . . of the children or child of my said daughter Mary Crook upon such conditions . . . as she my daughter Mary Crook shall by her last will . . . appoint," and in default of appointment "upon trust for the child if only one or all the children if more than one of my said daughter Mary Crook." There were children of the union of John and Mary Crook born and living before the testator's decease and treated by him as his grandchildren, but, according to the law as it stood in 1873, they were illegitimate, John Crook having at one time been the husband of Sarah, the sister of Mary, whom he had married after Sarah's death. [The Deceased Wife's Sister's Marriage Act, by which marriage with a deceased wife's sister was rendered legal was passed in 1907: see now Marriage (Enabling) Act, 1960.] The appellants were executors and trustees of the will. The respondents were two children of Mary by John Crook.

Sir George Jessel, *Q.C.*, and *Speed* for the appellants.
Dickinson, *Q.C.*, and *F. H. Colt* for the respondents.

Their Lordships took time for consideration.

May 27, 1873. The following opinions were read.

LORD CHELMSFORD.—The question in this case is not what amount of intention must be expressed to allow illegitimate children to take under a will, but whether there is sufficient indication in the will in question of an intention that the children of Mary Crook, the daughter of the testator (who were illegitimate

by law), should take under the description of "the child or all the children of my daughter Mary Crook." To lay down such an abstract rule as suggested would be impossible, for each case must be decided according to the varying indications of intention which are to be found in each particular will.

There are certain general rules which are applicable to the construction of all wills of this discription, one of which is that a gift to children prima facie imports legitimate children. This construction will not yield to mere conjecture, or to anything short of the clearest evidence of an opposite intention. As LORD ELDON said in *Wilkinson* v. *Adam* (1) (1 Ves. & B. at p. 466):

> "In construing a will conjecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed."

Strong observations were made upon the words "natural necessity," which were said to be unintelligible. They are perhaps not happily chosen, but I understand them to mean that the intention need not be expressed in language which is necessarily susceptible of only one interpretation, but that it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator. In construing a will it has been frequently said that the court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired.

The testator, John Hill, knew that John Crook, whom he calls his son-in-law, had first married his daughter Sarah Ann, and that upon her death Crook had gone through the ceremony of marriage with his other daughter Mary. It was said in argument that there is no statement in the bill that the testator knew of the first marriage, but I think this knowledge may be assumed in the absence of any allegation to the contrary. Whether the testator knew that the second marriage of John Crook with his daughter Mary was void or not does not appear, but ignorance upon this point can hardly be imputed to him. It is stated that he always looked upon it as an existing marriage, which is ambiguous. It is admitted that the testator always treated John Crook as his son-in-law, and always treated the respondents, who were born after the marriage, as his grandchildren. Mary Crook had, therefore, acquired by reputation the name of wife of John Crook, and the respondents had acquired by reputation the name and description of children of Mary Crook.

At the beginning of the will the testator styles John Crook his son-in-law. It was said in argument that this is of no importance, as he had actually been his son-in-law by his first marriage with the testator's daughter, Sarah Ann. But that the testator meant to speak of him as being his son-in-law at the time plainly appears from his afterwards calling his daughter Mary the wife of John Crook. The demise to Mary Crook and her children is in the following terms:

> "From and immediately after the decease of my said wife I direct that the trustees or trustee for the time being of this my will shall stand possessed of [certain messuages and tenements] in Wenlock-street aforesaid subject to the payment of the rent and to the performance of the covenants to be paid and performed in respect thereof upon trust during such part of my term estate and interest therein as my daughter Mary the wife of the said John Crook shall happen to live to pay the net rents issues and profits of the said last-mentioned hereditaments and premises unto her my said daughter Mary Crook or unto such person or persons as she shall from time to time after the same shall have accrued due by writing under her hand notwithstanding coverture appoint as her agent or agents to receive the same for her sole

separate and exclusive use and benefit independently of her present or any after-taken husband. Subject as aforesaid I direct and declare that from and after the decease of my said daughter Mary Crook or such cesser as in that behalf herein mentioned the last-mentioned hereditaments shall go remain and be upon such trusts for the benefit of all and every or such one or more exclusively of the other or others of the children or child of my said daughter Mary Crook upon such conditions with such restrictions and generally in such manner as she my said daughter Mary Crook shall by her last will and testament in writing or any codicil or codicils thereto in writing direct limit or appoint [and in default of appointment], upon trust for the child if only one or all the children if more than one of my said daughter, Mary Crook."

Looking to the facts which must have been in the mind of the testator at the time of making his will, is there or is there not declaration plain, or manifest intent, that the two existing children of Mary Crook should take under the description of her children? If he so intended, then, whether they were legitimate or illegitimate, appears to be immaterial; for, as LORD ELDON said in *Wilkinson* v. *Adam* (1): "There is no law against devising to the children of a woman whether natural or not, as that creates no uncertainty." But it is said the gift is to all the children of Mary Crook as a class which renders it by law inapplicable to illegitimate children. The proposition stated in this general and unqualified way is inaccurate. There may be a gift to existing illegitimate children as a class, provided it clearly appears that they were intended to be the objects of the gift. No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift, good as to illegitimate children as a class, will after-born illegitimate children be permitted to take. But I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children being so applied, although, after-born illegitimate children must be excluded and the gift be extended to future legitimate children.

Counsel for the appellants argued that a gift by will to the children of A. B. can by law apply only to his lawful children living at his death. I asked whether this rule was so inflexible as not to bend to the plainest indications of an opposite intention; to which question there could be only one answer. In the course of his argument he put his case thus. The testator intended his words to have their popular meaning, but their application legally was to different persons. If I interpret this argument correctly it means that the testator intended by the gift to the children of Mary Crook to benefit her children, but, they being illegitimate, the law lays hold of the expression "children," and diverts it from its intended meaning, because it will not allow a gift to children as a class to apply to any other than legitimate. But there is an obvious fallacy in this argument. If a devise or bequest is made to children as a class, and there is nothing to indicate a contrary intention, the law undoubtedly appropriates the gift to lawful children only; but if a different intention is manifest (and in stating the proposition a different intention is assumed) illegitimate children will be allowed to take as a class.

It was further argued that whether the testator believed the marriage of John Crook with his daughter Mary to be a lawful marriage or not, the devise would be equally invalid. That if he thought Mary's children were legitimate he meant to benefit them as legitimate children, and, therefore, he was deceived in his gift, and his devise failed, as being contrary to his intentions, and if he thought the children were illegitimate his gift failed for want of a sufficient description of them in that character. But this dilemma may be easily disposed of. If it clearly appears that the testator intended to benefit the existing children of Mary Crook, and has manifested his intention by a description which has an

application to them in the first instance, it is immaterial whether they are legitimate or illegitimate, for there can be no mistake as to the persons intended, and illegitimate children may take under a gift to children if described with sufficient certainty. MR. JARMAN, in his TREATISE ON WILLS (vol. 2, p. 204), in the conclusion which he draws from the cases on this subject, says that

> "illegitimate children may take by any name or description which they have acquired by reputation at the time of the making of the will."

There can be no doubt that the respondents were reputed and known as the children of Mary Crook, and they appear to me to be as clearly pointed out by that description as personæ designatæ as if they had been mentioned by name. I think, therefore, that the devise to the children of Mary Crook as a class applies to the respondents, though illegitimate, not by necessary implication but by actual description, notwithstanding that future illegitimate children are excluded from the gift, and that the class includes future lawful children of Mary Crook by any after-taken husband. I am of opinion that the decree of the lord justices ought to be affirmed.

LORD COLONSAY.—I concur. Two things are clear, and do not depend in any degree on the intention of the testator or the terms of his will, viz., (i) that the union of Mary Hill and John Crook, though in form a marriage, was by law not a valid marriage, and that the children born of that union were not legitimate children; (ii) that the testator could not by any form of words make an effectual bequest in favour of after-born children of that union or create a trust for the benefit of such after-born children, and, consequently, that no such children can take under the will in question.

There are also certain rules of construction as to which there does not appear to be any material difference of opinion, viz., (i) that the term "children" means children lawfully born only, and must be so understood unless there is in the will something sufficient to show the contrary. (ii) that illegitimate children existing at the date of the will may take under the term "children" if they are sufficiently indicated. It was said that in that case they would not take as a class, but as persons specially designated, just as if they had been enumerated or severally named. I have no disposition to disturb the legal susceptibilities of the word "class," but without doing so I may be permitted to say that I think such children may take though described collectively. That I venture to think is not inconsistent with the authorities. There was another proposition maintained by the appellants, but which was not assented to by the respondents, viz., that legitimate children and illegitimate children cannot take together under what was sometimes called the same "description," sometimes the same "class."

The question we have to decide is whether the testator has sufficiently indicated his purpose that the children of the union of his daughter Mary and John Crook were to take under the trust created by his will. I am of opinion that he has. He begins by describing John Crook as his "son-in-law." He describes his daughter Mary as the "wife of John Crook." He constantly called her "Mary Crook," a name clearly referable to her union with Crook. He directs that the rents during her life should be for her own use and benefit "independently of her present or any after-taken husband," plainly contemplating two possible conditions in her future life, both of which he puts on the same footing. Then he declares that "from and after the decease of my said daughter Mary Crook" the property shall remain on trust for the benefit of all and every the children of "my said daughter Mary Crook" on such conditions as his said daughter "Mary Crook" shall appoint, and in default of such appointment he gives directions as to the distribution among the children of his daughter "Mary Crook." Finally, if in dealing with this case we are to accept the statement in the bill,

he not only knew that there were children of the union with Crook, but he always treated the young Crooks as his grandchildren, which they undoubtedly were. Looking to the structure of that part of his will which contains the bequests to his daughter and her children, and seeing plainly the current of thought and intention by which he was actuated, it is clear to me that in regard to the distribution of his estate which was the real purpose of his will, he intended that these children should participate and be dealt with as if they were legitimate, giving to them in the distribution all the benefit that could belong to legitimate children, and that his direction for his trustees cannot fairly be read in any other sense.

But in answer to this it is stated that if John Crook had died, or if the mother of the children had separated from him and married some other person and had children by that other person, such children could have taken under the terms of the will, and that it is legally impossible that both legitimate and illegitimate children could take under it. Therefore, it is said you cannot impute to the testator an intention so repugnant to law as to include the children of his daughter by Crook, though they were known to him and treated by him as his grandchildren, I do not think that any of the authorities cited went that length, although they were represented as of all shades of complexion and altogether irreconcileable, and we were asked to extract from them some valuable principle or to find one for ourselves. Far from me be the presumption to take that task. But if I find in this case, as I think I do, sufficient to point out clearly the then existing children of the union of the testator's daughter Mary with John Crook as objects of his bequest, I should be unwilling, unless compelled by some very clear and absolute rule plainly applicable to the case, to hold that they must be excluded, because the words are such as would comprehend the possible children of some possible future marriage.

LORD CAIRNS.—I have had an opportunity since the argument of this case concluded, and I have felt it my duty, to look with considerable care through the long line of cases, most of which were referred to in the argument at your Lordships' Bar, upon the subject of a will dealing with children who are said to be illegitimate. I have referred to those cases not with the view of finding a will exactly parallel with the present, for that indeed would be a hopeless task, but for the purpose of extracting any principle which appeared to be the ratio decidendi of those various cases. What appears to me to be the principle which may fairly be extracted from the cases upon this subject is this—the term "children" in a will prima facie means legitimate children, and if there is nothing more in the will the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take.

But there are two classes of cases in which that prima facie interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way. Suppose there is a bequest "to the children of my daughter Jane," Jane being dead, and having left illegitimate children, but having left no legitimate children, there, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that bequest should fail altogether the court will hold that those illegitimate children are intended, and they will take under the term "children." Having referred to that class of cases, I may put them altogether aside, for your Lordships will observe that that class of cases can have no bearing upon the present case, because here, as was truly said, there was no reason why legitimate children might not take under the bequest in this will.

A The other class of cases is of this kind, where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term "children" not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to and which will include illegitimate children. I might give again a familiar illustration of that class of cases by B the supposition of a bequest upon which I presume there would be no argument. Suppose that a testator were to say in his will "being aware that my daughter who is now married to her husband had before her marriage children by the same person who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life and after her death to divide the funds among the children of C my said daughter." I apprehend that no person reading a bequest of that kind could hesitate to say that the testator had shown upon the face of his will by the words which he had used his intention, in a way that could not be mistaken, to use the generic term "children" so as to include illegitimate children along with legitimate children.

D The question is whether the present case ranges itself among that latter class of cases to which I have referred or not. In my opinion it does. In the first place in order to interpret the words of the will it is always not only allowable, but it is the duty of the court, to obtain the knowledge which the testator had of the state of his family. I find this statement with regard to the state of the testator's family admitted by the demurrer to this bill:

E "John Crook had formerly been married to Sarah Ann, one of the daughters of the said testator, and the said Sarah Ann having died in the year 1851 the said John Crook in the year 1854, with the full knowledge of the said testator, went through the ceremony of marriage with the said Mary, another daughter of the said testator, and who is in his said will referred to as, 'Mary the wife of the said John Crook.' The said union of the said F John Crook and Mary Crook was always looked upon by and treated by the said testator as an existing marriage. Two children of the said Mary Crook were born after her said marriage, and during the lifetime of the testator, that is to say, the plaintiff Alice Sarah Crook and the plaintiff Ernest William Crook. The testator was in the habit of constant and affectionate intercourse with his said daughter Mary Crook and the said John Crook, G and always recognised and treated the said John Crook as his son-in-law, and always recognised and treated the plaintiffs as his grandchildren."

I may say that, in my opinion, if the matter had stopped there, if your Lordships had nothing more than this admitted statement of the state of the family and the habit of the testator with regard to the treatment of his H grandchildren, that would, in my opinion, not have been sufficient. If even with that statement you found in the will merely a reference to the children of his daughter Mary, it would not, in my opinion, have been sufficient to refer to this statement of the facts with regard to the family to entitle you to enlarge the term "children" so as to include illegitimate children. But when we turn to the terms of the will we find these expressions used. In the first I place the testator calls this John Crook his "son-in-law," and he makes it clear that he calls him his son-in-law, not in respect of his former marriage to his daughter Sarah Ann, but in respect of his marriage to Mary, because he describes her as the "wife of John Crook" in these words—that it is to be "for her sole separate and exclusive use and benefit independently of her present or any after-taken husband and without being liable to the debts control or engagements of any such husband." Then he directs "after the decease of my said daughter Mary Crook" that the property is to be held "upon such trusts for the benefit of all and every or such one or more exclusively of the other or

others of the children or child of my said daughter Mary Crook'' as she shall appoint.

A great deal of criticism was passed upon the statements admitted by the demurrer with reference to the family of the testator. It is quite sufficient, I think, to say that, in my opinion, the statements admitted by the demurrer amount to this, that there was here, in the family of the testator, a case of what is commonly called a marriage with a deceased wife's sister. The testator knew that it was that kind of marriage. I think it must be assumed that he knew that that marriage was in law illegal, but he had brought himself, by what process of reasoning or feeling it is not for your Lordships to determine, to consider that notwithstanding the law of the country, that was a union which he was justified in styling a ''marriage,'' and that he was justified in styling the parties to that union or connection ''husband and wife.'' It is not for your Lordships to criticise the feelings which led to the expressions. It is a question of fact that we are dealing with, and as a matter of fact this was the way in which the testator viewed and spoke of this connection.

It appears to me that the terms ''husband'' and ''wife,'' ''father'' and ''mother,'' and ''children,'' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a ''marriage'' with a man whom he calls her ''husband,'' terming the daughter the ''wife'' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the ''children'' of his daughter this meaning, that, as he has termed his daughter and the man with whom she was living ''husband'' and ''wife,'' so also he means to term the offspring born of that so-called ''marriage'' the ''children'' according to that nomenclature. That is all that your Lordships have to find. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires. Treating the cases as establishing the proposition to which I have referred, I am of opinion that there is clearly upon the face of this will, reading it simply with the knowledge which we are told to impute to the testator, a statement by him in his own words, that he meant to make a provision for the family already born of that union which he styles a ''marriage.''

I do not go over what has been said by my noble and learned friend Lord Chelmsford as to the impossibility of providing for future illegitimate children. That is out of the question here. The question here is whether these children, who have filed this bill and were born before this will was made, can take under the will, and, in my opinion, they can.

Appeal dismissed.

Solicitors: *Wilkins, Blyth & Marsland; Turner & Son.*

[*Reported by* A. K. Loyd, Esq., *Barrister-at-Law.*]

DORIN *v.* DORIN

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan and Lord Selborne), April 16, 1875]

[Reported L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 23 W.R. 570]

Will—Children—Illegitimate child—Exclusion—Exclusion unless repugnancy or inconsistency would result.

The word "children" in a will, prima facie means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency, and not merely some violation of a moral principle or probable intention of the testator, would result from so interpreting it.

Notes. Applied: *Re Ayle's Trusts* (1875), 1 Ch.D. 282; *Willats* v. *Hooper*, [1875] W.N. 115. Distinguished: *Laker* v. *Hordern* (1876), 1 Ch.D. 644. Considered: *Re M'Naughtan's Trusts* (1876), 33 L.T. 774. Applied: *Levy* v. *Solomon* (1877), 37 L.T. 263; *Ellis* v. *Houstoun* (1878), 10 Ch.D. 236. Considered: *Re Bolton, Brown* v. *Bolton* (1886), 31 Ch.D. 542; *Re Haseldine, Grange* v. *Sturdy* (1886), 31 Ch.D. 511. Explained: *Re Horner, Eagleton* v. *Horner* (1887), 37 Ch.D. 695. Considered: *Re Browne, Raggett* v. *Browne* (1889), 61 L.T. 463; *Re Deakin, Starkey* v. *Eyres*, [1894] 3 Ch. 565; *Re Fish, Ingham* v. *Rayner*, [1894] 2 Ch. 83; *Re Harrison, Harrison* v. *Higson*, [1894] 1 Ch. 561. Applied: *Re Pearce, Alliance Assurance Co., Ltd.* v. *Francis*, [1911-13] All E.R. Rep. 1067. Considered: *Re Embury, Bowyer* v. *Page (No. 2)* (1914), 111 L.T. 275; *Re Taylor, Hockley* v. *O'Neal*, [1925] All E.R. Rep. 662; *Re Dicker*, [1947] 1 All E.R. 317. Referred to: *Re Humphries, Smith* v. *Millidge* (1883), 24 Ch.D. 691; *Re Baynham, Hart* v. *Mackenzie* (1891), 7 T.L.R. 587; *Neale* v. *Mitchell* (1897), 14 T.L.R. 154; *Re Helliwell, Pickles* v. *Helliwell*, [1916] 2 Ch. 580; *Ward* v. *Van Der Loeff, Burnyeat* v. *Van Der Loeff*, [1924] All E.R. Rep. 542; *Khoo Hooi Leong* v. *Khoo Hean Kwee*, [1926] A.C. 529; *Re Wohlgemuth's Will Trusts, Public Trustee* v. *Wohlgemuth*, [1948] 2 All E.R. 882.

As to gifts to illegitimate children, see 39 Halsbury's Laws (3rd Edn.) 1070-1075; and for cases see 44 Digest 222-225.

Case referred to:

(1) *Hill* v. *Crook* (1873), ante p. 62; L.R. 6 H.L. 265; 41 L.J.Ch. 702; 22 W.R. 137, H.L.; 44 Digest 223, *476*.

Also referred to in argument:

Wilkinson v. *Adam* (1813), 1 Ves. & B. 422, L.C.; affirmed (1823), 12 Price, 470; 147 E.R. 780, H.L.; 44 Digest 807, *6607*.

Swaine v. *Kennerley* (1813), 1 Ves. & B. 469; 35 E.R. 182, L.C.; 44 Digest 807, *6605*.

Occleston v. *Fullalove* (1874), 9 Ch. App. 147; 43 L.J.Ch. 297; 29 L.T. 785; 38 J.P. 196; 22 W.R. 305, L.C. & L.JJ.; 44 Digest 224, *487*.

Gill v. *Shelley* (1831), 2 Russ. & M. 336; 9 L.J.O.S.Ch. 68; 39 E.R. 422; 44 Digest 815, *6676*.

Bagley v. *Mollard* (1830), 1 Russ. & M. 581; 8 L.J.O.S.Ch. 145; 39 E.R. 223; 44 Digest 807, *6608*.

Owen v. *Bryant* (1852), 2 DeG.M. & G. 697; 21 L.J.Ch. 860; 20 L.T.O.S. 45; 16 Jur. 877; 42 E.R. 1045, L.JJ.; 44 Digest 814, *6662*.

Harris v. *Lloyd* (1823), Turn. & R. 310; 37 E.R. 1119, L.C.; 44 Digest 807, *6606*.

Durrant v. *Friend* (1852), 5 DeG. & Sm. 343; 21 L.J.Ch. 353; 19 L.T.O.S. 152; 16 Jur. 709; 64 E.R. 1145; 44 Digest 817, *6687*.

Evans v. *Davies* (1849), 7 Hare, 498; 18 L.J.Ch. 180; 68 E.R. 206; 44 Digest 813, *6661*.

Appeal against a decree of MALINS, V.-C., reported L.R. 17 Eq. 463.

In 1823 the testator married in India and had two children by his marriage. One died in 1857, without issue; the other died in 1858, leaving an only son, Arthur Dorin, the appellant. Mrs. Dorin died in 1863. Before her death Mr. J. A. Dorin had formed an illicit connection with a Mrs. Twentyman, a widow, by whom he had two children, born in 1855 and 1861 respectively. In 1864 he married Mrs. M. C. Twentyman. On the day after this marriage he made a will in the following terms:

> "I bequeath all I possess, real and personal property, to my wife M. C. Dorin, in trust, that she shall apply the same to her own personal use during the term of her natural life, and I leave her at liberty to direct the disposal of the property among our children by will at her death in such manner as she shall think fit; and, should she make no will, I desire that the property existing at her death shall be divided, so far as it may be practicable to do so, equally between my children by her, and I nominate my said wife M. C. Dorin to be sole executrix of this my will."

The testator died in 1872, leaving his widow and his two illegitimate children surviving, but having had no further issue. On a bill filed by the widow against the testator's grandson and her own two children, praying to have the estate administered under the direction of the court, MALINS, V.-C., declared that she had power to appoint the estate among the two children, and that in default of appointment the estate would pass to them in equal shares absolutely. From this decree the testator's grandson by his first marriage appealed.

J. Pearson, *Q.C.*, and *Millar* for the appellant.

Glasse, *Q.C.*, *Cotton*, *Q.C.*, and *Vaughan Hawkins* for the widow and her infant children.

LORD CAIRNS, L.C.—The question which arises for your Lordships consideration in this case is an extremely short one. I adhere to the conclusions which I was able, upon consideration of *Hill* v. *Crook* (1), to draw from the various authorities which were cited. According to those conclusions, I feel myself bound to ask whether, with a knowledge of the position and circumstances of the testator at the time he made his will there is anything upon the face of it which enables me to say that those who, in the eye of the law were not his children, were intended by him to take under the general expressions used in his will, namely,

> "I leave her [his wife] at liberty to direct the disposal of the property among our children by will at her death in such manner as she shall think fit; and should she make no will, I desire that the property existing at her death shall be divided so far as it may be practicable to do so, equally between my children by her."

The testator who used these expressions had been married to the wife of whom he speaks the day before he made his will. He had had two children by her, who at that time were of the age, the elder of about eight and the younger nearly three years. They were clearly illegitimate children.

I ventured to put to the learned counsel who argued the case at the Bar, this question. Supposing that it had been in the mind of the testator (and we do not and cannot know what his mind was except by his own expressions) not to take any notice of these children in his will or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Therefore, if that is so, you are not able to say that the will, upon the face of it, constrains you to depart from what is the ordinary and prima facie

legal meaning of the word "children." When the case is considered that is the true result. There is no case whatever which would enable us, in the interpretation of this will, to strain that word "children" beyond its original legal meaning. What the result of the decision may be it is impossible for me to say as regards property, or the effect that the intestacy will have as between the various persons interested. It is not for your Lordships to regret the result of what is the true and proper application of the rules of law. All that your Lordships have to do is to determine what is the true application of those rules, and, in my opinion, which I submit to your Lordships, the true application of those rules requires us to hold that, subject to the life interest given by the will to the widow, there is, in the events which have happened, no disposition which carries the estate of the testator further, for he died without any legitimate children surviving him. I, therefore, move that the decree of the Vice-Chancellor should be varied by a declaration that, according to the true construction of the will of the testator, and in the events which have happened, the real and personal estate of the testator is, subject to the interest given to the widow for her life, undisposed of.

LORD HATHERLEY.—I am of the same opinion. The difficulty which we have to encounter in endeavouring in any way to accede to the argument for the respondents is, that there are words used in this will which have a perfectly definite legal sense, and admit prima facie of no other sense. Prima facie the word "children" means "legitimate children;" and, as has been stated in several cases, as much so as if the very word "legitimate" had been introduced before it. Here we find a testator, just married, providing in a manner which would be perfectly natural according to the ordinary legal use of the term "children," that is to say, providing a life estate for his wife, saying nothing of any existing children, but saying that his wife at her death is to dispose of the property as she thinks fit "amongst our children," and that, if she does not do so, the property which should be existing at her death should be divided, as far as practicable, "equally amongst my children by her." Words could not express more accurately what would be done by any testator who had recently married, and was desirous of providing for a family that he might in future have.

The only mode in which the word "children" can be made to bear a different sense from that which is its legal and natural sense is, if you look to the outward circumstances as to the expressions contained in the will and find that they fail to give any adequate or intelligible sense to the will. Then you have at once to arrive at the conclusion that the word "children" has been used in some other or different sense. If a will spoke of "the children of my late brother," or "the children of my late sister" and neither of those persons had ever been married, were then dead, and there was no possibility that they should ever marry, you would be driven necessarily to the conclusion that the only children that could be meant must be those whom the law would not otherwise allow to fall in that class, namely, illegitimate children. But I am at a loss to find in the outward circumstances in this case anything beyond the fact that this gentleman had by this lady illegitimate children to whom he was very partial, and whom he treated as his own children; but the fact that he had such children by no means shows that he intended to provide for them in the will. Your Lordships may make your own conjecture upon that subject, but you are not at liberty, from anything that appears in his will, to infer that he meant anything other than that which the law says he has there done, namely, to make provision for the children of the marriage by the lady whom he had just married and for the "children" in the strict legal sense of that term. It is not because you find in the outward circumstances that there are some children whom you think he ought to have provided for that the will must

be taken to mean that they are to be provided for, when the words in the will can have full and complete effect given to them if you interpret them in another and a legal sense, without altering a single word. In this case the testator unfortunately (I use the word on the supposition that he intended to provide for his illegitimate children) has not used apt words in his will to give effect to that intention.

LORD O'HAGAN.—I am quite of the same opinion, and I really have nothing to add to what has been said by my noble and learned friends.

Probably the intention of the testator here was to reach his illegitimate children; I think it is hardly possible to conceive that it was not so. But in several of the cases to which we have been referred, a similar intention was equally clear. In a case to which our attention was called before LORD ELDON, he declared that, in his view, the intention was undoubted, but when he came to the will he found that the very words which upon the face of the will indicated that intention failed to carry it out. I think we are precisely in the same position in this case. In criticising a will we are bound to administer the law as we find it without considering the consequences, and the law is too strong for the intention here. In the cases that have been referred to where the word "children" has had an application and meaning given to it reaching the case of illegitimate children the matter was one of necessary construction, and that conclusion was unavoidable. In some of the cases to which we have been referred, illegitimate children were named in the will; there could be no controversy there, of course. In *Hill* v. *Crook* (1) there could be no doubt, because the particular class of persons was clearly designated. But in the will that we have to do with here there is nothing of the sort. It appears to me that we should be obliged to find out some necessary meaning inconsistent with the meaning which the law applies to the word "children" before we could give it any other interpretation. Undoubtedly we are to read the word "children" in this will as if the word "legitimate" stood before it, and we must find some good and coercive reason to force us not to read in the word "legitimate," which the law introduces of itself before the word "children." We have no such reason whatever here, in my opinion.

I was struck with an observation which fell from the learned counsel for the respondents, as to the period at which this will was made. It was made the day after the marriage. It appears to me, however, that this is an argument rather against the respondents. We must remember that the testator had at that time changed his position; he was making a new arrangement of his property, and it is perfectly conceivable that he may have provided for the children who might be produced in the future, having at that particular period already provided for those who were already in existence, namely, the illegitimate children. But we have not to speculate upon the matter. The law is clear, and, therefore, in my opinion, this decree ought to be reversed.

LORD SELBORNE.—I am by no means sure that the law would not be in a better state than it is at present if the word "children" in a will were regarded as large enough, when used concerning the children of the testator by a particular woman, to include within its proper and prima facie construction any children living at the date of the will, who might be recognised by the testator as being his own by that woman, as well as those who might afterwards be procreated between them in lawful marriage. But it is perfectly well settled, as the law now stands, that the word "children" in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency, and not merely some violation of a moral obligation or probable intention would result from so interpreting it. I find no ground upon which it can be held that any repugnancy or inconsistency

would result from giving to the word "children," as used in the present will, its ordinary legal sense, and I am, therefore, compelled to concur in the judgment proposed by my noble and learned friend on the Woolsack.

Appeal allowed.

Solicitors: *J. B. Batten; Freshfields & Williams.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

FRITZ *v.* HOBSON

[CHANCERY DIVISION (Fry, J.), February 25, 26, 27, March 3, 4, 1880]

[Reported 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 28 W.R. 459; 24 Sol. Jo. 366]

Highway—Access—Premises abutting on highway—Obstruction—Damage to business conducted on premises—Adjacent building operations—Action for nuisance by owner of premises—Competency.

Where the private right of an owner of land to access to that land is unlawfully interfered with by the defendant, as by the defendant's unreasonable conduct (e.g., of building operations) in the near vicinity, he may recover damages from the defendant to the extent of the loss of profit of a business carried on by him on his land resulting from the interference with his right.

Nuisance—Access to land—Obstruction—Building operations—Liability of person causing obstruction.

The public, including a man's immediate neighbours, must submit to the inconvenience necessarily occasioned in repairing or re-building a house, but, if the inconvenience is prolonged for an unnecessary time or increased by the unreasonable manner in which the building operations are carried on, such operations are a public nuisance, and a person who has suffered thereby a particular damage, other than and beyond the general injury to the public, of a direct and substantial, and not a fleeting and evanescent, character, is entitled to maintain an action for such nuisance. The question whether the manner in which the building operations have been carried on is reasonable must be determined with reference to all the circumstances of each case, and such operations to be reasonable must have been carried on with a due regard to the convenience not only of the operator, but of other persons.

Nuisance—Public nuisance—Action by private person for private injury—Need to prove substantial personal wrong directly resulting from nuisance.

A plaintiff may bring an action for a private injury resulting from a public nuisance in his own name, and not merely as relator in proceedings by the Attorney-General, when he can show that he has suffered a particular injury to himself beyond that suffered by the rest of the public, that the injury to him is direct and not consequential, and that it is of a substantial, and not a fleeting or evanescent, character.

Per FRY, J.: It appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question, therefore, is not one to be measured by time, but one to be measured by its effect on the plaintiff.

Notes. Distinguished: *Landrock* v. *Metropolitan District Rail. Co.* (1886), 2 T.L.R. 532; *Lingké* v. *Christchurch Corpn.* (1912), 106 L.T. 376. Considered:

Slack v. *Leeds Industrial Co-operative Society*, [1923] 1 Ch. 431. Distinguished: *Harper* v. *G. N. Haden & Sons, Ltd.*, [1932] All E.R. Rep. 59. Considered: *Re Inchcape, Graigmyle* v. *Inchcape*, [1942] 2 All E.R. 157. Referred to: *Beddall* v. *Maintland* (1881), 17 Ch.D. 174; *Serrao* v. *Noel* (1885), 15 Q.B.D. 549; *Serff* v. *Acton Local Board* (1886), 55 L.J.Ch. 569; *Chapman, Morsons & Co.* v. *Auckland Union Guardians* (1889), 23 Q.B.D. 294; *Dreyfus* v. *Peruvian Guano Co.* (1889), 43 Ch.D. 316; *Morton* v. *L.C.C.* (1898), 79 L.T. 170; *Chaplin* v. *Westminster Corpn.*, [1901] 2 Ch. 329; *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109; *Trevett* v. *Lee*, [1955] 1 All E.R. 406.

As to actions for private and public nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 153-160; and for cases see 36 DIGEST (Repl.) 306-313. As to right of access to highways, see 19 HALSBURY'S LAWS (3rd Edn.) 78-82; and for cases see 26 DIGEST (Repl.) 347-353.

Cases referred to:

(1) *R.* v. *Jones* (1812), 3 Camp. 230, N.P.; 26 Digest (Repl.) 479, *1655*.

(2) *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 36 Digest (Repl.) 312, *598*.

(3) *Rose* v. *Groves* (1843), 5 Man. & G. 613; 1 Dow. & L. 61; 6 Scott, N.R. 645; 12 L.J.C.P. 251; 1 L.T.O.S. 146; 7 Jur. 951; 134 E.R. 705; 36 Digest (Repl.) 312, *594*.

(4) *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; 46 L.J.Ch. 68; 35 L.T. 569; 42 J.P. 163; 25 W.R. 165, H.L.; 26 Digest (Repl.) 347, *641*.

(5) *A.-G.* v. *Thames Conservators, Thornton* v. *Same, City of London Brewery* v. *Same, Clothworkers' Co.* v. *Same* (1862), 1 Hem. & M. 1; 1 New Rep. 121; 71 E.R. 1; 26 Digest (Repl.) 350, *660*.

(6) *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K.B. 10; 1 Salk. 15; Willes, 74, n.; 91 E.R. 1224; sub nom. *Jeveson* v. *Moor*, 12 Mod. Rep. 262; 36 Digest (Repl.) 312, *590*.

(7) *Ricket* v. *Metropolitan Rail. Co.* (*Directors, etc.*) (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, *281*.

(8) *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. N.C. 281; 2 Scott, 446; 1 Hodg. 281; 5 L.J.C.P. 23; 132 E.R. 110; 26 Digest (Repl.) 520, *1976*.

(9) *Davenport* v. *Rylands* (1865), L.R. 1 Eq. 302; 35 L.J.Ch. 204; 14 L.T. 53; 12 Jur.N.S. 71; 14 W.R. 243; 36 Digest (Repl.) 1033, *3819*.

Also referred to in argument:

R. v. *Russell* (1805), 6 East, 427; 2 Smith, K.B. 424; 102 E.R. 1350; 26 Digest (Repl.) 484, *1701*.

R. v. *Cross* (1812), 3 Camp. 224, N.P.; 26 Digest (Repl.) 485, *1707*.

R. v. *Carlile* (1834), 6 C. & P. 636; 26 Digest (Repl.) 489, *1747*.

Thorpe v. *Brumfitt* (1873), 8 App. Cas. 650; 37 J.P. 742, L.JJ.; 36 Digest (Repl.) 318, *634*.

Cory v. *Thames Ironworks and Shipbuilding Co., Ltd.* (1863), 2 New Rep. 16; 8 L.T. 237; 11 W.R. 589; 28 Digest (Repl.) 790, *396*.

St. Helen's Smelting Co. v. *Tipping* (1865), 11 H.L.Cas. 642; 35 L.J.Q.B. 66; 12 L.T. 776; 29 J.P. 579; 11 Jur.N.S. 785; 13 W.R. 1083; 11 E.R. 1483, H.L.; 36 Digest (Repl.) 263, *127*.

A.-G. v. *Sheffield Gas Consumers Co.* (1853), 3 De G.M. & G. 304; 22 L.J.Ch. 811; 21 L.T.O.S. 49; 17 Jur. 677; 1 W.R. 185; 43 E.R. 119; sub nom. *Sheffield United Gas Co.* v. *Sheffield Gas Consumers Co., A.-G.* v. *Sheffield Gas Consumers Co.*, 7 Ry. & Can. Cas. 650; 36 Digest (Repl.) 251, *28*.

Bamford v. *Turnley* (1862), 3 B. & S. 66; 31 L.J.Q.B. 286; 6 L.T. 721; 9 Jur.N.S. 377; 10 W.R. 803; 122 E.R. 27, Ex. Ch.; 36 Digest (Repl.) 262, *123*.

Mott v. *Shoolbred* (1875), L.R. 20 Eq. 22; 44 L.J.Ch. 380; 23 W.R. 545; 36 Digest (Repl.) 307, *533*.

A *Jones* v. *Chappell* (1875), L.R. 20 Eq. 539; 44 L.J.Ch. 658; 36 Digest (Repl.) 307, *534.*

Spokes v. *Banbury Board of Health* (1865), L.R. 1 Eq. 42, 51; 35 L.J.Ch. 105; 13 L.T. 453; 30 J.P. 54; 11 Jur.N.S. 1010; 14 W.R. 169, L.JJ.; 38 Digest (Repl.) 35, *177.*

B *Paine* v. *Partrich* (1691), Carth. 191; 3 Mod. Rep. 289; 1 Show. 243; Comb. 180; Holt, K.B. 6; 90 E.R. 715; sub nom. *Payne* v. *Partridge*, 1 Salk. 12; 1 Show. 255; 26 Digest (Repl.) 520, *1967.*

Baker v. *Moore* (1696), cited in 1 Ld. Raym. at p. 491; 91 E.R. 1227; 26 Digest (Repl.) 523, *1992.*

R. v. *Scott* (1842), 3 Q.B. 543; 3 Ry. & Can. Cas. 187; 2 Gal. & Dav. 729; 11 L.J.Q.B. 254; 6 Jur. 1084; 114 E.R. 615; 26 Digest (Repl.) 534, *2089.*

C *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch.D. 769; 46 L.J.Ch. 773; 37 L.T. 149; 25 W.R. 874; 36 Digest (Repl.) 254, *59.*

Battishill v. *Reed* (1856), 18 C.B. 696; 20 J.P. 775; 4 W.R. 603; 139 E.R. 1544; sub nom. *Bathishill* v. *Reed*, 25 L.J.C.P. 290; 36 Digest (Repl.) 525, *695.*

Lamb v. *Walker* (1878), 3 Q.B.D. 389; 47 L.J.Q.B. 451; 38 L.T. 643; 42 J.P. 532; 26 W.R. 775, D.C.; 17 Digest (Repl.) 87, *77.*

D *Original Hartlepool Collieries Co.* v. *Gibb* (1877), 5 Ch.D. 713; 46 L.J.Ch. 311; 36 L.T. 433; 41 J.P. 660; 3 Asp.M.L.C. 411; 26 Digest (Repl.) 485, *1709.*

Cracknall v. *Janson* (1879), 11 Ch.D. 1; 40 L.T. 640; 27 W.R. 851, C.A.; Digest (Practice) 793, *3561.*

Kino v. *Rudkin* (1877), 6 Ch.D. 160; 46 L.J.Ch. 807; 28 Digest (Repl.) 794, *434.*

E *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1877), 6 Ch.D. 757; 46 L.J.Ch. 871; 37 L.T. 91; 26 W.R. 26; 28 Digest (Repl.) 794, *433.*

Krehl v. *Burrell* (1878), 7 Ch.D. 551; 308 L.T. 407; affirmed (1878), 11 Ch.D. 146; 40 L.T. 637; 27 W.R. 805, C.A.; 28 Digest (Repl.) 778, *296.*

White v. *Boby* (1877), 37 L.T. 652; 26 W.R. 133, C.A.; 1 Digest (Repl.) 634, *2138.*

F *Evans* v. *Harries* (1856), 1 H. & N. 251; 26 L.J.Ex. 31; 156 E.R. 1197; 32 Digest (Repl.) 211, *2295.*

Riding v. *Smith* (1876), 1 Ex.D. 91; 45 L.J.Q.B. 281; 34 L.T. 500; 24 W.R. 487; 32 Digest (Repl.) 206, *2230.*

Winterbottom v. *Lord Derby* (1867), L.R. 2 Exch. 316; 36 L.J.Ex. 194; 16 L.T. 771; 31 J.P. 566; 16 W.R. 15; 26 Digest (Repl.) 302, *226.*

G *Ripley* v. *Great Northern Rail. Co.* (1875), 10 Ch. App. 435; 23 W.R. 685, L.JJ.; 11 Digest (Repl.) 132, *173.*

East and West India Docks and Birmingham Junction Rail. Co. v. *Gattke* (1851), 3 Mac. & G. 155; 6 Ry. & Can. Cas. 371; 20 L.J.Ch. 217; 17 L.T.O.S. 85; 15 Jur. 261; 42 E.R. 220, L.C.; 11 Digest (Repl.) 140, *215.*

H *Beckett* v. *Midland Rail. Co.* (1867), L.R. 3 C.P. 82; 37 L.J.C.P. 11; 17 L.T. 499; 16 W.R. 221; 11 Digest (Repl.) 151, *287.*

McCarthy v. *Metropolitan Board of Works* (1872), L.R. 8 C.P. 191; 42 L.J.C.P. 81; 28 L.T. 417; 21 W.R. 125, Ex. Ch.; affirmed (1874), L.R. 7 H.L. 243; 43 L.J.C.P. 385; 31 L.T. 182; 38 J.P. 820; 23 W.R. 115, H.L.; 11 Digest (Repl.) 152, *289.*

I *Theed* v. *Debenham* (1876), 2 Ch.D. 165; 24 W.R. 775; 19 Digest (Repl.) 152, *990.*

Duke of Buccleuch v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 11 Digest (Repl.) 143, *228.*

Nitro-Phosphate and Odam's Chemical Manure Co. v. *London and St. Katharine Docks Co.* (1878), 9 Ch.D. 503; 39 L.T. 433; 27 W.R. 267, C.A.; 36 Digest (Repl.) 161, *856.*

Witness Action tried by FRY, J., in which the plaintiff, who occupied under a lease the shop, house, and premises No. 17A, Fetter Lane, in the city of London,

where he let lodgings, traded in old china, works of art, and other antiques, and carried on business as a tailor, claimed from the defendant, a builder who was engaged in building operations in the near vicinity of the plaintiff's premises, damages for injury done by the defendant to the plaintiff by trespasses committed against the plaintiff's premises by blocking up the plaintiff's windows, by preventing access to the plaintiff's premises, and by other acts of the defendant injuring the plaintiff's premises, and an injunction to restrain the defendant from further injuring the premises.

By his statement of claim the plaintiff alleged inter alia that the defendant, in pulling down a damaged building and re-building the premises had carried on his operations negligently and without proper care and precautions, and so as to cause the same to be a continual nuisance to the plaintiff and the other persons living in the plaintiff's house, and thereby and in other ways as hereinafter is set forth to do injury and cause damage to the plaintiff; and that the defendant, in the course of his building operations, had committed repeated trespasses to the plaintiff's house, in particular by placing iron girders, stones, beams of wood, wheelbarrows, and rubbish against the plaintiff's doorways, and continuing the same there at improper times, particularly during the business hours of the day, and for an unreasonable length of time, and also by placing planks against the plaintiff's windows, taking up the paving stones adjacent to the plaintiff's house, making holes in the ground thereunder and causing water to flow through the holes so made into the cellars of the plaintiff's house and in other ways damaging the cellars and the roofs thereof, and also by breaking numerous squares of glass in the plaintiff's windows. The plaintiff said that by reason of the premises the plaintiff's customers and other persons who would have become his customers had been prevented from going into the plaintiff's shop and from going to the windows thereof, and looking in thereat to observe the pictures, china, and other articles exposed for sale therein, and even from walking down or standing on the pavement in Fetter Lane adjacent to the plaintiff's shop. Furthermore, on several occasions intending customers of the plaintiff had been pushed and jostled out of the way by the defendant's workmen and thereby actively prevented from going into the plaintiff's shop or approaching the windows thereof. The defendant denied liability.

North, Q.C., and *Seward Brice* for the plaintiff.
Cookson, Q.C., and *Northmore Lawrence* for the defendant.

FRY, J.—The plaintiff resides in a house on the eastern side of Fetter Lane, London, which has a narrow frontage to that lane and extends up a passage, known as Fleur-de-lis passage, leading eastward from that lane to another court known as Fleur-de-lis Court. The entrances to his house and shop are from the passage. The defendant is a builder, who has carried on large operations in the rear of the plaintiff's premises, and the plaintiff brought this action originally for an injunction, and damages in respect of the injury sustained by him in consequence of the alleged wrongful acts of the defendant in so using the passage and the Fetter Lane front of the plaintiff's premises as to damage him. He also alleges various trespasses committed on his property by the defendant, such as placing iron girders, stones, beams of wood, wheelbarrows, and rubbish against the plaintiff's doorways, and continuing the same there at improper times, particularly during the business hours of the day and for an unreasonable length of time, also by placing planks against the plaintiff's windows and taking up the paving stones adjacent to the plaintiff's house, making holes in the ground thereunder, causing water to flow through the holes so made into the cellars of the plaintiff's house, and in other ways damaging the cellars and the roofs thereof, and, further, by breaking numerous squares of glass in the plaintiff's windows. With regard to that part of the case there is some evidence of trespasses on

the part of the defendant, but the trespasses, as proved, are of the most trifling description, and all that I can do is to award the plaintiff damages to the extent of one farthing in respect of them and to express my regret that the time of the court has been occupied to any extent in considering claims of so frivolous a description.

The serious part of the plaintiff's case arises from his allegation of the loss of custom to him in his character of a dealer in articles of antiquity, old china, and so forth, and of a tailor. With regard to the latter there is no evidence of loss. With regard to the former, I shall consider it hereafter. The plaintiff puts his case in two ways. He says, in the first place, that "the defendant has created a public nuisance, which public nuisance has resulted in special or peculiar damage to me in consequence of the place where I reside and that where the nuisance has been committed being so near to one another; and in the next place I have a private right of entrance from the highway to my dwelling-house, and with that private right you have interfered."

Before I consider those rights separately, I must inquire whether the user by the defendant of the roadway of Fetter Lane and the passage has been reasonable or unreasonable. The law with regard to the point appears to me to be easily gathered from one or two cases. In *R.* v. *Jones* (1) LORD ELLENBOROUGH says as to the repairing of a house (3 Camp. at p. 231):

> "The public must submit to the inconvenience occasioned necessarily in repairing a house; but if this inconvenience is prolonged for an unreasonable time the public have a right to complain, and the party may be indicted for a nuisance."

Again, in *Benjamin* v. *Storr* (2) the question left by HONYMAN, J., to the jury was

> "whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience,"

the judge telling them that "they were not to consider solely what was convenient for the business of the defendants." The defendant at the Bar has asserted an unqualified and absolute right to approach the area of the building operations which he was carrying on by the nearest road, to any extent, for any materials, for any time, and without regard to the plaintiff's convenience or inconvenience. Such a claim is in my judgment untenable. It appears to me to be the expression of the selfish and not of the social man—of the man who recollects his rights, but who does not recollect his obligations, and human life could not be carried on if such extreme rights were asserted and insisted on.

The question I have to inquire into is whether the user of the road or roads in question by the defendant was, having regard to all the circumstances of the case, reasonable. The circumstances are undoubtedly peculiar. The block of buildings which the defendant had to erect was capable of being got at from roads only by means of three passages—Crane Court leading from Fleet Street, Fleur-de-lis Court leading from the southern part of Fetter Lane and what has been called for convenience "the plaintiff's passage," and the "plaintiff's court," leading directly from the northern part of the site into Fetter Lane. That last passage was undoubtedly for the defendant the most convenient mode of access to his property. It was the most convenient for several reasons. It was the shortest, and it also led to that portion of the property which the defendant used as a yard for the purpose of his building operations. It must be further observed that the operations which the defendant had to carry on were very considerable. His building contract was for nearly £6000. He had to remove a very large quantity of old buildings and rubbish—a quantity that took from May 21 to July 9. He had to carry in a very large quantity

of materials for the purpose of the new hall and chapel, which he erected for the Scottish Corporation—operations which lasted for several months. Under those circumstances it appears to me that to carry on the whole of the defendant's operations through what has been called the plaintiff's passage was not reasonable. I am unable to see any reason why a large proportion of the old materials might not have been carried down Crane Court, and why a much larger proportion might not have been carried down Fleur-de-lis Court, and the inconvenience necessarily created by carrying away rubbish of that character distributed over the whole of the passages which gave access to the site. Further than that, it appears to me that the defendant, having regard to the peculiar difficulties of his case, should have made some different arrangement with regard to the time during which his operations were carried on. In fact he carried them on during the busiest and most occupied hours of the day, and took no pains to diminish the inconvenience by carrying on his operations early in the morning or late at night.

What was the result upon the plaintiff of these operations so carried on by the defendant? Undoubtedly, the passage close by his house was practically devoted to the building operations of the defendant for a long period of time. For exactly how many days it was unsafe to cross that passage I do not know, but certainly for months these operations went on, and it appears to me that they went on in such a manner as to render it exceedingly difficult, if not impossible, for persons to obtain access to the plaintiff's premises from Fleet Street, coming up on the eastern side of Fetter Lane, and the natural effect of it would be to drive persons away who might have become customers, and to render the access to the plaintiff's house so difficult that most persons would abandon passing along that side of the road. There is some evidence that persons who were in the frequent habit of going to the plaintiff's house as customers ceased to do so during a portion of the time these operations were going on. What has been the result of these operations, therefore, to the plaintiff? I have come to the conclusion that the plaintiff has proved that he has sustained considerable loss in his business as a dealer in old curiosities in consequence of the defendant's operations, and, although it is very difficult to assess the amount of that loss, I have, sitting as a judge of fact, arrived at the conclusion that he has sustained loss to the extent of £60.

Then arises the question, how far this state of circumstances gives rise to any legal right in the plaintiff. *Rose* v. *Groves* (3), and *Lyon* v. *Fishmongers' Co.* (4) in the House of Lords appear to me to establish that where the private right of the owner of land to access to that land is unlawfully interfered with by the acts of the defendants, he may recover damages from the wrong-doers to the extent of the loss of profits of the business carried on at that place. *Rose* v. *Groves* (3) was the case of an owner of a riparian property, but it is referred to by the Lord Chancellor in *Lyon* v. *Fishmongers' Co.* (4), and he cites there the observations of Wood, V.-C., in *A.-G.* v. *Thames Conservators* (5) as follows (1 Hem. & M. at p. 31):

> "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway or the river. The existence of such a private right of access was recognised in *Rose* v. *Groves* (3). As I understand the judgment in that case, it went not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but on the principle that a private right of the plaintiff had been interfered with."

After more fully examining that case and expressing not the slightest intention to differ from it, his Lordship says (ibid. at pp. 32, 33):

> "Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something

quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties, when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right."

Applying that principle to the present case it does appear to me that the evidence shows that the access to the plaintiff's door in the passage from the street was interfered with by the acts of the defendant, which I hold to be unreasonable, and, therefore, wrongful, and, that being so, the cases to which I have referred are authorities for the plaintiff on that ground, and entitle him to recover the amount of loss in his business carried on upon his property.

But I will consider the case further on the ground of the private injury resulting from the public nuisance. The conditions under which a private person may recover in such a case as that are well expressed in the judgment of BRETT, J., in *Benjamin* v. *Storr* (2). He said (L.R. 9 C.P. at p. 406):

"The cases referred to on this subject show that there are three things which the plaintiff must substantiate, beyond the existence of a mere public nuisance, before he can be entitled to recover. In the first place he must show a particular injury to himself beyond that which is suffered by the rest of the public."

I ask whether, in this case, the plaintiff has or has not sustained that particular injury from the public nuisance? It appears to me that he has. *Iveson* v. *Moore* (6) is a case of great authority. It is reported in numerous books. It has found its way into the various digests of the law, and has been cited with approval in the great case of *Ricket* v. *Metropolitan Rail. Co.* (*Directors, etc.*) (7), by the Court of Exchequer Chamber. The case itself was decided by the Court of Exchequer Chamber. That case resulted in this (COMYN'S DIGEST (5th Edn.), vol. 1, p. 278):

"As if A. has a colliery, and B. stops a highway near it whereby nothing can pass to such colliery, an action on the case lies, for he ought to be remedied in particular, although it was a highway."

Accordingly, in *Benjamin* v. *Storr* (2), the court there considered that

"if by reason of the access to his premises being obstructed for an unreasonable time and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage."

No doubt *Ricket* v. *Metropolitan Rail. Co.* (*Directors, etc.*) (7) shows that where the obstruction is at a considerable distance and temporary, and the injury which the plaintiff sustains is only in common with a large number of other persons, such a right of action does not arise; but it appears to me that this case is far more like *Iveson* v. *Moore* (6) and *Benjamin* v. *Storr* (2), than either *Wilkes* v. *Hungerford Market Co.* (8), or *Ricket* v. *Metropolitan Rail. Co.* (*Directors, etc.*) (7), and that there is here that particular injury to the plaintiff resulting from a public nuisance which is referred to in those cases.

The second condition which is referred to by BRETT, J., in *Benjamin* v. *Storr* (2) is this. He says (L.R. 9 C.P. at p. 407):

"Other cases show that the injury to the individual must be direct, and not a mere consequential injury."

I have already considered that point, and the cases I have already referred to seem to show that this is sufficiently direct. Lastly, he says:

"The injury must be shown to be of a substantial character, not fleeting or evanescent." A

What is the meaning of those words "fleeting or evanescent?" It is not, perhaps, easy to answer that, but it appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question, therefore, is not one to be measured by time, but one to be measured B by its effect upon the plaintiff, and, accordingly, in the case I have referred to, and which, it appears to me, I am bound to treat as law, I find that the interruption for the course of one month of a public highway was deemed sufficient interference to give the plaintiff a right of action. That case, I repeat, has been adopted and approved of by the Court of Exchequer Chamber in C *Ricket* v. *Metropolitan Rail. Co.* (*Directors, etc.*) (7). The result, therefore, to my mind is this, that even upon the ground of public nuisance the plaintiff has made out his case, and it follows from what I have said that it appears to me that he is entitled to judgment to the extent of £60.

Then this argument was raised by the defendant. It was said that the £60 represents damage accrued to the plaintiff after the issue of the writ, and that D the only thing which the court can now assess is the amount of damages in respect of damage sustained anterior to the writ, and, therefore, the whole amount cannot now be recovered. Nothing that I intend to say will affect the general question whether the damages sought for by a writ or by a counterclaim go back to the date of the writ or counterclaim. What I have to consider is the power and duty of the court, in a case in which, there being jurisdiction E to grant injunctions, the court, in substitution for that injunction under the Chancery Amendment Act, 1858, grants damages. As we all know, the power of the court given by that statute is, if it thinks fit, to grant damages in addition to, or in substitution for, an injunction, and I am now asked to give it in substitution for an injunction. It is manifest that no damages can be an adequate substitute for an injunction unless the damages cover the whole area F which would have been covered by an injunction, and that is often one difficulty in giving damages in lieu of an injunction, but here the circumstances are peculiar. The damages sought for are partly those accruing before the writ and partly those accruing after the writ, but all before the trial, because this is a case in which the cause of the annoyance had come to an end before the trial of the action. Ought I, in the circumstances, to refuse to give the entire damages which G would cover the whole ground which the injunction might have covered, or am I to leave the plaintiff to bring a second action for the damages accruing between the issue of the writ and the conclusion of the operations of the defendant? It is manifest that to do the second would be a thing highly inconvenient, and one that seems to me at variance with the intention of the Act of 1858 which was clearly intended to prevent the multiplicity of actions and the excess of costs. H

It appears to me, however, that the question is covered by authority, and by authority cited to me by the defendant's counsel. In *Davenport* v. *Rylands* (9), Wood, V.-C., had before him a case in which an injunction had been sought for in respect of the infringement of a patent. Before the case was heard the patent had expired, and he was then asked to assess damages in lieu of the injunction. The first question raised was whether, the patent being gone, I the injunction could be granted, or whether, if it could not be granted, the jurisdiction to give damages arose. The Vice-Chancellor held that he had jurisdiction. The next inquiry was what damages should be assessed, and he directed an inquiry into "what damages the plaintiff had sustained." He added (L.R. 1 Eq. at p. 308):

"The inquiry must extend to the sale by the defendants of any articles manufactured by them within six years before the filing of the bill, and

up to the expiry of the patent, by that process, the exclusive use of which was secured by the letters patent in the bill mentioned."

He, therefore, in that case, did not stop the assessment of the damages at the time of the issuing of the writ, but continued it until the determination of the wrong. I shall gladly follow that precedent, and direct that the whole sum which includes the damages sustained subsequent to the issue of the writ, be paid by the defendant to the plaintiff. From what I have said it follows that the general costs of the action must be borne by the defendant, but considering that a portion of the plaintiff's claim was addressed to those frivolous trespasses I have mentioned, I shall disallow £10 of the costs.

Solicitors: *Moresby, White & Jackson; W. M. Webster.*

[*Reported by* FRANK EVANS, ESQ., *Barrister-at-Law.*]

BAIN AND OTHERS *v.* FOTHERGILL AND OTHERS

[HOUSE OF LORDS (Lord Chelmsford and Lord Hatherley), June 30, 1873, May 15, June 22, 1874]

[Reported L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; 23 W.R. 261]

Sale of Land—Contract—Breach—Breach by vendor—Failure to make good title—Right of purchaser to recover expenses, repayment of deposit, and damages.

Where, on a contract for the sale of land the vendor, in the absence of any fraud and any express stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he has paid one.

The defendants, lessees of a mining royalty who had covenanted not to assign without the consent of the lessors, agreed to sell their interest therein to the plaintiffs. The plaintiffs paid to the defendants a deposit, but the lessors, after some negotiations, refused their consent to the sale. In an action by the plaintiffs to recover the amount of the deposit, the expenses incident to the investigation of the defendants' title, and also damages for the loss of their bargain,

Held: the plaintiffs were only entitled to recover their deposit and the expenses they had incurred in investigating the defendants' title.

Flureau v. *Thornhill* (1) (1776), 2 Wm. Bl. 1078, applied.

Hopkins v. *Grazebrook* (2) (1826), 6 B. & C. 31, overruled.

Notes. Distinguished: *Burrow* v. *Scammell* (1881), 19 Ch.D. 175. Followed: *Re Higgins and Hitchman* (1882), 30 W.R. 700. Considered: *Rock Portland Cement Co.* v. *Wilson* (1882), 52 L.J.Ch. 214. Applied: *Coombs* v. *Cook* (1883), Cab. & El. 75; *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch.D. 519; *Rowe* v. *London School Board* (1887), 36 Ch.D. 619. Distinguished: *Royal Bristol Permanent Building Society* v. *Bomas*, [1886-90] All E.R. Rep. 283. Applied: *Lee* v. *Soames* (1888), 36 W.R. 884; *Re Scott and Alvarez's Contract, Scott* v. *Alvarez*, [1895] 1 Ch. 596. Considered: *Day* v. *Singleton*, [1899] 2 Ch. 320; *Jones* v. *Gardiner*, [1902] 1 Ch. 191. Distinguished: *Holliwell* v. *Seacombe*, [1906] 1 Ch. 426. Applied: *Morgan* v. *Russell*, [1909] 1 K.B. 357. Distinguished: *Re Daniel, Daniel* v. *Vassall*, [1916-17] All E.R. Rep. 654; *Braybrooks* v. *Whaley*, [1919] 1 K.B. 435; *Goffin* v. *Houlder* (1920), 90 L.J.Ch. 488. Applied: *Grindell* v. *Bass*, [1920] 2 Ch. 487. Distinguished:

Keen v. *Mear*, [1920] All E.R. Rep. 148. Considered: *Wallington* v. *Townsend*, [1939] 2 All E.R. 225. Followed: *J. W. Cafés, Ltd.* v. *Brownlow Trust, Ltd.*, [1950] 1 All E.R. 894. Referred to: *Gray* v. *Fowler* (1873), L.R. 8 Exch. 249; *Wall* v. *London City Real Property Co.* (1874), L.R. 9 Q.B. 249; *Re Hargreaves and Thompson's Contract* (1886), 32 Ch.D. 454; *Synge* v. *Synge* (1893), 63 L.J.Q.B. 202; *Re Wilson's and Steven's Contract*, [1894] 3 Ch. 546; *Baynes* v. *Lloyd*, [1895] 2 Q.B. 610; *Pease* v. *Courtney*, [1904] 2 Ch. 503; *Curtis Moffat* v. *Wheeler*, [1929] 2 Ch. 224; *Barnes* v. *Cadogan Developments, Ltd.*, [1930] 1 Ch. 479; *Thomas* v. *Kensington*, [1942] 2 K.B. 181; *Elliott* v. *Pierson*, [1948] 1 All E.R. 939; *Phillips* v. *Lamdin*, [1949] 1 All E.R. 770; *Diamond* v. *Campbell-Joncs*, [1960] 1 All E.R. 583.

As to remedies under an uncompleted contract for the sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 320 et seq.; and for cases see 40 DIGEST (Repl.) 235 et seq.

Cases referred to:

(1) *Flureau* v. *Thornhill* (1776), 2 Wm. Bl. 1078; 96 E.R. 635; 40 Digest (Repl.) 284, *2358*.

(2) *Hopkins* v. *Grazebrook* (1826), 6 B. & C. 31; 9 Dow. & Ry. K.B. 22; 5 L.J.O.S.K.B. 65; 108 E.R. 364; 40 Digest (Repl.) 286, *2375*.

(3) *Walker* v. *Moore* (1829), 10 B. & C. 416; 8 L.J.O.S.K.B. 159; 109 E.R. 504; 40 Digest (Repl.) 284, *2360*.

(4) *Robinson* v. *Harman* (1848), 1 Exch. 850; 18 L.J.Ex. 202; 13 L.T.O.S. 141; 154 E.R. 363; 30 Digest (Repl.) 443, *857*.

(5) *Pounsett* v. *Fuller* (1856), 17 C.B. 660; 25 L.J.C.P. 145; 26 L.T.O.S. 240; 4 W.R. 323; 139 E.R. 1235; 40 Digest (Repl.) 289, *2417*.

(6) *Sikes* v. *Wild* (1861), 1 B. & S. 587; 30 L.J.Q.B. 325; affirmed (1863), 4 B. & S. 421; 32 L.J.Q.B. 375; 8 L.T. 642; 11 W.R. 954; 122 E.R. 517; sub nom. *Sykes* v. *Wild*, 2 New Rep. 456, Ex. Ch.; 40 Digest (Repl.) 289, *2422*.

(7) *Engell* v. *Fitch* (1868), L.R. 3 Q.B. 314; 9 B. & S. 85; 37 L.J.Q.B. 145; 16 W.R. 785; affirmed (1869), L.R. 4 Q.B. 659; 10 B. & S. 738; 38 L.J.Q.B. 304; 17 W.R. 894, Ex. Ch.; 40 Digest (Repl.) 285, *2369*.

(8) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

Appeal by the plaintiffs from a decision of the Exchequer Chamber, affirming a decision of the Court of Exchequer, reported L.R. 6 Exch. 59, on a Special Case.

The Court of Exchequer held that the plaintiffs were entitled to recover only their deposit money and the expenses incidental to the investigation of the defendants' title.

The judges were summoned, and KEATING, BRETT, and DENMAN, JJ., and MARTIN, PIGOTT and POLLOCK, BB., attended.

Sir George Jessel, Q.C., and *Herschell, Q.C.*, for the appellants.
Manisty, Q.C., *Holker, Q.C.*, and *Mellor* for the respondents.

The following questions of law were left by their Lordships to the judges: (i) whether upon a contract for the sale of real estate, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain? (ii) whether the actual possession of the property, the subject of the contract is essential to bring the case within the rule laid down in *Flureau* v. *Thornhill* (1)? (iii) whether, if the rule of law is correctly laid down in *Flureau* v. *Thornhill* (1), the circumstances of the present case distinguish it, and take it out of that rule?

On May 15, 1874, the judges delivered their opinions. They were unanimous in answering questions (i) and (ii) in the negative and with the exception of DENMAN, J., answered question (iii) also in the negative.

Their Lordships took time for consideration.

June 22, 1874. The following opinions were read.

LORD CHELMSFORD.—This appeal brings in review *Flureau* v. *Thornhill* (1), and the other cases which have engrafted exceptions upon it, and the first question is whether that case was rightly decided. The decision was nearly a century ago, in 1775, and has been followed ever since—not, however, without an occasional expression of doubt. The rule established by it is that upon a contract for the purchase of a real estate, if the vendor, without fraud is incapable of making a good title, the purchaser is not entitled to any compensation for the loss of his bargain. The case is very shortly reported. DE GREY, C.J., merely laid down the rule, without giving any reason for it; but BLACKSTONE, J., said this:

> "These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title."

The rule and the reason for it have been adopted and followed in subsequent cases. In *Walker* v. *Moore* (3), PARKE, J., said (10 B. & C. at pp. 422, 423):

> "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau* v. *Thornhill* (1). . . . In the absence of any express stipulation about it, the parties must be considered as content that the damages, in the event of the title proving defective, shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

In *Robinson* v. *Harman* (4), the same learned judge said (1 Exch. at p. 855):

> "The case of *Flureau* v. *Thornhill* (1) qualified the rule of the common law, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

Again, in *Pounsett* v. *Fuller* (5), the court held that where a vendor failed to make a good title, pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation) was not entitled to damages for the loss of his bargain. CRESSWELL, J., in delivering his opinion, said (17 C.B. at p. 679):

> "We are not called upon here to investigate the grounds upon which the decision in *Flureau* v. *Thornhill* (1) proceeded, or to pronounce any opinion as to the wisdom or expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent cases to allow us to call it in question."

In *Sikes* v. *Wilde* (6), the Courts of Queen's Bench and Exchequer Chamber adopted the rule and acted upon it. In *Engell* v. *Fitch* (7), COCKBURN, C.J., expressed his opinion that *Flureau* v. *Thornhill* (1) was unsatisfactory, and gave his sanction to the doubt of ABBOTT, C.J., as to the soundness of that decision.

There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment, but in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision. "The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would be very difficult to determine in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a re-sale appears to me to be a consequence too remote from the breach. I am aware that in *Engell* v. *Fitch* (7), where, after the contract and before the breach, the purchaser contracted for a re-sale at an advance of £105, the

court, though pressed with the decision in *Hadley* v. *Baxendale* (8), held that,

> "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case."

But it must be borne in mind that this question as to damages depends, as ALDERSON, B., said in *Hadley* v. *Baxendale* (8), upon what

> "may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract as the probable result of the breach of it."

Although the purchaser in *Engell* v. *Fitch* (7), when he entered into the contract, may have contracted a re-sale at an advance, it is not likely that the loss of this profit should have occurred to the vendor as the probable result of the breach. The judges were, no doubt, influenced by the fact that the profitable re-sale had actually taken place, and were in consequence drawn aside from considering what must have been in the minds of both parties at the time when they made the contract.

The decision in *Flureau* v. *Thornhill* (1) derives great additional authority from the opinion of LORD ST. LEONARDS, who considers that it was rightly decided: VENDORS AND PURCHASERS (14th Edn.), p. 360. The almost unanimous approval of the decision was broken in upon by an expression of disapprobation from ABBOTT, C.J., in *Hopkins* v. *Grazebrook* (2). He there said (6 B. & C. at p. 33):

> "Upon the present occasion I will only say that if it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration."

That case was one which, according to the opinion of the court, was not within the operation of the rule in *Flureau* v. *Thornhill* (1), but the decision itself cannot be supported. The seller in that case had undoubtedly an equitable estate, in respect of which he had a right to contract. Therefore, the language of ABBOTT, C.J., that "the defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances, as he could certainly have assigned his equitable estate, and thus the sole ground upon which he was held responsible for damages entirely failed. But although the facts in that case did not justify the decision, yet it has always been treated as having introduced an exception into the rule in *Flureau* v. *Thornhill* (1), and as having withdrawn from its operation a class of cases where a person knowing that he has no title to real estate, enters into a contract for the sale of it.

The rule has been recognised in several cases since. In *Robinson* v. *Harman* (4), PARKE, B., said, "the present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins* v. *Grazebrook* (2)", and ALDERSON, B., and PLATT, B., expressed the same opinion. In *Pounsett* v. *Fuller* (5), it was treated as a valid authority by all the judges, the question which they considered being, whether the case fell within the rule in *Flureau* v. *Thornhill* (1), or the exception in *Hopkins* v. *Grazebrook* (2), and they decided that it was within the former case. But in *Engell* v. *Fitch* (7), the Courts of Queen's Bench and Exchequer Chamber proceeded expressly on *Hopkins* v. *Grazebrook* (2) and *Robinson* v. *Harman* (4), KELLY, C.B., quoting the very words of COCKBURN, C.J., and relying on those cases. It was after this decision that the plaintiffs in error declined to argue the present case in the Exchequer Chamber, as the authorities could only be fully reviewed by a higher tribunal.

Notwithstanding the repeated recognition of the authority of *Hopkins* v. *Grazebrook* (2), I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced into the rule established by *Flureau* v. *Thornhill* (1), with respect to damages upon the breach of a contract for the sale of real estate, for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception has always been taken to be that in an action for breach of a contract for the sale of a real estate, if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain. In SEDGWICK ON DAMAGES (4th Edn.), p. 234, it is said:

> "To this general rule there undoubtedly exists an important exception, which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform, because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case the plaintiff can only recover whatever money has been paid by him, with interest and expenses. In the latter he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice."

I quite agree that this distinction is not to be justified or explained on principle. I fully agree in the doubt expressed by BLACKBURN, J., in *Sikes* v. *Wild* (6), as to the soundness of the exception in *Hopkins* v. *Grazebrook* (2), and in the observations which follow the expression of that doubt, and upon a review of all the decisions on the subject, I think that it ought not any longer to be regarded as an authority.

Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule as established by *Flureau* v. *Thornhill* (1), or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule, because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit. It is only necessary to add that, in my opinion, if there were any exceptions from the rule in *Flureau* v. *Thornhill* (1), the present case would not fall within any of them, but is within the rule itself. There is no reason to think that the respondents were not acting throughout under a bona fide belief that the lessor's consent might be obtained at any time upon application. They were prevented from performing their contract, not from any wilful act or fraud on their part, but by an unexpected defect in their title, which it was beyond their power to cure. The case falls precisely within the terms of the rule, as stated in *Flureau* v. *Thornhill* (1), and, therefore, in my opinion, the judgment appealed from is right, and ought to be affirmed.

LORD HATHERLEY.—I entirely concur in the view which has been expressed by my noble and learned friend. If the question in this case depends entirely upon *Flureau* v. *Thornhill* (1), it can scarcely, in my judgment, after the lapse of time which has taken place since that decision, be argued at your Lordships' Bar. The rule, as settled by *Flureau* v. *Thornhill* (1), has prevailed for ninety-nine years, and it has affected and governed I may say thousands of transactions annually, and nobody, I apprehend, has ever yet contradicted it. Whatever

may have been the expressions of dissatisfaction uttered with regard to it, nobody has come to the conclusion that it should be overthrown. Your Lordships' House has been in the habit of acting upon a much less extensive series of practice by conveyancers, but in this case there is not merely the practice of conveyancers, but the common dealings of mankind, which, continuing year after year, as I have said, in many thousands of cases, have required the practice to be put into effect. As far, therefore, as this case falls within the rule in *Flureau* v. *Thornhill* (1), it must be considered as beyond all doubt.

As regards *Engell* v. *Fitch* (7), that certainly was a very peculiar case, whether or not the course taken by the court was correct in the decision upon the point of damages arising in consequence of the loss of the benefit of the contract. The vendor in that case was bound, as every vendor is, by his contract to do all that he could to complete the conveyance; but, having sold his estate and having failed to do everything in his power to compel possession to be given up, and being in a condition in which, if a bill had been filed in equity, he would have been compelled by the court to take proceedings in order to obtain the delivery of premises according to his contract, he refused to take any such proceedings simply on the ground of the expense it might entail on him. There could be no doubt that he was acting in gross violation of his contract; but whether or not the proper mode of correcting that abuse was by giving damages to the plaintiff in respect of the loss of his contract, I will not stop to inquire.

It is, however, quite clear that that case was exceedingly different from that of *Flureau* v. *Thornhill* (1), where it turned out on investigation that the vendor had no legal title. The reasons given for the judgment in *Flureau* v. *Thornhill* (1), were certainly not altogether satisfactory, because De Grey, C.J., is said to have stated simply, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad and the vendor is incapable (without fraud) of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain; to which Blackstone, J., adds (2 Wm. Bl. at p. 1078):

> "These contracts are merely upon a condition, frequently expressed, but always implied, that the vendor has a good title."

That is scarcely a correct representation of the case, because, if the vendor's contract with his vendee was on the condition that he had a good title, then, in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded. If the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract. Therefore, the reason is not that the contract is made upon that condition, but the foundation of the rule has been more clearly expressed by my noble and learned friend in saying that, having regard to the very nature of this transaction, it is recognised on all hands that the purchaser knows that there must be some degree of uncertainty whether, with all the complications of our law, a good title can be made by his vendor, and, taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have incurred in investigating the matter. He has a right also to take the estate and complete the purchase with that defective title, if he thinks proper to do so, but he is held to have bargained with the vendor that he shall not be entitled, under all circumstances, to have the contract completed, and, therefore, he is not put in a position to make a re-sale before the matter has been fully investigated. A contract for the sale of real estate is very different from a contract for the sale of a chattel, where the vendor must know, or at all events

A is taken to know, what his right to the chattel is. And further, in the case of chattels, as regards the larger part of those contracts, the chattels are purchased with a view to re-sale, the loss of profit is within the contemplation of both parties, and it is, therefore, assumed to be the actual contract which the vendor wished to enter into.

B The only question, therefore, really remaining in the case is whether it can be distinguished in any way from the decision in *Flureau* v. *Thornhill* (1). It appears to me that there is nothing whatever to distinguish it; for the contract was made bona fide by the vendor (there is no allegation to the contrary), in the genuine belief that he had a good title. I entirely agree with the comments which my noble and learned friend has made upon *Hopkins* v. *Grazebrook* (2). C I think it would be impossible to say, regard being had to the principles on which the courts have proceeded since the rule in *Flureau* v. *Thornhill* (1) was laid down, that it can be substantially distinguished from that case, because the vendor had made a bargain with another person for the purchase of a property which he had every reason to suppose would be conveyed to him within a reasonable time, and, having made that bargain, he made D another contract for the sale of the same property. The circumstance of his not being in possession is not a circumstance which in itself ought at all to lead the court to say that he must have known that he could not complete the title. In a vast number of instances, from a variety of circumstances, the actual vendor may not be immediately in possession, although he may have a right to obtain that possession in a reasonable time, and to compel (as in *Engell* v. E *Fitch* (7)) those who are in possession to hand over that possession to him. I do not think, therefore, that there is any sound distinction between *Hopkins* v. *Grazebrook* (2) and that class of authorities which are governed by *Flureau* v. *Thornhill* (1). Under these circumstances I have no hesitation in coming to the conclusion that the decision of the court now appealed from was right, and ought to be affirmed.

F *Appeal dismissed.*

Solicitors: *Helder & Roberts; Thomas & Hollams.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

G

CROWHURST *v.* AMERSHAM BURIAL BOARD

H [EXCHEQUER DIVISION (Kelly, C.B., and Pollock, B.), May 8, June 25, November 8, 1878]

[Reported 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 27 W.R. 95]

Nuisance—Rylands v. *Fletcher doctrine—Application—Poisonous trees permitted to project over neighbour's land—Death of horse through eating leaves.*

I The defendants owned a piece of ground, which was used as a cemetery, and they fenced it round with a wall two feet high, with, at two places, open iron railings two feet high on the top of the wall. In the part of their ground opposite these railings, and about four feet within the same, the defendants planted yew trees, which in course of time grew through and beyond the railings, and projected over the adjoining meadow which was occupied by the plaintiff and was rented by him for the purpose of pasturing his horse therein. The horse, having eaten a quantity of yew leaves from the branches projecting over the plaintiff's meadow, was poisoned and died.

Held: the defendants had placed on their land trees which were likely to do mischief if their branches and leaves were not confined to the defendants' land; the plaintiff was not guilty of negligence for he was not bound to examine all the boundaries of the field which he had hired, so as to see that no tree likely to be injurious to his horse was projecting over it; and, therefore, the defendants were liable to the plaintiff for the loss of the horse.

Rylands v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, applied.

Notes. Considered: *Ponting* v. *Noakes*, [1891-4] All E.R. Rep. 404. Applied: *Smith* v. *Giddy*, [1904-7] All E.R. Rep. 289. Followed: *Butler* v. *Standard Telephones and Cables, Ltd.*, *McCarthy* v. *Standard Telephones and Cables, Ltd.*, [1940] 1 All E.R. 121. Referred to: *Lemmon* v. *Webb*, [1894] 3 Ch. 1; *Cheater* v. *Cater*, [1918] 1 K.B. 247; *Edwards* v. *Birmingham Navigations*, [1924] 1 K.B. 341; *Davey* v. *Harrow Corpn.*, [1957] 2 All E.R. 305.

As to liability for the dangerous user of property, see 28 Halsbury's Laws (3rd Edn.) 145-149; and for cases see 36 Digest (Repl.) 282 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334.*

(2) *Aldred's Case* (1610), 9 Co. Rep. 57b; 77 E.R. 816; 36 Digest (Repl.) 267, *183.*

(3) *Tenant* v. *Goldwin* (*or Golding*) (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, *356.*

(4) *Turbervill* (*Tubervil*) v. *Stamp* (1697), Holt, K.B. 9; Carth. 425; Skin. 681; Comb. 459; 1 Com. 32; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 90 E.R. 846; 2 Digest (Repl.) 91, *551.*

(5) *Lambert and Olliot* v. *Bessey* (1680), T. Raym. 421, 467; 83 E.R. 220, 244; 1 Digest (Repl.) 34, *259.*

(6) *Lawrence* v. *Jenkins* (1873), L.R. 8 Q.B. 274; 42 L.J.Q.B. 147; 37 J.P. 357; 21 W.R. 577; sub nom. *Laurence* v. *Jenkins*, 28 L.T. 406; 36 Digest (Repl.) 159, *840.*

(7) *Firth* v. *Bowling Iron Co.* (1878), 3 C.P.D. 254; 47 L.J.Q.B. 358; 38 L.T. 568; 42 J.P. 470; 26 W.R. 558; 2 Digest (Repl.) 303, *104.*

(8) *Wilson* v. *Newberry* (1871), L.R. 7 Q.B. 31; 41 L.J.Q.B. 31; 25 L.T. 695; 36 J.P. 215; 20 W.R. 111; 2 Digest (Repl.) 90, *547.*

(9) *Erskine* v. *Adeane*, *Bennett's Claim* (1873), 8 Ch. App. 756; 42 L.J.Ch. 835; 29 L.T. 234; 38 J.P. 20; 21 W.R. 802, L.JJ.; 2 Digest (Repl.) 90, *549.*

Appeal by the defendants from a decision of Chesham County Court in an action brought by the plaintiff to recover £30 damages from the defendants for the loss of a horse belonging to the plaintiff under the circumstances herein mentioned.

The defendants were owners and occupiers of about half an acre of land at Amersham, Bucks, which had been used for a cemetery for about seventeen years. The plaintiff had been tenant for two years, and some time previously for a period of three years, of a meadow adjoining the cemetery, and had used the meadow for pasture for his horse, and frequently visited the same. The defendants' cemetery was separated from the plaintiff's meadow by a wall about two feet high, and at two places by an open iron railing, about two feet high, upon the wall. The wall and railing were constructed by and belonged to the defendants, and when the cemetery was laid out the defendants planted two yew trees, about four feet within their fence. These trees however, had grown through and beyond the iron railings adjoining the defendants' boundary, and projected on or over the meadow in the plaintiff's occupation. A horse belonging to the plaintiff had been turned out in the meadow for some months immediately preceding Sept. 26, 1877, on which day the plaintiff saw the horse alive and well in the meadow. On the morning of Sept. 27, the horse

was found dead in the meadow, having been poisoned by eating the twigs and leaves of one of the yew trees. The value of the horse when living was £21.

It was contended by the plaintiff that the defendants were liable for the consequences of their having allowed the branches of poisonous trees like the yew to project over the plaintiff's meadow and the fence to be insufficient to keep cattle from eating the yew so planted in the defendants' land. It was contended by the defendants, first, that the plaintiff proved no obligation on the defendants by grant, prescription, or otherwise to maintain any fence whatever for the plaintiff's benefit, and that the defendants were not liable for the consequences of the plaintiff's horse eating the defendants' tree; secondly, that if there was any breach of duty on the defendants' part, the accident to the horse was directly attributable to the plaintiff's own act in turning the animal into a meadow where he could get at the tree, and that either the damage was too remote or the plaintiff directly contributed to it by negligence on his part and by his own act. The action was tried at the county court of Buckinghamshire, holden at Chesham, on Dec. 3, 1877, before the learned judge of that court, who found that, in fact, there had been no contributory negligence on the part of the plaintiff, and that, under the circumstances the defendants were liable. He gave judgment for the plaintiff for £21 and costs. The defendants appealed.

Herschell, *Q.C.*, and *G. Shaw* for the defendants.
Griffits, *Q.C.*, and *Cooper Wyld* for the plaintiff

Cur. adv. vult.

Nov. 8, 1878. **KELLY, C.B.**, read the following judgment of the court.—This is an appeal from the county court of Buckinghamshire, holden at Chesham, the learned judge of which court, at the hearing, gave judgment for the plaintiff with £21 damages, and stated a Case for our opinion. The material facts of the matter are that the defendants some seventeen years ago obtained a piece of land for the purpose of their cemetery and fenced it round with a dwarf wall two feet high in which at two places there were openings filled up with iron railings about two feet high on the top of the wall. Where these railings occurred the defendants planted two yew trees at a distance of about four feet from the railings. These grew through and beyond the railings, so as to project over an adjoining meadow. The plaintiff, two years before the alleged cause of action, hired this meadow to pasture his horse for a term of three years. After the plaintiff had occupied the field for two years his horse, which was feeding in the meadow, ate that portion of the yew tree which projected over the field, the wall and railings not being sufficiently high to prevent a horse from so eating, and died from the effects of the poison contained in what he so ate. The question for our determination is whether the death of the horse so occasioned afforded any cause of action against the defendants. There being no pleadings in the county court, the question is not in any way affected by the form in which the cause of action is put forward, and the facts found by the learned judge of the county court must be taken as conclusive.

The only matter, therefore, for our decision is whether upon these facts any legal liability is disclosed. The matter might appear to be somewhat trivial, but the case gives rise to a question which may not unfrequently arise, and, therefore, is of some general importance. Considering this, it is remarkable that there is an absence of any immediate authority by which our decision should be governed, and it is, therefore, necessary to determine what are the principles of law properly applicable to it. Before, however, doing this it may be well to state shortly what we apprehend to be the effect of the finding of the county court judge. In the first place, we consider that the judge has so found the facts regarding the planting and growth of the yew trees as to preclude the supposition of mere accident, and that the trees must be taken so

to have been planted and grown with the knowledge of the defendants as to make them responsible for whatever might be the direct consequences of the original planting. Secondly, although it is found that the plaintiff saw the horse in the meadow the day before he died, it is also found that he was not aware of the existence of the yew trees, and we think it must be taken that any such neglect on the part of the plaintiff as would disentitle him to recover is negatived. The mere fact that the plaintiff saw the horse in the field would go for nothing, and we do not think that he was bound to examine all the boundaries of the field which he had hired so as to see that no tree likely to be injurious to his horse was projecting over it. It ought also to be noticed that the decision in no way depends upon any question of fencing or the correlative rights and duties arising therefrom, and so, therefore, the cases which were cited in argument before us based upon these considerations afford us no assistance.

The question seems to resolve itself into this: Was the act of the defendants in originally placing this tree, or the omission to keep it within their own boundary, a legal wrong against the occupiers of the adjoining field, which, when damage arose from it, would give the latter a cause of action? On the part of the defendants it may be said that the planting of a yew tree in or near to a fence, and permitting it to grow in its natural course, is so usual and ordinary an occurrence that a court of law ought not to decide that it can be made the subject of an action, especially where an adjoining landowner, over whose property it grew, would according to the authorities have the remedy in his own hands by clipping. On the other hand, the plaintiff may fairly argue that what was done was a curtailment of his rights, which, had he known of it, would prevent his using the field for the purpose for which he had hired it, or would impose upon him the unusual burden of tethering or watching his cattle, or of trimming the trees in question; and although the right so to trim the trees may be conceded, this does not dispose of the case, as the watching to see when trimming would be necessary and the operation of trimming are burdens which ought not to be cast upon a neighbour by the acts of an adjoining owner. It may also be said that, if the trees were innocuous, it might well be held, upon grounds of general convenience, that the occupier of the land projected over would have no right of action, but he should be left to protect himself by clipping. Such projections are innumerable throughout the country, and no such action has ever been maintained; but the occupier ought, upon similar grounds of general convenience, to be allowed to turn out his cattle, acting upon the assumption that none but innocuous trees are permitted to project over his land.

The principle upon which such a case is to be governed is carefully expressed in the judgment of the Court of Exchequer Chamber in *Fletcher* v. *Rylands* (1), where it is said (L.R. 1 Exch. at p. 279):

> "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

This statement of the law was cited and approved of in the judgment of the House of Lords in the same case. In *Fletcher* v. *Rylands* (1) the act of the defendant which was complained of was the collecting in a reservoir a large quantity of water, which burst its bounds and flowed into the plaintiff's mine; but, though the degree of caution required may vary in each particular case, the principle upon which the duty depends must be the same, and it has been applied under many and varied circumstances of a more ordinary kind, as in *Aldred's Case* (2), where the wrong complained of was the building of a house

A for hogs so near to the plaintiff's as to be a nuisance; the laying of dung so high as to damage a neighbour, *Tenant* v. *Goldwin* (3), and other cases which are cited in COMYN'S DIGEST, tit. "Action on the Case for Nuisance"; and in the judgment in *Fletcher* v. *Rylands* (1); and in all such cases the maxim sic utere tuo ut alienum non lædas, was considered to apply, and those who so interfered with the enjoyment by their neighbours of their premises were B held liable.

Other cases of a similar kind may be found in the books. Thus in *Tubervil* v. *Stamp* (4) it was held that an action lay by one whose corn was burnt by the negligent management of a fire upon his neighbour's ground, although one of the judges did not agree in the decision, upon the ground that it was usual for farmers to burn stubble. In *Lambert and Olliot* v. *Bessey* (5) the action was in C trespass quare clausum fregit. The defendant pleaded that he had land adjoining the plaintiff's close, and upon it a hedge of thorns; that he cut the thorns, and that they, ipso invito, fell upon the plaintiff's land, and the defendant took them off as soon as he could. On demurrer judgment was given for the plaintiff, on the ground that, though a lawful thing, yet if any damage thereby befalls D another he shall be answerable if he could have avoided it. This case was alluded to and approved of by LORD CRANWORTH in his judgment in *Rylands* v. *Fletcher* (1) in the House of Lords where he says (L.R. 3 H.L. at p. 341):

> "The doctrine is founded on good sense; for when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

E

It does not appear from the Case as stated what evidence was given in the county court in the present instance to prove either that the defendants knew that yew trees were poisonous to cattle, or that the fact was common knowledge among persons who have to do with cattle. As to the defendants' knowledge, it would be immaterial as, whether they knew it or not, they would be held F responsible for the natural consequences of their act. It is, however, distinctly found by the county court judge that,

> "the fact that cattle frequently browse on the leaves and branches of yew trees within reach, and not unfrequently are poisoned thereby, is generally known."

G By this finding, which certainly is in accordance with experience, we are bound.

Several cases were cited during the argument. In two of them—*Lawrence* v. *Jenkins* (6) and *Firth* v. *Bowling Iron Co.* (7)—the liability of the defendant was based upon his duty to fence. These, therefore, as I have already said, throw no light upon the present question. In *Wilson* v. *Newberry* (8), which arose upon demurrer to a declaration, the Court of Queen's Bench merely H decided that an averment that clippings from the defendant's yew tree got upon the plaintiff's land was insufficient, without showing that they were placed there by or with the knowledge of the defendant. MELLOR, J., however, in giving judgment, says (L.R. 7 Q.B. at p. 33), after alluding to *Fletcher* v. *Rylands* (1) (L.R. 1 Exch. at p. 279):

I

> "If a person brings on to his land things which have a tendency to escape and to do mischief, he must take care that they do not get on to his neighbour's land."

Another case which was cited to us during the argument was *Erskine* v. *Adeane* (9), in which the Court of Appeal in Chancery held that a warranty could not be implied by the lessor of land, let for agricultural purposes, that there were no plants likely to be injurious to cattle, such as yew trees, growing on the premises demised. This decision obviously rests on grounds foreign to those by which the present case should be determined. We notice it, therefore, only

that we may not appear to have overlooked it. In the result we think that the judgment of the judge of the county court was correct, and that it should be affirmed with costs.

Appeal dismissed.

Solicitors: *Alfred T. Cox*, for *Daniel Clarke*, High Wycombe, Bucks; *Allen & Edwards*, for *Bedford*, Amersham.

[*Reported by* Henry Leigh, Esq., *Barrister-at-Law.*]

SOTTOMAYOR *v.* DE BARROS (No. 1)

[Court of Appeal (James, Baggallay and Cotton, L.JJ.), July 20, November 26, 1877]

[Reported 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455]

Conflict of Laws—Marriage—Ceremony—Validity—Law of country of solemnisation.

Conflict of Laws—Marriage—Validity—Solemnisation in England—Parties domiciled abroad—Marriage valid in England, but invalid in country of parties' domicil.

The law of the country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but the personal capacity of the parties must depend on the law of their domicil, and, if the laws of a foreign country prohibit its subjects in certain circumstances from contracting marriage, that imposes on the subjects of that country a personal incapacity which affects them so long as they are domiciled in the country where the law prevails, and renders invalid a marriage between two persons both so domiciled which is solemnised in England.

Notes. This case was decided on a misapprehension of the facts, and later it was found that at the time of the marriage the husband was domiciled in England. Further proceedings took place and the marriage was held to be valid: see *Sottomayor* v. *De Barros* (No. 2), post, p. 97.

Considered: *Ingham* (*falsely called Sachs*) v. *Sachs* (1886), 56 L.T. 920; *Hay* v. *Northcote*, [1900] 2 Ch. 262; *Re Bozzelli's Settlement*, *Husey-Hunt* v. *Bozzelli*, [1902] 1 Ch. 751. Explained: *Ogden* v. *Ogden*, [1907] P. 107. Considered: *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669. Followed: *Robert* (*otherwise De La Mere*) v. *Robert*, [1947] 2 All E.R. 22. Considered: *Hill* (*otherwise Petchey*) v. *Hill*, [1959] 3 All E.R. 734. Referred to: *Bloxam* v. *Favre* (1884), 50 L.T. 766; *Viditz* v. *O'Hagan* (1899), 68 L.J.Ch. 553; *Mitford* v. *Mitford and Von Kuhlmann*, [1923] All E.R. Rep. 214; *Apt* (*otherwise Magnus*) v. *Apt*, [1947] 1 All E.R. 620; *Ponticelli* v. *Ponticelli* (*otherwise Giglio*), [1958] 1 All E.R. 357; *Ross Smith* v. *Ross Smith* (*otherwise Radford*), [1962] 1 All E.R. 344.

As to validity of marriage and ceremonies of marriage, see 7 Halsbury's Laws (3rd Edn.) 91-102; and for cases see 11 Digest (Repl.) 455 et seq.

Cases referred to:

(1) *Brook* v. *Brook* (1861), 9 H.L.Cas. 193; 4 L.T. 93; 25 J.P. 259; 7 Jur.N.S. 422; 9 W.R. 461; 11 E.R. 703, H.L.; 11 Digest (Repl.) 457, *915*.

(2) *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, *1065*.

A Also referred to in argument:

Conway v. *Beazley* (1831), 3 Hag. Ecc. 639; 162 E.R. 1292; 11 Digest (Repl.) 459, *931.*

Warrender v. *Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, *250.*

Harford v. *Morris* (1776), 2 Hag. Con. 423; 161 E.R. 792; 27 Digest (Repl.) 38, *150.*

B *Lady Herbert* v. *Lord Herbert* (1819), 2 Hag. Con. 263; 3 Phillim. 58; 161 E.R. 1257; 11 Digest (Repl.) 462, *958.*

Scrimshire v. *Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955.*

Ruding v. *Smith* (1821), 2 Hag. Con. 371; 1 State Tr.N.S. 1054; 161 E.R. 774; 11 Digest (Repl.) 465, *982.*

C

Appeal from a decision of PHILLIMORE, J., dismissing a petition by Ignacia Sottomayor for a decree of nullity of her marriage with the respondent, Gonzalo de Barros, which was solemnised at a registrar's office in London in 1866.

The petitioner and the respondent were Portuguese subjects, and domiciled in that country. They were first cousins, and it was proved that by the law of D Portugal first cousins were incapable of contracting a valid marriage by reason of consanguinity, and that any marriage between parties so related was by the law of Portugal held to be incestuous and, therefore, null and void, unless solemnised under the authority of a Papal dispensation. In the year 1858 the petitioner, her father and mother, and her uncle De Barros and his family, including the respondent, his eldest son, came to England, and the two families E occupied a house jointly in Dorset Square, London. On June 21, 1866, the petitioner, at that time of the age of fourteen years and a half, and the respondent, of the age of sixteen years, were married at a registrar's office in London. No religious ceremony accompanied or followed the marriage; and although the parties lived together in the same house until the year 1872, the marriage was never consummated. The petitioner stated that she went through F the form of marriage contrary to her own inclination, by the persuasion of her uncle and mother, on the representation that it would be the means of preserving her father's Portuguese property from the consequences of the bankruptcy of the wine business of which her father was a partner. In November, 1874, the petitioner presented her petition for nullity. The respondent appeared to the G petition, but he did not file an answer or appear at the hearing, and by the direction of the court the Queen's Proctor appeared by counsel to argue the case against the petitioner. PHILLIMORE, J., by whom the case was heard, held that the lex loci contractus must prevail, and, as by the law of England the marriage was good and binding, he declined to declare the marriage invalid, and dismissed the petition. The petitioner appealed.

H *Inderwick, Q.C., Dr. Tristram,* and *Bayford* for the petitioner.
Willis, Q.C., and Jacques for the Queen's Proctor.

Cur. adv. vult.

Nov. 26, 1877. **COTTON, L.J.,** read the following judgment of the court.— I This is an appeal from an order of the Divorce Court dismissing a petition presented by Ignacia Sottomayor, praying the court to declare her marriage with the respondent, Gonzalo de Barros to be null and void. There were several grounds on which the petitioner originally claimed relief, but the only ground now to be considered is, that she and the respondent were under a personal incapacity to contract marriage.

If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid, but it is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicil. It is, however, urged that this does not

apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in my opinion, is not a correct statement of the law. The law of the country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but, as in other contracts, so in that of marriage, personal capacity must depend on the law of their domicil, and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between the prohibited degrees as incestuous, this, in my opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails and renders invalid a marriage between persons, both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised.

In argument, several passages in STORY'S CONFLICT OF LAWS were referred to in support of the contention, that in an English court a marriage between persons who by our law can lawfully intermarry ought not to be declared void, though declared incestuous by the law of the parties' domicil, unless the marriage is one which the general consent of Christendom stamps as incestuous. It is hardly possible to suppose that the law of England, or of any Christian country, would consider as valid a marriage which the general consent of Christendom declared to be incestuous. Probably the true explanation of the passages in STORY is given in *Brook* v. *Brook* (1), by LORD CRANWORTH (9 H.L. Cas. at pp. 227, 228), and by LORD WENSLEYDALE (ibid. at pp. 241, 242), who express their opinions that he is referring to marriages not prohibited or declared to be incestuous by the municipal law of the country of domicil. But it is said that the impediment imposed by the law of Portugal can be removed by a Papal dispensation, and, therefore, that it cannot be said that there is a personal incapacity of the petitioner and respondent to contract marriage. The evidence is clear that by the law of Portugal the impediment to the marriage between the parties is such that in the absence of Papal dispensation the marriage would be by the law of that country void as incestuous. The statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous, but the law of Portugal does recognise the validity of such a dispensation, and it cannot, in my opinion, be held that such a dispensation is a matter of form affecting only the sufficiency of the ceremony by which the marriage is effected, or that the law of Portugal, which prohibits and declares incestuous, unless with such a dispensation, a marriage between the petitioner and respondent, does not impose on them a personal incapacity to contract marriage. It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void, as solemnised between parties incapable of marrying, and incestuous. How can the courts of this country hold the contrary, and, if appealed to, say the marriage is valid?

It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of a prohibition imposed by the law of the domicil of the latter. My opinion on this appeal is confined to the case when both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country.

Counsel for the petitioner relied on *Brook* v. *Brook* (1) as a decision in favour of the petitioner. If, in my opinion, that case had been a decision on the question arising on this petition, I should have thought it to be sufficient without more to refer to that case as decisive. The judgment in that case, however, only decided that English courts must hold invalid a marriage between two English subjects domiciled in this country who were prohibited from intermarrying by an English statute, even though the marriage was solemnised during a temporary sojourn in a foreign country. It is, therefore, not decisive of the present case; but the reasons given by the Lords who delivered their opinions in that case strongly support the principle on which this judgment is based.

It only remains to consider *Simonin* v. *Mallac* (2). The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not under the circumstances by that of this country. In my opinion, this consent must be considered a part of the ceremony of marriage and not a matter affecting the personal capacity of the parties to contract marriage; and the decision in *Simonin* v. *Mallac* (2) does not, I think, govern the present case. I am of opinion that the judgment appealed from must be reversed, and a decree made declaring the marriage null and void.

Appeal allowed.

Solicitors: *Tamplin, Taylor & Joseph; J. P. Poncione.*

[*Reported by* H. PEAT, ESQ, *Barrister-at-Law.*]

SOTTOMAYOR *v.* DE BARROS (QUEEN'S PROCTOR INTERVENING)

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), June 25, 26, July 1, August 5, 1879]

[Reported 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 W.R. 917]

Conflict of Laws—Marriage—Validity—Solemnisation in England—Wife domiciled abroad—Marriage valid in England, but invalid in country of wife's domicil.

Where of the two contracting parties to a marriage solemnised in England, one is domiciled in England and the other in a foreign country, and neither of the parties is subject to any personal incapacity recognised by the laws of England, the marriage is valid even though the party having the foreign domicil be subject to a personal incapacity recognised by the laws of the country in which that party is domiciled.

A Portuguese, domiciled in England, contracted a marriage with his first cousin, whose domicil was Portuguese.

Held: the marriage was valid although, by the law of Portugal, the marriage of first cousins was unlawful except by the dispensation of the Pope, which had not been obtained.

Simonin v. *Mallac* (1) (1860), 2 Sw. & Tr. 67, applied.

Divorce—Queen's Proctor—Intervention—Grounds other than collusion.

In a suit for divorce or nullity of marriage the Queen's Proctor is not restricted to an allegation of collusion by the parties, but may intervene with regard to other matters by leave of the court at any stage of the proceedings.

Notes. Considered: *Ogden* v. *Ogden*, [1904-7] All E.R. Rep. 87; *Re Luck, Walker* v. *Luck*, [1940] 3 All E.R. 307; *Hill (otherwise Petchy)* v. *Hill*, [1959] 3 All E.R. 734. Referred to: *Linke (otherwise Van Aerde)* v. *Van Aerde* (1894), 10 T.L.R. 426; *Moss* v. *Moss*, [1897] P. 263; *Viditz* v. *O'Hagan* (1899), 68 L.J.Ch. 553; *Hay* v. *Northcote*, [1900] 2 Ch. 262; *Chetti* v. *Chetti*, [1908-10] All E.R. Rep. 49; *R.* v. *Hammersmith Superintendent Registrar of Marriages, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634; *Republica de Guatemala* v. *Nunez*, [1927] 1 K.B. 669; *Sloggett* v. *Sloggett*, [1928] All E.R. Rep. 164; *Nachimson* v. *Nachimson*, [1930] All E.R. Rep. 114; *Apt (otherwise Magnus)* v. *Apt*, [1947] 1 All E.R. 620; *Harthan* v. *Harthan*, [1948] 2 All E.R. 639; *Pugh* v. *Pugh*, [1951] 2 All E.R. 680; *Ross Smith* v. *Ross Smith (otherwise Radford)*, [1962] 1 All E.R. 344.

As to conflict of laws relating to marriage, see 7 Halsbury's Laws (3rd Edn.) 88 et seq.; and for cases see 11 Digest (Repl.) 455 et seq. As to intervention by the Queen's Proctor see 12 Halsbury's Laws (3rd Edn.) 413, 414; and for cases see 27 Digest (Repl.) 579-581. For the Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Simonin* v. *Mallac* (1860), 2 Sw. & Tr. 67; 29 L.J.P.M. & A. 97; 2 L.T. 327; 6 Jur.N.S. 561; 164 E.R. 917; 11 Digest (Repl.) 478, *1065*.

(2) *Dering* v. *Dering and Blakeley* (1868), L.R. 1 P. & D. 531; 37 L.J.P. & M. 52; 19 L.T. 48; 16 W.R. 1176; 27 Digest (Repl.) 587, *5475*.

(3) *Drummond* v. *Drummond* (1861), 2 Sw. & Tr. 269; 30 L.J.P.M. & A. 177; 4 L.T. 416; 164 E.R. 998; sub nom. *Viscountess Forth* v. *Viscount Forth*, 7 Jur.N.S. 762; 27 Digest (Repl.) 394, *3251*.

(4) *Boardman* v. *Boardman* (1866), L.R. 1 P. & D. 233; 14 W.R. 1024; 27 Digest (Repl.) 305, *2517*.

(5) *Male* v. *Roberts* (1790), 3 Esp. 163, N.P.; 11 Digest (Repl.) 429, *751*.

(6) *Scrimshire* v. *Scrimshire* (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, *955*.

(7) *Mette* v. *Mette* (1859), 1 Sw. & Tr. 416; 28 L.J.P. 117; 33 L.T.O.S. 139; 164 E.R. 792; sub nom. *In the Goods of Mette*, 7 W.R. 543; 11 Digest (Repl.) 456, *914*.

(8) *Campbell* v. *Hall* (1774), 20 State Tr. 239; 1 Cowp. 204; Lofft, 655; 98 E.R. 1045; 2 Digest (Repl.) 196, *167*.

Also referred to in argument:

Sottomayor v. *De Barros* (*No.* 1) (1877, ante, p. 94; 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415; 26 W.R. 455, C.A.; 11 Digest (Repl.) 460, *945*.

Doucet v. *Geoghegan* (1878), 9 Ch.D. 441; 26 W.R. 825, C.A.; 11 Digest (Repl.) 337, *94*.

Case Remitted by the Court of Appeal for trial of issues of fact.

The petitioner (the wife) prayed that her marriage, which was solemnised at a registrar's office in London in 1866, might be declared null and void. The petition set forth that she and the respondent were natives of Portugal, and domiciled in that country at the time of their marriage; that they were natural and lawful first cousins; and that by the law of Portugal first cousins are incapable of contracting marriage on the ground of consanguinity. The respondent entered an appearance, but did not file any answer. The case came on before Sir Robert Phillimore, who directed the papers to be sent to the Queen's Proctor in order that he might, under the direction of the Attorney-General, instruct counsel to argue the point whether the petitioner had shown sufficient ground for a decree of nullity (i) by reason of the incapacity of the parties to contract a marriage in 1866; (ii) by reason of fraud; and (iii) by reason of the petitioner's want of intention to contract a marriage and of her ignorance of the effect of the ceremony. On Nov. 7, 1876, the Queen's Proctor obtained leave to intervene

and file pleas. On Jan. 20, 1877, it was ordered, by consent of the parties, that the questions of law referred to the Queen's Proctor be heard before the questions of fact, without prejudice to either party. The case came on for argument on Mar. 17, 1877, when Sir Robert Phillimore stated that he was satisfied that the petitioner perfectly understood that she was about to contract a marriage and that it could not vitiate the marriage that she had an erroneous view of its consequences. He refused to set it aside on the ground of incapacity of age, or collusion, or fraud, and he held that the marriage, having been contracted in England and being valid by English law, could not be declared null on the ground that the parties were incapacitated from entering into it by the law of Portugal. On appeal this judgment was reversed, and the case was remitted to the Divorce Division so that the questions of fact raised by the Queen's Proctor's pleas might be determined. These pleas alleged (i) collusion; (ii) that the petitioner and the respondent were lawfully married; (iii) that the said marriage was not procured by fraud; (iv) that the petitioner intended to, and did, contract a lawful marriage and was not ignorant of the effect thereof; (v) that the petitioner and respondent cohabited as man and wife; and (vi) that the petitioner and respondent were at the time of the marriage domiciled in England.

Inderwick, Q.C. & Bayford for the petitioner.

The Attorney-General (*Sir John Holker, Q.C.*), *Gorst, Q.C., Willis, Q.C.*, and *Jacques* for the King's Proctor.

Cur. adv. vult.

Aug. 5, 1879. **SIR JAMES HANNEN, P.,** read the following judgment.— It was objected to on behalf of the petitioner that the Queen's Proctor could not intervene on any ground except that of collusion. This depends on the construction to be put on s. 7 of the Matrimonial Causes Act, 1860 [see now Matrimonial Causes Act, 1950, s. 10], by which it is enacted that, during the period between the decree nisi and the decree absolute, any person shall be at liberty to show cause why the decree nisi should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court. That part of the section is clearly inapplicable, because no decree nisi has been pronounced; but the section proceeds,

> "and at any time during the progress of the case or before the decree is made absolute, any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case who may thereupon take such steps as the Attorney-General may deem necessary or expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpœna witnesses to prove it. . . ."

In this case information was given to the Queen's Proctor of matter material to the due decision of the case, among other things that facts tending to show that the parties at the time of the marriage were not domiciled in Portugal, but in England, which were not brought before the court, could be proved. He thereupon took the opinion of the Attorney-General on the subject, and, suspecting that the parties were acting in collusion, he, under the direction of the Attorney-General, and by leave of the court, intervened in the suit.

He having done so, the question is whether he may plead anything besides collusion. This question was decided in the affirmative by Lord Penzance in *Dering* v. *Dering and Blakeley* (2). There the intervention was after decree nisi;

but in *Drummond* v. *Drummond* (3), the same question had arisen before the decree nisi, and SIR CRESSWELL CRESSWELL held that the Queen's Proctor was entitled to plead other pleas besides collusion, and the same course was allowed in *Boardman* v. *Boardman* (4). I, therefore, hold that the Queen's Proctor is entitled to set up other defences as well as collusion, and I proceed to give my findings on the several issues raised by the Queen's Proctor's pleadings.

The first of these is whether the petitioner and the respondent are guilty of collusion, and I am of opinion that the charge was not established. The second question is whether the parties were lawfully married. It was not disputed that a ceremony of marriage was gone through, which was valid according to the law of England. Whether it was valid according to the law of Portugal, and the effect of its validity will be considered hereafter. The third issue is whether the marriage was procured by fraud. I think the evidence clearly establishes that the marriage was not procured by fraud. The fourth issue is whether the petitioner intended to contract a lawful marriage. On this point I may refer to the evidence of Mr. Miller, a solicitor, who was consulted by the father of the respondent with regard to the marriage before its celebration and says that, being struck with the youth of the parties, he saw them on the subject, both separately and together, and ascertained that they both wished it. That they were ignorant of the effect of the Portuguese law on the ceremony is most probable, but this ignorance cannot affect the validity of the marriage. The fifth issue was whether or not the petitioner and the respondent cohabited as man and wife. I do not give any opinion on this question, as I consider it unimportant for the purposes of this case.

The sixth issue is the important one, on which the arguments have chiefly turned, namely, whether or not the petitioner and the respondent, or either of them, were or was domiciled in England at the time of the marriage. With regard to the petitioner, since she was a minor her domicil was that of her father. His domicil was Portuguese down to his coming to England in 1858, and I am not satisfied that he had at that time, or at any time afterwards, mental capacity to change his domicil. I, therefore, find that the petitioner had a Portuguese domicil at the time of the marriage. With regard to the respondent he also was a minor, and, therefore, his domicil was the same as his father's. [HIS LORDSHIP reviewed the evidence.] From these facts I draw the inference that in 1861 the father of the respondent adopted England as his place of permanent residence with the intention of remaining there for an unlimited time, or, in other words, that he became domiciled here. It follows that the respondent's domicil was English also.

The question remains: What is the law applicable to such a case? It is clear that the judgment which has been already given by the Court of Appeal is not applicable to such a state of facts. The language of the Court of Appeal is explicit.

> "It was pressed upon us in argument that a decision in favour of the petitioner would lead to many difficulties if questions should arise as to the validity of a marriage between an English subject and a foreigner in consequence of the prohibitions imposed by the law of the domicil of the latter. Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the law of which prohibits their marriage."

This passage leaves me free to consider the question whether the marriage in England of a domiciled Englishman with a woman subject by the law of her domicil to a personal incapacity not recognised by English law must be declared invalid by the tribunals of this country. I would here observe that the lords justices appear to have laid down as a principle of law a proposition which is

much wider in its terms than was necessary for the determination of the case before them. It is thus expressed:

> "It is a well-recognised principle of law that the question of personal incapacity to enter into any contract is to be decided by the law of domicil."

And again:

> "As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."

It is, of course, competent for the Court of Appeal to lay down a principle which, if it forms the basis of the judgment of that court, must be binding in all future cases, unless disclaimed by the House of Lords.

I trust that I may be permitted, without disrespect, to say that the doctrine thus laid down has not hitherto been "well recognised." On the contrary, it appears to me to be a novel principle of which up to the present time there has been no English authority. What authority there is seems to be distinctly the other way. There is *Male* v. *Roberts* (5). The contract there sued upon was made in Scotland. The defence was infancy, which LORD ELDON held to be bad, saying (3 Esp. at p. 164):

> "If the law of Scotland is that such a contract as the present could not be enforced against an infant, it should have been given in evidence. The law of the country where the contract arose must govern the contract."

In *Scrimshire* v. *Scrimshire* (6) SIR EDWARD SIMPSON says (2 Hag. Con. at p. 413):

> "These authorities fully show that all contracts are to be considered according to the laws of the country where they are made, and the practice of civilised countries has been conformable to this doctrine, and by the common consent of nations has been so received."

In *Simonin* v. *Mallac* (1) SIR CRESSWELL CRESSWELL says (2 Sw. & Tr. at p. 77):

> "In general the personal competency or incompetency of individuals to contract has been held to depend on the law of the place where the contract was made."

In the American reports numerous authorities support SIR CRESSWELL CRESSWELL's view of the law. I, therefore, cannot but think that the learned lords justices would not desire to base their judgment on so wide a proposition as that which they have laid down with reference to the personal capacity to enter into all contracts.

In truth many serious difficulties arise if marriage is regarded only in the light of a contract. It is, indeed, based upon the contract of the parties, but it is a status arising out of contract to which each country is entitled to attach its own conditions. In some countries no other condition is imposed than that the parties, being of a certain age and not related within certain specified degrees, shall have contracted with each other to become man and wife; but that in those countries marriage is not regarded merely as a contract is clear since the parties are not at liberty to rescind it. In some countries certain civil formalities are prescribed, in others a religious sanction is required. If the subject be regarded from this point of view, the effect of the decision of the Court of Appeal has only been to define a further condition imposed by English law, namely, that the parties must not both belong by domicil to a country the laws of which prohibit this marriage. But, as I have already pointed out, the judgment leaves altogether untouched the case of the marriage in England of a British subject with a person domiciled in a country where the marriage is prohibited. With regard to such a marriage all the arguments which have hitherto been urged in support of the

larger proposition—that a marriage, good by the law of the country where it is solemnised, must be deemed by the tribunals of that country to be valid irrespective of the law of the domicil of the parties—remain with undiminished effect. They cannot be stated with greater accuracy and force than they were stated by SIR CRESSWELL CRESSWELL in *Simonin* v. *Mallac* (1); and, as I could not express myself so well, I shall adopt the language of that learned judge as my own, without introducing the qualification which the decision of the Court of Appeal has created.

The Court of Appeal has distinguished the present case from *Simonin* v. *Mallac* (1) on the ground that there the incapacity arose from the want of consent of parents, and that "the consent of parents required by the law of France must be considered a part of the ceremony of marriage." Certainly SIR CRESSWELL CRESSWELL did not base his judgment on that ground. After observing that a distinction might be drawn between an absolute and a conditional prohibition, he proceeds (2 Sw. & Tr. at p. 77):

> "But taking the decree of the French court, in the suit there instituted, as evidence that by the law of France this marriage was void, we again come to the broad question, is it to be judged of here by the law of England or by the law of France?"

After reviewing the authorities, he says (ibid. at pp. 80, 81):

> "It is very remarkable that neither in the writings of jurists, nor the arguments of counsel, nor in the judgments delivered in the courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnised in conformity with the law of that country should hold it void because the parties to the contract were the domiciled subjects of another country where such a marriage would not be allowed."

Later on the following passage occurs in his judgment, and is specially applicable to the present case (ibid. at pp. 83, 84):

> "Every nation has a right to impose on its own subjects restrictions and prohibitions as to entering into marriage contracts, either within or without its own territories; and if its subjects sustain hardships in consequence of those restrictions their own nation only must bear the blame; but what right has one independent nation to call upon any other nation equally independent to surrender its own laws in order to give effect to such restrictions and prohibitions? If there be any such right, it must be found in the law of nations, that law 'to which all nations have consented, or to which they must be presumed to consent for the common benefit and advantage.' Which would be for the common benefit and advantage in such cases as the present, the observance of the law of the country where the marriage is celebrated, or of a foreign country? Parties contracting in any country are to be assumed to know, or to take the responsibility of not knowing, the law of that country. Now, the law of France is equally stringent whether both parties are French or one only. Assume, then, that a French subject comes to England and marries, without consent, a subject of another foreign country, by the laws of which such a marriage would be valid. Which law is to prevail? To which country is an English tribunal bound to pay the compliment of adopting its law? As far as the law of nations is concerned, each must have an equal right to claim respect for its laws. Both cannot be observed. Would it not, then, be more just, and, therefore, more for the interest of all, that the law of the country should prevail, which both are presumed to know and to agree to be bound by? Again, assume that one of the parties is English, would

A not an English subject have as strong a claim to the benefit of English law as a foreigner to the benefit of foreign law? But it may be said that in the case now before the court both parties are French, and, therefore, no such difficulty can arise. That is true; but if once the principle of surrendering our own law to that of a foreign country is recognised, it must be followed out to all its consequences; the cases put are therefore a fair test as to the B possibility of maintaining that, by any comitas or jus gentium, this court is bound to adopt the law of France as its guide."

That was the opinion of SIR CRESSWELL CRESSWELL, CHANNELL, B., and KEATING, J., constituting the full court which was at that time in the position of the Court of Appeal, the decisions of which were subject to review only by the C House of Lords.

The Court of Appeal has, indeed, without alluding to the arguments of these very eminent judges, now overruled their opinion; but COTTON, L.J., has expressed his concurrence in their views so far as is necessary for the purposes of the present case. He says:

D "No country is bound to recognise the laws of a foreign State when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country."

E Numerous examples might be suggested of the injustice which might be worked to our own subjects if a marriage was declared invalid on the ground that it was forbidden by the law of the domicil of one of the parties. In his excellent treatise on DOMICIL, MR. DICEY says (p. 223):

F "A marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which, though imposed by the law of his or her domicil, is of a kind to which our courts refuse recognition."

On what principle are our courts to refuse recognition if not on the basis of our own laws? If this guide alone be not taken, it will be open to every judge to indulge his own feelings as to what prohibitions of foreign countries on the G capacity to contract a marriage are reasonable. What have the English tribunals to do with what may be thought in other countries on such a subject? Of the cases cited in argument, the only one which I think it necessary to mention is *Mette* v. *Mette* (7), where SIR CRESSWELL CRESSWELL held that a domiciled English subject could not marry a deceased wife's sister at the place of her domicil, although by the law of that place the marriage would be good. [Such H marriages were legalised in England by the Deceased Wife's Sister's Marriage Act, 1907: see now Marriage (Enabling) Act, 1960.] SIR CRESSWELL CRESSWELL had already pointed out in *Simonin* v. *Mallac* (1) the distinction between controversies arising in the country where the marriage was celebrated and those arising elsewhere, and his judgment in that case showed that he considered that the law of the place of celebration was to prevail.

I Before concluding I wish to direct attention to the statute law upon this subject of the marriage of first cousins. The Marriage Act, 1540 (32 Hen. 8, c. 38), after reciting that the See of Rome had usurped the power of making that unlawful which by God's word was lawful, and

"the dispensations whereof it always reserved to itself, as in kindred or affinity between cousin-germanes . . . and all because it would get money by it and keep a reputation for its usurped jurisdiction,"

enacts that

"all and every such marriages as within this Church of England shall be contracted between lawful persons (as by this Act we declare all persons to be lawful, that be not prohibited by God's law to marry)"

shall be valid. This statute and all the marriage Acts which have been since enacted are general in their terms, and bind all persons within the kingdom. In the weighty language of LORD MANSFIELD in *Campbell* v. *Hall* (8) (1 Cowp. at p. 208):

"The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and it is the rule of decision for all questions which arise there."

Where is the enactment or what is the principle of English law which engrafts on this statute the exception that it shall not apply to the marriage in England of cousins german who by the law of another country are prohibited from marrying without the dispensation of the Pope? On what is the distinction founded between the prohibition of a marriage unless the consent of a parent be obtained (as in *Simonin* v. *Mallac* (1)), and the prohibition of a marriage unless the dispensation of the Pope be granted, as in the present case? If there be a distinction, which I am unable to perceive, why is greater value to be attached by the tribunals of this country to the permission of the Pope than to that of the father? For the reasons which I have given I hold that the marriage between the petitioner and the respondent was valid, and I dismiss the petition.

Solicitors: *Tamplin, Taylor & Joseph; Queen's Proctor.*

[*Reported by* L. D. POWLES, ESQ., *Barrister-at-Law.*]

THE PARLEMENT BELGE

[COURT OF APPEAL (James, Baggallay and Brett, L.JJ.), December 11, 12, 20, 1879, February 27, 1880]

[Reported 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234]

Constitutional Law—Foreign sovereign—Immunity from suit—Exercise by court of jurisdiction incompatible with regal dignity.

Constitutional Law—Diplomatic privilege—Immunity from suit—Ambassador—Clothed with independence of sovereign represented—Immunity of person and property.

Constitutional Law—Foreign sovereign State—Immunity from legal process—Public property of foreign State—Public use—Subordinate use for trading—Action in rem.

The principle on which rests the exemption of a foreign sovereign from the jurisdiction of the courts is that the exercise of that jurisdiction would be incompatible with his regal dignity, i.e., his absolute independence of every superior authority. The immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based on his being the representative of the independent sovereign or State which sends him upon the faith of his being admitted to be clothed with the same independence and superiority to all adverse jurisdiction as would be the sovereign authority whom he represents. The immunity is from the exercise by the courts of their territorial jurisdiction over the person of any sovereign or ambassador of any foreign

State or over the public property of any State which is destined to its public use or over the property of any ambassador, although such sovereign, ambassador, or property be within its territory, and, therefore, but for the immunity, subject to its jurisdiction. An action in rem against such property will not lie, even if such an action were held to be a proceeding solely against property and it would not be necessary that the owner of the property should be personally served with any process, for, while the owner might not be directly impleaded, he would be indirectly impleaded, and under his immunity he could not be indirectly impleaded any more than he could be directly impleaded. The fact that the property was used subordinately for trading purposes does not take away the general immunity.

Proceedings in rem were instituted in the Admiralty Division by the owners of the tug D. against the steamship P.B. to recover damages for damage received by the D. in a collision between the vessels. A writ was served in the prescribed manner on board the P.B. No appearance was entered, but the Attorney-General, in answer to a motion to direct judgment with costs to be entered for the plaintiffs and that a warrant should issue for the arrest of the P.B., filed an information and protest asserting that the court had no jurisdiction to entertain the suit. The P.B. was a mail packet running between Ostend and Dover, and one of the packets mentioned in art. 6 of the Convention of the 17th Feb., 1876, made between the sovereigns of Great Britain and Belgium. She was the property of the King of the Belgians and in his possession, control, and employ, as reigning sovereign of the State, was a public vessel employed by the State, and was officered by officers of the Belgian royal navy. Besides carrying letters she carried merchandise and passengers and their luggage for hire. Upon the hearing of the motion and protest, the learned judge of the Admiralty Division overruled the protest and allowed the warrant of arrest to issue. On appeal,

Held: the P.B., being public property of a foreign State, was not subject to the jurisdiction of the court, and, therefore, the action did not lie.

Notes. Considered and Applied: *Strousberg* v. *Costa Rica Republic* (1880), 44 L.T. 199. Considered: *The Newbattle* (1885), 10 P.D. 33; *The Longford* (1889), 14 P.D. 34. Explained: *The Dictator*, [1891-4] All E.R. Rep. 360. Considered: *S.S. Utopia* v. *S.S. Primula*, [1893] A.C. 492; *Morgan* v. *Castlegate S.S. Co.*, *The Castlegate*, [1893] A.C. 38. Considered and Applied: *Mighell* v. *Sultan of Johore*, [1891-4] All E.R. Rep. 1019. Considered: *Musurus Bey* v. *Gadban*, [1891-4] All E.R. Rep. 761. Applied: *The Jassy*, [1906] P. 270. Considered: *The Burns*, [1907] P. 137. Applied: *The Broadmayne*, [1916] P. 64; *The Crimdon* (1918), 35 T.L.R. 81; *The Gagara*, [1918-19] All E.R. Rep. 369; *The Porto Alexandre*, [1918-19] All E.R. Rep. 615; *The Tervaete*, [1922] All E.R. Rep. 387. Considered: *The Sylvan Arrow*, [1923] P. 220; *Duff Development Co.* v. *Kelantan Government*, [1924] All E.R. Rep. 1; *Compania Mercantil Argentina* v. *United States Shipping Board* (1924), 93 L.J.K.B. 816; *Compania Naviera Vascongada* v. *Steamship Cristina*, [1938] 1 All E.R. 719; *Haile Selassie* v. *Cable and Wireless, Ltd.*, [1938] 3 All E.R. 384; *The Arantzazu Mendi*, [1939] P. 37; *The Tolton*, [1946] P. 135; *Krajina* v. *Tass Agency*, [1949] 2 All E.R. 274; *United States of America* v. *Dollfus Mieg et Compagnie S.A.*, [1952] 1 All E.R. 572. Referred to: *Chalmers* v. *Scopenich* (1892), 66 L.T. 348; *The Ripon City*, [1895-9] All E.R. Rep. 487; *South African Republic* v. *La Compagnie Franco-Belge Du Chemin De Fer Du Nord*, [1898] 1 Ch. 190; *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Re Suarez*, *Suarez* v. *Suarez*, [1916-17] All E.R. Rep. 641; *Re Bjornstad and Ouse Shipping Co.*, [1924] 2 K.B. 673; *The Jupiter*, [1924] All E.R. Rep. 405; *The Jupiter (No. 3)*, [1927] All E.R. Rep. 237; *Engelke* v. *Musmann*, [1928] All E.R. Rep. 18; *The "Kafiristan,"* [1937] 1 All E.R. 40; *France Fenwick Tyne Wear Co.* v. *H.M. Procurator-General*, [1942] A.C. 667; *Kahan* v. *Federation of Pakistan*, [1951] 2 K.B. 1003; *Sultan of*

Johore v. *Abubakar, Tunku Aris Bendahara*, [1952] 1 All E.R. 1261; *Baccus S.R.L.* v. *Servico Nacional Del Trigo*, [1956] 3 All E.R. 715; *Nizam of Hyderabad* v. *Jung*, [1957] 1 All E.R. 257.

As to immunity from process of foreign sovereigns, ambassadors, and others, see 7 HALSBURY'S LAWS 265-279; and for cases see 11 DIGEST (Repl.) 628 et seq.

Cases referred to:

(1) *The Exchange*, 7 Cranch, 116.

(2) *Duke of Brunswick* v. *King of Hanover* (1844), 6 Beav. 1; 6 State Tr. N.S. 33; 13 L.J.Ch. 107; 2 L.T.O.S. 306; 8 Jur. 253; 49 E.R. 724; affirmed (1848), 2 H.L.Cas. 1; 9 E.R. 993, H.L.; 11 Digest (Repl.) 622, *491*.

(3) *The Prins Frederik* (1820), 2 Dods. 451; 165 E.R. 543; 1 Digest (Repl.) 128, *143*.

(4) *Wadsworth* v. *Queen of Spain*, *De Haber* v. *Queen of Portugal* (1851), 17 Q.B. 171; 8 State Tr.N.S. 53; 20 L.J.Q.B. 488; 16 Jur. 164; 117 E.R. 1246; sub nom. *R.* v. *Lord Mayor of London*, *Wordsworth* v. *Queen of Spain*, *De Haber* v. *Queen of Portugal*, 18 L.T.O.S. 39; 11 Digest (Repl.) 622, *492*.

(5) *The Athol* (1842), 1 Wm. Rob. 374; 1 Notes of Cases, 586; 6 Jur. 376; 1 Digest (Repl.) 199, *852*.

(6) *Briggs* v. *The Lightships*, 11 Allen, 157.

(7) *The Marquis of Huntly* (1835), 3 Hag. Adm. 246.

(8) *The Schooner Merchant*, Marvin on Wreck and Salvage, s. 122.

(9) *The Thomas A. Scott* (1864), 10 L.T. 726; 2 Mar.L.C. 43; 1 Digest (Repl.) 128, *147*.

(10) *Vavasseur* v. *Krupp* (1878), 9 Ch.D. 351; 39 L.T. 437, C.A.; 1 Digest (Repl.) 56, *416*.

(11) *The Santissima Trinidad*, 1 Brock. 479; on appeal, 7 Wheaton, 283.

(12) *United States* v. *Wilder*, 3 Sumner, 308.

(13) *The Charkieh* (1873), L.R. 4 A. & E. 59; 42 L.J.Adm. 17; 28 L.T. 513; 1 Asp.M.L.C. 581; 41 Digest 814, *6757*.

(14) *Harmer* v. *Bell*, *The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 11 Digest (Repl.) 551, *1580*.

Also referred to in argument:

Triquet v. *Bath* (1764), 3 Burr. 1478; 1 Wm. Bl. 471; 97 E.R. 936; 11 Digest (Repl.) 632, *555*.

Magdalena Steam Navigation Co. v. *Martin* (1859), 2 E. & E. 94; 28 L.J.Q.B. 310; 34 L.T.O.S. 30; 5 Jur.N.S. 1260; 7 W.R. 598; 121 E.R. 36; 11 Digest (Repl.) 628, *513*.

The Constitution (1879), 4 P.D. 39; 48 L.J.P. 13; 40 L.T. 219; 27 W.R. 739; 4 Asp.M.L.C. 79; 1 Digest (Repl.) 128, *146*.

The Swift (1813), 1 Dods. 320; 165 E.R. 1325; 42 Digest 691, *1067*.

The Ticonderaga (1857), Sw. 215; 1 Digest (Repl.) 165, *532*.

The Resolute (1859), 4 Ir.Jur.N.S. 123 (Adm.); 33 L.T.O.S. 80; 1 Digest (Repl.) 127, **23*.

Larivière v. *Morgan* (1872), 7 Ch. App. 550; 41 L.J.Ch. 746; 26 L.T. 339, 859; 20 W.R. 480, 731, L.C.; affirmed sub nom. *Morgan* v. *Larivière* (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 23 W.R. 537, H.L.; 1 Digest (Repl.) 56, *414*.

Gladstone v. *Musurus Bey* (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L.J.Ch. 155; 7 L.T. 477; 9 Jur.N.S. 71; 11 W.R. 180; 71 E.R. 216; 11 Digest (Repl.) 628, *514*.

Betts v. *Neilson* (1865), 12 L.T. 719, L.JJ.

Taylor v. *Best* (1854), 14 C.B. 487; 8 State Tr. N.S. 317; 23 L.J.C.P. 89; 22 L.T.O.S. 287; 18 Jur. 402; 2 W.R. 259; 2 C.L.R. 1717; 139 E.R. 201; 11 Digest (Repl.) 629, *517*.

United States v. *Judge Peters*, 5 Cranch, 115.

Thomas v. *R.* (1874), L.R. 10 Q.B. 44; 44 L.J.Q.B. 17; 23 W.R. 345; 18 Digest (Repl.) 24, *173.*

Tomline v. *R.* (1879), 4 Ex.D. 252; 48 L.J.Q.B. 453; 40 L.T. 542; 27 W.R. 651, C.A.; 18 Digest (Repl.) 24, *174.*

Prioleau v. *United States and Johnson* (1866), L.R. 2 Eq. 659; sub nom. *U.S.A.* v. *Prioleau*, *Prioleau* v. *U.S.A.*, 36 L.J.Ch. 36; 14 L.T. 700; 12 Jur.N.S. 724; 14 W.R. 1012; 18 Digest (Repl.) 24, *179.*

Augusta (*or Eugenie*) (1822), 1 Hag. Adm. 11; 16 Digest (Repl.) 672, *955.*

The Helen (1801), 3 Ch. Rob. 224; 1 Eng. Pr. Cas. 299; 165 E.R. 444; 37 Digest 675, *1420.*

The Cybele (1878), 3 P.D. 8; 47 L.J.P. 86; 37 L.T. 773; 26 W.R. 345; 3 Asp.M.L.C. 532, C.A.; 39 Digest 316, *7.*

Appeal by the Attorney-General from the decision of the Probate, Divorce, and Admiralty Division (Admiralty), directing judgment by default to be entered against the steamship *Parlement Belge*, and a warrant to issue for the arrest of that vessel.

At about 4.30 p.m. on Feb. 14, 1878, the steam tug *Daring* brought up to an anchor in Dover Harbour, in a safe and proper berth. In the course of the evening a fog began to rise from off the shore, and at about 10.30 p.m. the fog was still continuing. The *Daring* was riding in the same place, having her anchor regulation light clearly exhibited, and burning brightly. Her fog bell rang at proper intervals, and a good look-out was kept on board her. The paddle steamship, *Parlement Belge*, was seen and heard by those on board the *Daring*, when a short distance off, approaching rapidly towards her from the direction of the harbour, and, although the fog bell of the *Daring* was loudly rung and her captain hailed the *Parlement Belge* to stop, she came on and ran her stem into the starboard side of the *Daring*, doing a great deal of damage. The plaintiffs, owners of the *Daring*, alleged that the collision was caused by the bad navigation and negligence of those on board the *Parlement Belge*. A writ in rem was duly served on the *Parlement Belge* on Feb. 26, 1878, and no appearance was entered in the action. The *Parlement Belge* was a Belgian vessel, employed in the service of carrying mails between Dover and Ostend in Belgium, but in addition she was engaged in carrying, besides the mails, passengers and merchandise, and in earning passage money and freight. The plaintiffs claimed (i) judgment against the *Parlement Belge*, her tackle, apparel, and furniture, for the damage occasioned to the plaintiffs by the collision, and for the costs of this action; (ii) a warrant to arrest the *Parlement Belge*, her tackle, apparel, and furniture, and, if necessary, a sale thereof.

After the hearing of the motion had been adjourned in order to allow time for the Crown to appear and plead if they thought fit, on Feb. 24 an information and protest of the Attorney-General was filed in which he stated that before, and at the time of the collision, the *Parlement Belge* was one of the mail packets running between Ostend and Dover, and one of the packets mentioned in art. 6 of a Convention of Feb. 17, 1876, hereinafter referred to. During the period mentioned, and at all material times, the vessel was the property of the King of the Belgians, and in his possession, control, and employ, as reigning sovereign of the State of Belgium, and was a public vessel of the government and sovereign State of Belgium, carrying his Majesty's royal pennon, and was being navigated and employed by and in possession of such government and not otherwise. She was officered by officers of the royal Belgian navy holding commissions from the King of the Belgians, and in the pay and service of his government. At all material times, a Convention, dated Feb. 17, 1876, was in force between Her Majesty the Queen and the King of the Belgians. During the period hereinbefore mentioned, and at all material times, the *Parlement Belge* was carrying public mails, under the Convention, between and from the

royal post offices of Great Britain and Belgium. The Attorney-General, under protest, said that the court had no jurisdiction to entertain the suit.

By art. 6 of the Convention:

> The packets employed for the conveyance of the correspondence between Ostend and Dover shall be steamboats of sufficient power and size for the service in which they are to be employed. They shall be vessels belonging to government, or freighted by order of government. These vessels shall be considered, and treated in the port of Dover and in all other British ports at which they may accidentally touch, as vessels of war, and be there entitled to all the honours and privileges which the interests and importance of the service in which they are employed, demand. They shall be exempted in those ports, as well on their entrance as on their departure, from all tonnage, navigation, and port dues, excepting however the vessels freighted by order of government, which must pay such dues in those ports where they are levied on behalf of corporations, private companies, or private individuals. They shall not be diverted from their especial duty—that is to say, the conveyance of the mails—by any authority whatever, or be liable to seizure, detention, embargo, or arrêt de prince.

Sir Robert Phillimore decided in favour of the plaintiffs and directed a warrant of arrest to issue. The Attorney-General appealed.

The Attorney-General (*Sir John Holker, Q.C.*), *the Solicitor-General* (*Sir Hardinge Giffard, Q.C.*), *the Admiralty Advocate* (*Dr. Deane*), and *A. L. Smith* for the Crown.

Webster, Q.C., and *Dr. W. G. F. Phillimore* for the plaintiffs.

Cur. adv. vult.

Feb. 27, 1880. **BRETT, L.J.**, read the following judgment of the court in which he shortly stated the facts, and continued:—Three main questions have been argued before us: (i) whether, irrespective of the express exemption contained in art. 6 of the Convention, the court had jurisdiction to seize the vessel in a suit in rem; (ii) whether, if the court would otherwise have such jurisdiction, it was ousted by art. 6 of the Convention; (iii) whether any exemption from the jurisdiction of the court which the vessel might otherwise have had was lost by reason of her trading in the carriage of goods and persons. In the course of the argument, we desired that it might, in the first instance, be confined to the first and third questions, reserving any further argument on the second question to be heard subsequently, if necessary. We have come to the conclusion that no such argument is necessary. We, therefore, can give no opinion on the second question. We neither affirm nor deny the propriety of the judgment of the learned judge of the Admiralty Division on that question.

The proposition raised by the first question seems to be as follows: Has the Admiralty Division jurisdiction in respect of a collision to proceed in rem against, and in the case of non-appearance or omission to find bail to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his State in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war, or employed as a part of the military force of the country? On the one side it is urged that the only ships exempted from the jurisdiction are armed ships of war, or ships which, though not armed, are in the employ of the government as part of the military force of the State. On the other side it is contended that all movable property which is the public property of the sovereign and nation used for public purposes is exempt from adverse interference by any court. It is

admitted that neither the sovereign of Great Britain nor any friendly sovereign can be adversely personally impleaded in any court of this country. It is admitted that no armed ship of war of the sovereign of Great Britain, or of a foreign sovereign, can be seized by any process whatever, exercised for any purpose of any court of this country. But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity, and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit personally impleaded against the sovereign, but in a suit in rem against the vessel itself.

This contention raises two questions:—(i) Supposing that an action in rem is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the court? (ii) Is it true to say that an action in rem is only and solely a legal proceeding against the property, or is it not rather a proceeding, indirectly if not directly, impleading the owner of the property to answer to the judgment of the court to the extent of his interest in the property? The first question really raises this—whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be so, or, in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any court of some property of every sovereign is admitted to be a part of the law of nations. The universal agreement which has made these propositions part of the law of nations has been an implied agreement. Whether the law of nations exempts all the public property of a State which is destined to the use of the State depends on whether the principle on which the agreement has been implied is as applicable to all that other public property of a sovereign or State as to the public property which is admitted to be exempt. If the principle is equally applicable to all public property used as such, then the agreement to exempt ought to be implied with regard to all such public property. If the principle only applies to the property which is admitted to be exempt, then we have no right to extend the exemption.

The first question, therefore, is: What is the principle on which the exemption of the person of sovereigns and of certain public properties has been recognised? Blackstone (bk. 1, c. 7) says:

> "Our King owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King even in civil matters, because no court can have jurisdiction over him; for all jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress and the sentence of a court should be contemptible unless the court had power to command the execution of it. . . . But who shall command the King?"

In this passage, which has been often cited and relied on, the reason of the exemption is the character of the sovereign authority, its high dignity, whereby it is not subject to any superior authority of any kind. Wheaton, adopting the words of the judgment in *The Exchange* (1) says:

> "The world being composed of distinct sovereignties, possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This perfect equality and absolute independence of sovereigns

has given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation. One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why has the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation."

By dignity is obviously here meant his independence of any superior authority. So VATTEL (liv. 4, c. 7, s. 108), speaking of sovereigns says:

"S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute jurisdiction."

In *Duke of Brunswick* v. *King of Hanover* (2) the suit was against the king. There was a demurrer to the jurisdiction. LORD LANGDALE, in an elaborate judgment, allowed the demurrer. He rejected the alleged doctrine of a fictitious ex-territoriality. He admitted that there are some reasons which might justify the exemption of ambassadors which do not necessarily apply to a sovereign, but he nevertheless adopted an analogy between the cases of the ambassadors and the sovereign, and allowed the demurrer, on the ground that the sovereign character is superior to all jurisdiction. He said (6 Beav. at pp. 50, 51):

"After giving to the subject the best consideration in my power, it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of a sovereign, but that there are reasons for the immunities of sovereign princes, at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors, that suits against sovereign princes of foreign countries must in all ordinary cases in which orders or declaration of right may be made end in requests for justice which might be made without any suit at all, that even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations. I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the courts here."

From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority. By a similar examination of authorities we come to the conclusion, although other grounds have sometimes been suggested, that the immunity of an ambassador from the jurisdiction of the courts of the country to which he is accredited is based upon his being the representative of the independent sovereign or State which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be.

The reason of the exemption of ships of war and some other ships must be next considered, and the first case to be carefully considered is, and always will be, *The Exchange* (1). It is undoubted that the decision applies, in fact, only to the case of a ship of war. Yet, in considering what was the principle on which the judgment was founded, there are some important circumstances

to which attention must be directed. The plaintiffs filed their libel against the schooner *Exchange* found in an American port, and prayed for the usual process to attach the vessel, and that she might be restored to her owners. Upon this libel the usual process in a cause of restitution was issued and executed—that is to say, the vessel was detained. There was no appearance in the suit. The usual proclamations issued for all persons to appear and show cause why the vessel should not be restored to the owners. No person appeared. Then the Attorney-General of the United States appeared and filed a suggestion. In that it must be noticed that the vessel is not described as "an armed ship of war," but as "a certain public vessel belonging to His Imperial Majesty, and actually employed in his service." It certainly is to be remarked that those who conducted this case with unusual ability deliberately, in stating the cause of objection, rested the claim of exemption, not on the fact of the vessel being an armed ship of war, but on the fact of her being one of a larger class, namely, "a public vessel" belonging to a sovereign, and employed in the public service. It is upon the suggestion so pleaded that the court gives judgment. It is right, however, to say that the fact of the vessel being an armed ship of war was before the court, and that the judgment frequently uses that phrase though by no means invariably.

It is impossible within reasonable bounds to set out the elaborate judgment of MARSHALL, C.J., and the court. The reasoning seems to be as follows: The ship is within the territorial jurisdiction of the United States—prima facie the court of the United States has jurisdiction. But all nations have agreed to certain limitations of their absolute territorial jurisdiction—as, for instance, they have abjured all personal jurisdiction over a foreign sovereign within their territory, and this on account of his dignity; all personal jurisdiction over foreign Ministers, and, says the judgment, this is on the same principle; and all jurisdiction over a foreign army passing through the territory. Is the same immunity to be held to apply to ships of war? The judgment answers, Yes, and upon the same principle; i.e., that to hold otherwise would be inconsistent with the dignity—that is to say, the recognised independence—of the foreign sovereign. After dealing with the case of private foreigners and merchant vessels in a foreign country the judgment continues:

> "But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation, acts under the immediate and direct command of her sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and dignity. The implied licence, therefore, under which such a vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rites of hospitality."

The Prins Frederik (3) seems to us to be worthy of great attention. An armed ship of war belonging to the King of the Netherlands was arrested on a claim for salvage. The case was elaborately argued upon the question of jurisdiction. An argument of the closest and most forcible reasoning, to which we see no answer, was presented by DR. ARNOLD, the Admiralty Advocate who said (2 Dods. at p. 468):

> "There is a class of things, which are not subject to the ordinary rules applying to property, which are not liable to the claims or demands of private persons, which are described by civilians . . . as extra commercium . . . and in a general enumeration are [by them] denominated sacra, religiosa, publica, publicis usis destinata. . . . These are things which are allowed to

be, and from their nature must be, exempt and free from all private rights and claims of individuals, inasmuch as if these claims were to be allowed against them the arrest, the judicial possession, and judicial sale incident to such proceedings would divert them from those public uses to which they are destined. . . . Ships of war belonging to the State are included in this class of things by their nature, and of necessity arising from their nature. . . . The same inconveniences . . . which . . . would arise [from such proceedings in the courts of their own country] would equally arise if such vessel could be arrested and detained in a foreign port. . . . There is another point of view. . . . It is the interest and duty of every sovereign independent state to maintain unimpeached its honour and dignity."

The point and force of this argument is that the public property of every State, being destined to public uses, cannot within reason be submitted to the jurisdiction of the courts of such State, because such jurisdiction, if exercised, must divert the public property from its destined public uses; and that, by international comity, which acknowledges the equality of States, if such immunity, grounded on such reasons, exist in each State with regard to its own public property, the same immunity must be granted by each State to similar property of all other States. The dignity and independence of each State requires this reciprocity. It was this reasoning which induced SIR WILLIAM SCOTT to hesitate to exercise jurisdiction, and so to act as to intimate his opinion that the reasoning could not be controverted. The case has always been considered as conveying his opinion to have been to that effect: see per LORD CAMPBELL in *De Haber* v. *Queen of Portugal* (4), who says that the difficulties suggested by the argument were, in the opinion of SIR WILLIAM SCOTT, insuperable. But, if so, he assented to an argument which embraced in one class "all public property" of the State, and treated "armed ships of war" as a member of that class. In *The Athol* (5), DR LUSHINGTON certainly extended the immunity from jurisdiction to a troopship, which was not an armed ship of war, though she was employed in a sense as part of the military force of the country. The reason of his judgment was in terms that in cases of tort or damage committed by vessels of the Crown the legal responsibility attaches to the actual wrongdoer only. That is in effect to say that the vessels of the Crown cannot be touched.

We come next to the important case of *Briggs* v. *The Lightships* (6). By the Massachusetts statute, it was enacted that:

"Any person to whom money is due for labour and materials furnished in the construction of a vessel shall have a lien upon her, which lien may be enforced by petition to the superior court praying for a sale of the vessel."

The petition may be entered or filed, a process of attachment issues against the vessel, and notice is to be given to the owner thereof to appear and answer to the petition. This enactment gave a statutory lien on the vessel, to be enforced by process of a court. It is a more extensive lien than the common law possessory lien in respect of work done on the vessel, as it is not lost by loss of possession. It is to be enforced by the same process as a maritime lien. It is, therefore, in effect an enactment which applies the incidents of a maritime lien to a new subject-matter, viz., a claim for work and labour in the construction of a vessel. It follows that upon the point raised in that case the reasoning must be as applicable to every maritime lien and the means of enforcing it, as to that similar statutory lien. In that case the plaintiffs filed a petition and prayed an attachment and sale of the vessel. The court thereupon issued a process of attachment and ordered notice to be given to the United States by service on their attorney. The vessel was attached and notice given accordingly. The United States appeared specially and pleaded to the juris-

diction that at the time of the filing of the petition the vessels were the public property of the United States and in their possession, and held and owned by them for public uses, and as instruments employed by them for the execution of their sovereign and constitutional powers, and, therefore, not subject to the process or jurisdiction of the court.

The question, therefore, was whether the court had jurisdiction to take possession of the vessels in order to sue them if necessary, and to give notice to the government that if they had any objection to such sale they must appear. Every step in that case was the same as every step in *The Exchange* (1), and every step in the present case. The objection to the jurisdiction as pleaded was in substance the same as that pleaded in *The Exchange* (1) and in the present case. The vessels, however, were not ships of war, or vessels employed in the military service of the State. They were like the *Parlement Belge*—vessels which were the public property of the State and in their possession, and held and owned by them for uses treated by them as public. It is obvious that all the arguments which have been used in the present case on behalf of the plaintiffs might have been, and almost certainly were, used in that case. But the court gave judgment as follows, declining the jurisdiction:

> "It is said for the petitioners that these lightboats were not intended for service. But after they had once come into the possession of the United States for public uses, they were subject to the exclusive control of the executive government of the United States, and could not be interfered with by State process. The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty. These reasons have satisfied us that there is no principle upon which the courts of this Commonwealth can entertain jurisdiction of these petitions."

The judgment then reviews many cases, among others *The Marquis of Huntly* (7), in which SIR JOHN NICHOLL treated "government stores" in charge of a lieutenant, but on board a ship which was only chartered by government, as beyond his jurisdiction, though the ship and freight were within it; *The Schooner Merchant* (8), in Florida, in which it was held that the mails could not be arrested or detained for salvage; *The Thomas A. Scott* (9), in which a transport ship, owned by the United States, but not commissioned, was held to be beyond jurisdiction. The judgment ends thus:

> "The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character."

The reasoning of that careful judgment is the reasoning of the Admiralty Advocate in *The Prins Frederik* (3). The ground of that judgment is that the public property of government in use for public purposes is beyond the jurisdiction of the courts either of its own or any other State, and that ships of war are beyond such jurisdiction, not because they are ships of war, but because they are public property. It puts all the public movable property of a State, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or ships of war, and exempts it from the jurisdiction of all courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the State.

The judgment of LORD CAMPBELL in *De Haber* v. *Queen of Portugal* (4) seems to the same effect, though the decision may fairly be said to apply only to a suit directly brought against the sovereign. But he relies on the statute of Anne [Diplomatic Privileges Act, 1708] with regard to ambassadors, and says (17 Q.B. at pp. 207, 208):

"Can we doubt that in the opinion of that great judge [LORD HOLT] the sovereign himself would have been considered entitled to the same protection, immunity, and privilege as the Minister who represents him?"

He cites the statute thus:

"It has always been said to be merely declaratory of the law of nations recognised and enforced by our municipal law, and it provides that all process whereby the person of any ambassador or of his domestic servants may be arrested, *or his goods distrained or seized*, shall be utterly null and void."

The italics are as written by LORD CAMPBELL, and, further citing *The Prins Frederik* (3), he says (ibid. at pp. 212, 213):

"Objection being made that the court had no jurisdiction, a distinction was attempted that the salvors were not suing the King of the Netherlands, and that being in possession of and having a lien upon a ship which they had saved the proceeding might be considered in rem, but LORD STOWELL saw such insuperable difficulties in judicially assessing the amount of salvage, the payment of which was to be enforced by sale, that he caused representations to be made to the Dutch government, who very honourably consented to his disposing of the matter as an arbitrator."

The decision, therefore, is that the immunity of the sovereign is at least as great as the immunity of an ambassador, but the statute declares that the law is and always has been not only that an ambassador is free from personal suit or process, but that his goods are free from such process as distress or seizure. The latter meaning seizure by process of law, it follows that the goods of every sovereign are free from any seizure by process of law.

The latest case on the point seems to be *Vavasseur* v. *Krupp* (10) before this court. The question was whether the English court had jurisdiction to order "shells" belonging to the Mikado of Japan to be destroyed supposing they were an infringement of the plaintiff's patent. All the judges held that there was no such jurisdiction. JAMES, L.J., said (9 Ch.D. at p. 355):

"I suppose that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent; but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, 'It is my public property, and I ask you for it.' That seems to me to be the whole of the case."

BRETT, L.J., said (ibid. at p. 358):

"The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country. . . . I shall assume for this purpose that there was an infringement of the patent, yet the Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country."

COTTON, L.J., says (ibid. at p. 360):

"This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially with what we call the public property of the State of which he is sovereign, as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but

because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented as all foreign countries having a sovereign are represented by the individual who is the sovereign."

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.

It is said, however, that there are authorities inconsistent with the view that this is a part of international law. *The Santissima Trinidad* (11) is relied on. But, as was pointed out in the judgment in *Briggs* v. *The Lightships* (6), the former case is one depending upon a well-known doctrine of the law of prize, viz., that property captured in breach of the laws of neutrality is held by the courts of the neutral State not to be lawful prize. In *United States* v. *Wilder* (12) it would be uncandid to say that there are not expressions of STORY, J., which are in favour of the contention that the immunity from jurisdiction is confined to ships and materials of war. But in that case the right which was adverse to the United States government was a possessory lien for general average. The remedy of the shipowner was in his own hands. He required no assistance from any process of any court, as would also be the case in a lien for freight. As a decision, therefore, the case is not in point, because the United States were plaintiffs voluntarily seeking the assistance of the Massachusetts tribunal. But it seems to us sufficient to say that we do not think the observations of STORY, J., countervail effectually the arguments and decisions in the other cases which have been cited.

There is then the opinion of SIR ROBERT PHILLIMORE, expressed in *The Charkeih* (13). The decision is, of course, not in point, because the case was decided on the ground that the Khedive was not an independent sovereign. But there is a careful consideration in the judgment of the question whether the ship would have been liable to the jurisdiction of the court in proceedings in rem in respect of a collision if the Khedive had been a sovereign prince. The conclusion is that she would have been. Such an opinion deserves respectful attention. We are not quite sure whether we correctly appreciate the grounds of the opinion. The learned judge agrees that an ambassador is personally exempt from the service of all process in a civil cause, and from any action which renders such service necessary, and that "the law as to the privileges of an ambassador applies with equal force to the sovereign; but," he continues :

> "it remains to be considered whether there may not be a proceeding in rem against property of the sovereign or ambassador which is free from the objections fatal to the other modes of procedure."

He then says

> "that he would be prepared to hold that proceedings in rem in some cases may be instituted without any violation of international law, though the owner of the res be in the category of persons privileged from personal suit."

This is an intimation of an opinion not yet conclusively formed that proceedings in rem are a legal procedure solely against property, and not directly

or indirectly against the owner of the property. But then he says that a proceeding in rem cannot be instituted against the property of a sovereign or an ambassador if the res can in any fair sense be said to be connected with the jus coronae of the sovereign or the discharge of the functions of the ambassador. From this one would infer that no personal process can issue against a sovereign or an ambassador; that no process in rem can issue against any property which can in any fair sense be said to be connected with the jus coronae, but such process might issue against other property of a sovereign or an ambassador. But then he says that

> "it is by no means clear that a ship of war to which salvage services have been rendered may not jure gentium be liable to be proceeded against in a Court of Admiralty for the remuneration of such services."

Yet such proceedings are undoubtedly by means of process in rem, and it can hardly be denied that a ship of war is property connected with the jus coronae. He said :

> "I am disposed to hold that in case of salvage or collision the obligatio attaches jure gentium upon the ship whatever be her character, public or private."

If this includes a ship of war it seems to us difficult to understand how it is not inconsistent with the principle of the judgments in *The Exchange* (1) and *Briggs* v. *The Lightships* (6). If it does not include a ship of war, the distinction between other processes and the process in rem is not always an answer to the claim of immunity. But then the learned judge expresses an opinion that in the case before him there was a nearer goal at hand, because it was idle to contend that the ships were not trading vessels to all intents and purposes, though, when engaged in their regular employment, they carried mail bags. This seems to intimate that the ships then in question were not public ships at all. We cannot think that this judgment discloses any final opinion of the learned judge, either as to the limits of the nature of the property which is exempt, or as to the whole nature of the action in rem with regard to the question under discussion.

Having carefully considered *The Charkieh* (13) we are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, namely, that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.

This proposition would determine the first question in the present case in favour of the protest, even if an action in rem were held to be a proceeding solely against property, and not a proceeding directly or indirectly impleading the owner of the property to answer to the judgment of the court. But we cannot allow it to be supposed that, in our opinion, the owner of the property is not indirectly impleaded. The course of proceeding, undoubtedly, is first to seize the property. It is, undoubtedly, not necessary, in order to enable the court to proceed further, that the owner should be personally served with any process. In the majority of cases brought under the cognizance of an Admiralty Court no such personal service could be effected. Another course was, therefore, taken from the earliest times. The seizure of the property was made by means of a formality which was as public as could be devised. That

formality of necessity gave notice of the suit to the agents of the owner of the property, and so, in substance, to him. Besides which, by the regular course of the Admiralty, the owner was cited or had notice to appear to show cause why his property should not be liable to answer to the complainant. The owner has a right to appear and show cause, a right which cannot be denied. It is not necessary, it is true, that the notice or citation should be personally served. But, unless it were considered that, either by means of the publicity of the manner of arresting the property, or by means of the publicity of the notice or citation, the owner had an opportunity of protecting his property from a final decree by the court, the judgment in rem of a court would be manifestly contrary to natural justice. In a claim made in respect of a collision, the property is not treated as the delinquent per se. Though the ship has been in collision and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation, if those in charge of her were not the servants of her then owner, as for example if she was in charge of a compulsory pilot.

This is conclusive to show that the liability to compensate must be fixed, not merely on the property, but also on the owner through the property. If so, the owner is, at least, indirectly impleaded to answer to—that is to say, to be affected by—the judgment of the court. It is no answer to say that, if the property be sold after the maritime lien has accrued, the property may be seized and sold as against the new owner. This is a severe law, arising probably from the difficulty of otherwise enforcing any remedy in favour of an injured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the alleged lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit and the same opportunity and right of appearance as the former owner would have had. He is impleaded in the same way as the former owner would have been. Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading.

The Bold Buccleugh (14) does not decide to the contrary of this. It decides that an action in rem is a different action from one in personam, and has a different result. But it does not decide that a court which seizes and sells a man's property does not assume to make that man subject to its jurisdiction. To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We think that he cannot be so indirectly impleaded any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign cannot be personally impleaded in any court.

But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use of her in part for such purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes. Both these propositions raise the question of how the ship must be considered to have been employed.

As to the first, the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign and to be a public vessel of the State. It seems very difficult to say that any court can inquire by

contentious testimony whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that, if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in *The Exchange* (1). Whether the ship is a public ship used for national purposes seems to come within the same rule. But, if such an inquiry could properly be instituted, it seems clear that in the present case the ship has been mainly used for the purpose of carrying the mails, and only subserviently to that main object for the purposes of trade. The carrying of passengers and merchandise has been subordinated to the duty of carrying the mails. The ship is not, in fact, brought within the first proposition.

As to the second, it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded; and in both cases because such a suit would be inconsistent with the independence and equality of the State which he represents. If the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the State which is represented by such owner. The property cannot upon the hypothesis be denied to be public property; the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity.

For all these reasons we are unable to agree with the judgment of the learned judge, and have come to the conclusion that the judgment must be reversed, with a declaration that the Admiralty Division had no jurisdiction over the *Parlement Belge*.

Appeal allowed.

Solicitors: *Hare & Co.; Lowless & Co.*

[*Reported by* J. P. Aspinall, Esq., and F. W. Raikes, Esq., *Barristers-at-Law.*]

HOLLINS AND OTHERS *v.* FOWLER AND OTHERS

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley and Lord O'Hagan), July 2, 1874, May 7, July 6, 1875]

[Reported L.R. 7 H.L. 757; 44 L.J.Q.B. 169; 33 L.T. 73; 40 J.P. 53]

Conversion—Goods obtained in good faith from person fraudulently in possession—Disposal by recipient for own benefit or that of another person.

Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of those goods for his own benefit, or for that of another person, is guilty of a conversion.

The appellants bought cotton from B., intending to act as brokers and re-sell the cotton to any of their customers whom it might suit, charging only a commission, but having no immediate principal at the time of the purchase. Subsequently, they sold the cotton to M. B. had obtained the cotton from the

respondents by fraud, but the appellants were not aware of this. In an action of trover brought by the respondents against the appellants to recover the value of the cotton,

Held: B., having fraudulently obtained possession of the cotton, could not give a title to it to any person to whom he purported to transfer possession, and so the property in and legal right of possession of the cotton remained in the respondents; the appellants, having no principal at the time of the purported transfer of the cotton to them, bought on their own responsibility; and, therefore, the respondents were entitled to succeed in the action.

Notes. Distinguished: *Lindsay* v. *Cundy* (1876), 1 Q.B.D. 348. Applied: *Cochrane* v. *Rymill* (1879), 40 L.T. 744. Considered: *Delaney* v. *Wallis* (1884), 15 Cox, C.C. 525. Distinguished: *Turner* v. *Hockey* (1887), 56 L.J.Q.B. 301. Considered and Applied: *Barker* v. *Furlong*, [1891] 2 Ch. 172. Considered: *Consolidated Co.* v. *Curtis*, [1892] 1 Q.B. 495. Applied: *Winter* v. *Bancks* (1901), 84 L.T. 504. Considered: *Underwood* v. *Bank of Liverpool*, *Same* v. *Barclays Bank, Ltd.*, [1924] All E.R. Rep. 230; *Fenton Textile Association* v. *Thomas* (1929), 45 T.L.R. 264. Considered and Applied: *Re Samuel*, *Ex parte Trustee* v. *Kerman*, [1945] 2 All E.R. 71. Considered: *Baker* v. *Barclays Bank, Ltd.*, [1955] 2 All E.R. 571. Referred to: *Arnold* v. *Cheque Bank*, *Arnold* v. *City Bank* (1876), 1 C.P.D. 578; *Iredale* v. *Kendall* (1878), 40 L.T. 362; *Glyn Mills, Currie* v. *East and West India* (1880), 6 Q.B.D. 475; *McEntire* v. *Potter* (1889), 22 Q.B.D. 438; *New York Breweries* v. *A.-G.*, [1899] A.C. 62; *Didisheim* v. *London and Westminster Bank*, [1900] 2 Ch. 15; *Mansell* v. *Valley Printing Co.*, [1908] 1 Ch. 567; *Morison* v. *London County and Westminster Bank*, [1914-15] All E.R. Rep. 853; *London and Montrose Shipbuilding and Repairing Co.* v. *Barclays Bank, Ltd.* (1925), 31 Com. Cas. 67; *William Leitch & Co.* v. *Leydon*, [1930] All E.R. Rep. 754; *A. G. Barr & Co.* v. *Macgeoghegan* (1930), 47 T.L.R. 81; *United Fruit Co.* v. *Frederick Leyland & Co.*, [1930] All E.R. Rep. 331; *G. B. Savory & Co.* v. *Lloyds Bank, Ltd.*, [1932] All E.R. Rep. 106; *The Arpad*, [1934] All E.R. Rep. 326.

As to conversion, see 38 Halsbury's Laws (3rd Edn.) 775 et seq.; and for cases see 43 Digest 469 et seq.

Cases referred to:

(1) *Hardman* v. *Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur.N.S. 81; 11 W.R. 239; 158 E.R. 1107; 35 Digest (Repl.) 17, *96.*

(2) *Stephens* v. *Elwall* (1815), 4 M. & S. 259; 105 E.R. 830; 43 Digest 469, *94.*

Appeal from an order of the Court of Exchequer Chamber on a Case stated by the parties under the Common Law Procedure Act, 1854, in an action in trover by the respondents against the appellants.

The respondents were merchants at Liverpool, and in 1869 they instructed their brokers to sell thirteen bales of cotton. One Bayley, a cotton broker, offered to purchase the cotton. The respondents' brokers refused to sell unless the name of a responsible person were given as purchaser, and were told by Bayley that he was buying as broker for Thomas Seddon, of Bolton. In fact, Bayley had no authority from Seddon to buy for him. The respondents' brokers, being ignorant of this want of authority, agreed to sell the cotton to Seddon, and on Dec. 18, 1869, sent to the respondents a sold note, with Seddon's name as buyer, and to Bayley a bought note of the purchase by him for Seddon. On the same day Bayley sent to the respondents' broker a sampling and delivery order for thirteen bales of cotton bought by him for Seddon. Bayley then offered to sell the cotton to the appellants, who were cotton brokers at Liverpool. They agreed to purchase it, and to send in the name of their principal in the course of the day. The appellants afterwards applied to Bayley for an order to allow them to sample the cotton, by the following note:

"Liverpool, Dec. 23, 1869. Messrs. H. K. Bayley & Co. Please allow the bearer to sample thirteen bales of cotton, ex Minnesota, at 11¼d. per lb., bought this day for Francis Hollins and Co."

It was stated in the joint Case on appeal that the appellants had a large number of customers, and frequently, and without any definite instructions, bought cotton, believing it would suit them, but if it should happen that a customer for whom they intended to buy the cotton would not take it, they trusted to be able to place it with some other customer. On the morning of Dec. 23 the appellants had received a message from Messrs. Micholls, Lucas & Co., cotton spinners at Stockport, for whom they were in the habit of purchasing cotton, stating that they were coming to Liverpool that day to purchase cotton through the appellants. This was the only communication which the appellants had with Micholls, Lucas & Co. that day as to buying them cotton, but at the time they agreed to purchase, they intended the cotton for them. About half an hour after the appellants had agreed with Bayley, Mr. Micholls came to their office, and, after seeing samples of the cotton, and satisfying himself as to the quality and price, agreed to take it. Later in the day the appellants sent to Bayley a delivery order, which stated that the cotton was bought for Micholls, Lucas & Co. This was the first intimation that Bayley received of Micholls, Lucas & Co. being interested in the purchase of the cotton. He sent to the appellants an invoice in these terms:

"Liverpool, Dec. 23, 1869. Messrs. Francis Hollins & Co. bought from H. K. Bayley & Co., thirteen bales of cotton, ex Minnesota, at 11¼d. per lb. . . ."

The delivery order received by the appellants was taken to the warehouse of Bayley by one of their clerks, and the thirteen bales of cotton were received by the appellants, conveyed to the railway station, and forwarded to Micholls, Lucas & Co. at Stockport. The invoice price of the cotton was paid by the appellants to Bayley, and the amount, together with a charge for their commission, was repaid by Micholls, Lucas & Co. to the appellants. The respondents, having applied to Seddon for payment for the cotton, discovered the fraudulent misrepresentation of Bayley—that he had bought as Seddon's broker—by which he had obtained possession of the cotton. Learning that he had sold the cotton to the appellants, they called upon them for payment, and upon their refusal to pay, the present action was brought.

At the trial, WILLES, J., left to the jury two questions: (i) Whether the thirteen bales of cotton in question were bought by the [appellants] as agents in the course of their business as brokers? (ii) Whether they dealt with the goods only as agents for their principals? The jury having answered both questions in the affirmative, the learned judge directed the verdict to be entered for the [appellants], reserving leave to the [respondents] to move to enter the verdict for them for the price of the cotton. The respondents accordingly moved the Court of Queen's Bench for a rule to show cause why the verdict entered for the appellants should not be set aside, on the grounds—first, that the verdict was against the weight of evidence; secondly, for misdirection; and thirdly, upon the leave reserved to enter a verdict for them. The court granted the rule on the third ground, but refused it on the other two. Upon the argument of the rule the court were unanimously of opinion that the rule to enter the verdict for the respondents ought to be made absolute, on the ground that the appellants in effect bought as principals, and would have been liable to Bayley as vendees; and, having dealt with the cotton as if the property were in them by assigning it to Micholls, Lucas & Co., they were liable to the respondents for a conversion on its turning out that no property had passed from the respondents to Bayley. On appeal to the Exchequer Chamber that court was equally divided, and, accordingly, the judgment of the Queen's Bench stood affirmed, and the appellants appealed to the House.

July 2, 1874.—The judges were summoned, and BLACKBURN, MELLOR, BRETT and GROVE, JJ., and CLEASBY and AMPHLETT, BB., attended. At the conclusion of the arguments the following question of law was left by their Lordships to the judges: "Whether, under the circumstances stated in the joint Case on appeal, the respondents were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration?" The learned judges having taken time for consideration, delivered their opinions on May 7, 1875, BLACKBURN, J., MELLOR, J., CLEASBY, B., and GROVE, J., answering the question in the affirmative, and BRETT, J., and AMPHLETT, B., in the negative.

Sir John Holker, *Q.C.*, and *Herschell*, *Q.C.*, for the appellants.
J. Kay, *Q.C.*, *Charles Russell*, *Q.C.*, and *Bigham* for the respondents.

Their Lordships took time for consideration.

July 6, 1875. The following opinions were read.

LORD CHELMSFORD.—The question upon this appeal is whether the appellants are liable in trover for the conversion of thirteen bales of cotton, the property of the respondents. From the difference of opinion which has existed among the judges, the question may be regarded as one of some difficulty, as it certainly is one of general importance.

In considering the case it is necessary in the first place to determine what is the exact effect of the finding of the jury, which some of the judges thought was binding upon them to regard the appellants as acting in the transaction merely as brokers in the ordinary mode of dealing by persons in that character. There was evidence at the trial that not an unusual mode of business with the appellants was to purchase cotton upon the chance of its suiting some of their numerous customers, and, therefore, the finding of the jury that the cotton in question was bought by the defendants in the course of their business as brokers does not necessarily mean that they bought according to the ordinary dealings of brokers for principals, but merely that they bought in their character of brokers, involving in it the proved course of their business in which they were accustomed to buy as brokers for the purpose, not of retaining the goods for themselves, but of keeping them only till they could find a purchaser for them. At the time when the appellants purchased the cotton from Bayley they had no principals, and, therefore, if Micholls, Lucas & Co. had not afterwards intervened the appellants alone must have been liable, but if once the liability attached, which liability would have been to the true owners of the cotton and not to the fraudulent vendor, the appellants could only have been discharged by the acceptance by the owners of Micholls, Lucas & Co., as purchasers, which, it is unnecessary to add, never took place. The appellants at the time of the sale to them were in the position of agents with an undisclosed principal. Bayley knew they were agents, because they promised to send in the name of their principals in the course of the day; but if they had been sued before they had named a principal they would have had no defence.

The question upon the facts is whether the appellants were guilty of a conversion. There can be no doubt that the property and legal right of possession of the cotton remained in the respondents, and Bayley, who had fraudulently obtained possession of it, could not give a title to anyone to whom he transferred the possession, however ignorant the transferee might be of the means by which Bayley acquired it. A great deal of argument was directed to the question of what amounts in law to a conversion. I agree with what was said by BRETT, J., in the Court of Exchequer Chamber in this case:

> "In all cases where we have to apply legal principles to facts there are found many cases about which there can be no doubt, some being clear for the plaintiff, and some for the defendant; and the difficulties arise in doubtful cases on the border line between the two."

But, to my mind, the proposition which fits this case is that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

The Court of Queen's Bench, in their judgment in this case, thought that it was not distinguishable from *Hardman* v. *Booth* (1). In that case the plaintiffs were worsted manufacturers near Manchester. One of the partners, being in London, called at the place of business of a firm of Gandell & Co., for orders. At that time the firm, which had been long established, and was well known, consisted only of Thomas Gandell, whose son, Edward Gandell, was his clerk, and managed the business. On inquiring for Messrs. Gandell, one of the workmen directed the plaintiff to the counting house, where he saw Edward Gandell, who led him to believe he was one of the firm of Gandell & Co., and under that belief the plaintiffs sent goods to the place of business of Gandell & Co., and invoiced them to Edward Gandell & Co. Edward Gandell who, unknown to the plaintiffs, carried on business with one Todd, pledged the goods with the defendant Booth for advances bona fide made to Gandell and Todd, and the defendant afterwards sold the goods under a power of sale. It was held by the Court of Exchequer that the defendant was liable for a conversion on the ground that there was no contract of sale, inasmuch as the plaintiffs believed they were contracting with Gandell & Co., and not with Edward Gandell personally, and Gandell & Co. never authorised Edward Gandell to contract for them, and, consequently no property passed by the sale, and the defendant, though ignorant of Gandell and Todd's want of title to the goods, was liable in trover for the amount realised by the sale. I agree with the Court of Queen's Bench that *Hardman* v. *Booth* (1) is not to be distinguished from the present case.

I may also advert to *Stephens* v. *Elwall* (2), mentioned by Blackburn, J., in his opinion delivered to your Lordships in this case. There a bankrupt, after his bankruptcy, sold goods to Deane to be paid for by bills on Heathcote, for whom Deane bought the goods. Heathcote was in America, and the defendant Elwall was his clerk, and conducted the business of his house in London. Deane informed the defendant of the purchase, and, the goods being afterwards delivered to him, he sent them to America to Heathcote. This was held to be a conversion by the defendant. Lord Ellenborough, C.J., said (4 M. & S. at p. 261):

> "The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it."

This case was decided sixty years ago, and I do not find that its authority has ever been disputed. I think that the judgments of the Court of Queen's Bench and of the Exchequer Chamber are right, and ought to be affirmed.

LORD CAIRNS, L.C.—It is quite clear that in law the appellants at the time when they purchased the thirteen bales of cotton on Dec. 23, 1869, had no principals, and must themselves have been liable on the contract; and although we must take it on the finding of the jury that the cotton was bought by the appellants as agents in the course of their business as brokers, that is explained by the statement that they were in the habit of making purchases of cotton without any instructions, but believing that the cotton would suit certain purchasers, and trusting to them to take it off their hands. There is no doubt that it was according to this course of their business as brokers that the cotton in question was purchased, and that the appellants bought it, intending to request

Micholls & Co. to adopt the contract; but until an agreement was made between Micholls & Co. and the appellants that the former would take the cotton, the appellants were the masters of it. They might, on the one hand, have done with the cotton what they pleased; and, on the other hand, if Micholls & Co. refused to take the cotton, the appellants alone would have been liable on the contract.

In this state of circumstances I agree with what is said by GROVE, J., in the opinion he has given to your Lordships that the jury appear to have meant that the appellants never bought intending to hold or to make a profit, but with a view to pass their goods over to Micholls & Co. or if they did not accept them, to some other customer, and that, therefore, in one sense they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods or dealing with them as buyers and sellers. But, as GROVE, J., continues:

> "this would leave the question untouched whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act, and did act in one respect as brokers, not making a profit by resale, but only getting brokers' commission, they did not intend to act, and did act in relation to the sellers in a character beyond mere intermediates, and not as mere conduit pipes."

In my opinion, they did act in relation to the sellers in a character beyond mere agents. They exercised a volition in favour of Micholls & Co., the result of which was that they transferred the dominion over and property in the goods, to Micholls, in order that Micholls might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion. I, therefore, agree with the motion of my noble and learned friend.

LORD HATHERLEY.—I agree in the opinion that has been expressed by my noble and learned friends, and I have nothing to add to what has been already said. It seems to be admitted by everybody, without any dispute whatever, that the title of the respondents to the goods in question had not been in itself displaced. The real question comes only to be whether or not there has been a wrongful conversion of these goods by what took place; that is, whether the appellants are responsible or Micholls. That the appellants bought the goods with the intention of acting as agents for any person who might be willing to take them, and to take the advantage of the bargain they had made, I have no doubt; and I apprehend, my Lords, that we must look upon the whole of the evidence in this case and the verdict of the jury, to ascertain the point I have stated, and that point alone. It is plain from the evidence in the case that at the time the purchase was made by the appellants from Bayley they had no definite instructions from anyone, although they were prepared to act upon the instructions of any client whom the goods might suit; and they found that Micholls was a person whom they would suit. The purchase of the goods by him not having taken place at the time, or previous to the time when the arrangement for the purchase was made and the purchase was completed by Bayley, it appears to me that we can only look upon the purchase of the goods as having been made by that right which they led the respondents to suppose they had acquired by their purchase from Bayley, and with the intention, no doubt, of passing on that right to anyone who was willing to acquire the goods from them upon the bargain they had made, they being at the same time in such a position that they would have been answerable as upon a bona fide sale to him, and would have had the goods as their own property until such time as they were taken off their hands by a purchaser.

LORD O'HAGAN.—The result of your Lordships' consideration of this case will, I fear, inflict hardship upon the appellants. They are innocent of any actual

wrong doing, but those with whom they are in conflict are as innocent as they, and we can only regard the liability attached to them by the law, without being affected in our judgment by its unpleasant consequences. They appear to me to have been guilty of a conversion in dealing with the respondents' property, and disposing of it to other persons without any right or authority to do so. Confessedly that property never passed from the respondents. Bayley's fraud vitiated the sale to him, and he could not convey to the appellants what in no way belonged to himself. They paid for it, and sampled it, and then disposed of it to Micholls, whom they reasonably expected to make the purchase, but who had not made it, and was not bound to make it. When the void sale was effected with Bayley, and the appellants got possession of the respondents' cotton, they had it conveyed to the railway station and forwarded to the purchaser in Stockport, who paid for it, and made yarn of it.

It seems to me that this state of facts entitles the respondents to recover in an action of trover, which rests on a right of property wrongfully interfered with. If the case had been that of a mere broker purchasing for his principal, it would have been, in my mind, much more difficult, for I do not think it plain, with MARTIN, B., in the Exchequer Chamber, that it is of no consequence to a right decision whether the appellants acted in the transaction as principals or agents. In my view of the finding of the jury, which that learned judge held immaterial, it is not necessary to determine as to the correctness or incorrectness of his opinion in that respect. But for that finding the facts in evidence appear to me plainly sufficient to remove all difficulty on the score of agency. The appellants were brokers, and as such had the habit of making purchases on the expectation that clients would take the goods from them; but in the particular matter with which we have to deal they purchased for themselves in their own name, and on their own responsibility. They had no principal at the time of the purchase. Micholls did not examine the cotton and make his bargain until some time after it had been completed, and the invoice was headed, "Messrs. F. Hollins & Co., bought from H. K. Bayley & Co."

On this state of facts I agree with the learned judges of the Court of Queen's Bench that this is not the case of a mere broker, dealing with goods only in that character—that although the appellants were actually brokers and intended to make a profit in that character, the appellants bought "as their own principals," and that the dealing with Micholls & Co. was in fact a re-sale in which they acted on the assumption that the property had been transferred to themselves by Bayley, and conveyed it to a new purchaser, in derogation and denial of the respondents' right. So considered, the case appears to me to be concluded by *Hardman* v. *Booth* (1). The real difficulty which embarrasses the decision has arisen on the findings of the jury, and the form of the reservation by which, properly understood, we are bound to abide. Unquestionably, although that view does not appear to have been pressed in the Court of Queen's Bench, I have felt the force of the objection founded on the findings, and I have doubted whether some of the judges in the Exchequer Chamber were not right in holding themselves coerced by the verdict to differ from the judges of the Queen's Bench, with whose conclusion they would otherwise have concurred. But on consideration I do not deem this difficulty insurmountable, as I think the findings, in one respect, quite reconcilable with what seems to me the true inference from the facts.

We must take it, as the jury found, that the appellants acted as brokers or agents in their purchase from Bayley, but, as has been observed already, the case shows that they frequently purchased, not intending to sell for profit on their own account, but taking their chance of finding customers who would adopt the bargain, and content to accept their commission as the only advantage resulting to themselves. In this sense, and according to this usage, they might properly, though, perhaps, not in perfectly unexceptionable language, be said to have acted

as brokers in the dealings before us; but they were not merely brokers negotiating "only as such" and representing in the ordinary way principals, disclosed or undisclosed, for they had no principals, and had other relations to the goods with which they meddled, and quite other interests than they would have had, if they had been simple negotiators, or "mediums of communication between buyer and seller," according to the description of KELLY, C.B. They do not seem to me to have been rightly likened to the carrier or the packer, who is merely such a medium, and the jury may have been warranted in holding that their dealings were in one sense conducted by them as brokers according to their peculiar course of business, and with a view to commission and not to sale, although, in another sense, they had not the purely representative and intermediary character, without regard to personal results of meddling with other men's property, which might have relieved them from the stringent doctrines of trover and conversion. I think, therefore, that the appeal should be dismissed, and that the judgments of the Queen's Bench and Exchequer Chamber should be affirmed.

Appeal dismissed.

Solicitors: *Chester, Urquhart & Co.*, for *Lace, Banner & Co.*, Liverpool; *W. W. Wynne*, for *T. & T. Martin*, Liverpool.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

WOODLEY *v.* METROPOLITAN DISTRICT RAIL. CO.

[COURT OF APPEAL (Cockburn, C.J., Mellish and Baggallay, L.JJ., Mellor and Grove, JJ.), February 24, 26, 1876, February 14, 1877]

[Reported 2 Ex.D. 384; 46 L.J.Q.B. 521; 36 L.T. 419; 42 J.P. 181]

Negligence—Defence—Volenti non fit injuria—Master and servant—Acceptance by servant of risks—Concealed danger—Absence of reasonably expected safety measures.

A man who enters on a necessarily dangerous employment with his eyes open takes it with the accompanying risks. If he takes such an employment, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury, and cannot make his employer liable for injury arising from danger to which he has voluntarily exposed himself. On the other hand, if the danger is concealed from him and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may hold the employer liable.

Notes. The safety of railway workers is now regulated by the Prevention of Accidents Rules, 1902 and 1911, the latter being amended by S.R. & O., 1926, No. 355.

Applied: *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685. Considered: *Yarmouth* v. *France* (1887), 19 Q.B.D. 647. Distinguished: *Thrussell* v. *Handyside*, [1886-90] All E.R. Rep. 830. Considered: *Membery* v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179; *Dann* v. *Hamilton*, [1939] 1 All E.R. 59. Referred to: *Charles* v. *Taylor, Walker* (1878), post; 38 L.T. 773.

As to the defence of volenti non fit injuria and its availability at the present day, see 28 HALSBURY'S LAWS (3rd Edn.) 82-85; and for cases see 36 DIGEST (Repl.) 150-158.

Cases referred to:

(1) *Bridges* v. *North London Rail. Co.* (*Directors, etc.*) (1874), L.R. 7 H.L. 213; 43 L.J.Q.B. 151; 30 L.T. 844; 38 J.P. 644; 23 W.R. 62, H.L.; 36 Digest (Repl.) 131, *676.*

(2) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur.N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex. Ch.; 36 Digest (Repl.) 46, *246.*

(3) *Ellis* v. *Great Western Rail. Co.* (1874), L.R. 9 C.P. 551; 43 L.J.C.P. 304; 30 L.T. 874, Ex. Ch.; 36 Digest (Repl.) 129, *658.*

(4) *Morgan* v. *Vale of Neath Rail. Co.* (1865), L.R. 1 Q.B. 149; 5 B. & S. 736; 35 L.J.Q.B. 23; 13 L.T. 564; 30 J.P. 36; 14 W.R. 144; 122 E.R. 1004, Ex. Ch.; 34 Digest (Repl.) 281, *2005.*

(5) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest (Repl.) 266, *1887.*

Also referred to in argument:

Seymour v. *Maddox* (1851), 16 Q.B. 326; 20 L.J.Q.B. 327; 16 L.T.O.S. 387; 15 Jur. 723; 117 E.R. 904; 34 Digest (Repl.) 263, *1867.*

Wiggett v. *Fox* (1856), 11 Exch. 832; 25 L.J.Ex. 188; 26 L.T.O.S. 309; 2 Jur.N.S. 955; 4 W.R. 254; 156 E.R. 1069; 34 Digest (Repl.) 285, *2032.*

Bilbee v. *London, Brighton and South Coast Rail. Co.* (1865), 18 C.B.N.S. 584; 6 New Rep. 174; 34 L.J.C.P. 182; 13 L.T. 146; 11 Jur.N.S. 745; 13 W.R. 779; 144 E.R. 571; 38 Digest (Repl.) 357, *382.*

Skelton v. *London and North Western Rail. Co.* (1867), L.R. 2 C.P. 631; 36 L.J.C.P. 249; 16 L.T. 563; 15 W.R. 925; 36 Digest (Repl.) 28, *121.*

Paterson v. *Wallace & Co.* (1854), 1 Macq. 748; 23 L.T.O.S. 249, H.L.; 36 Digest (Repl.) 219, *1152.*

Bartonshill Coal Co. v. *Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur.N.S. 767; sub nom. *Bartonshill Coal Co.* v. *Clark*, 6 W.R. 664, H.L.; 36 Digest (Repl.) 158, *1101.*

Clarke v. *Holmes* (1862), 7 H. & N. 937; 31 L.J.Ex. 356; 9 L.T. 178; 8 Jur.N.S. 992; 158 E.R. 751; sub nom. *Holmes* v. *Clark*, 10 W.R. 405, Ex. Ch.; 36 Digest (Repl.) 157, *831.*

Watling v. *Oastler* (1871), L.R. 6 Exch. 73; 40 L.J.Ex. 43; 23 L.T. 815; 19 W.R. 388; 34 Digest (Repl.) 270, *1917.*

Appeal by the defendants from an order of the Exchequer Division discharging a rule obtained by the defendants for leave to move for judgment in an action brought by the plaintiff to recover damages for injury suffered by him while he was working on the defendants' railway in the employment of a contractor. At the trial of the action the jury found for the plaintiff, awarding him £300 damages.

Cave, Q.C., and *Meadows White* for the defendants.

Francis for the plaintiff.

Cur. adv. vult.

Feb. 14, 1877. The following judgments were read.

COCKBURN, C.J.—In this case, which was an action to recover damages for an injury sustained by the plaintiff from one of the defendants' trains having struck him while at work on their premises, the jury found for the plaintiff with £300 damages, but a rule was obtained on leave reserved to enter a verdict for the defendants on the ground that, the plaintiff having voluntarily exposed himself to the danger, the defendants were not bound to adopt precautionary measures for his protection.

A The plaintiff was a workman in the employ of a contractor engaged by the defendants to execute certain work on a side wall on their line of railway in a dark tunnel. Trains were passing the spot every ten minutes, and, the line there being on a curve, the workman would not be aware of the approach of a train till it was within twenty or thirty yards of him. The space below the rail and the wall, on which the workman had to stand while at work, was just sufficient to enable him B to keep clear of a train when sensible of its approach. The place in question was wholly without light. No one was stationed to give notice of an approaching train. The speed of the trains was not slackened when arriving near where the men were at work, nor was any signal given by sounding the steam whistle. It is unnecessary to say that the service on which the plaintiff was thus employed was one of extreme danger. While he was reaching across the rail to find a tool he had laid down, a C train came upon him, suddenly struck him, and seriously injured him. It appeared that, on a previous occasion, when similar work was being done, a lookout man had been stationed to give warning of approaching trains, but this precaution had been discontinued. Under these circumstances, I have no hesitation in saying that, morally speaking, great culpability attaches to the defendants for having omitted to D adopt any precautionary measures to lessen as much as possible the danger to which the plaintiff and his fellow workmen were exposed. The jury have found that they were herein guilty of negligence, and, according to the recent decision of the House of Lords in *Bridges* v. *North London Rail. Co.* (*Directors, etc.*) (1) the question of negligence, if there is any evidence to go to the jury, is for the jury, and not for the court. In this case I am bound to say that, in my view, E so far as the question of negligence was concerned, not only was there evidence to go to the jury, but the verdict was in this respect perfectly right.

Whether, notwithstanding that the injury to the plaintiff was caused by the negligence of the defendants, the latter are in point of law liable is a different question, and one on which I have had considerable difficulty in making up my mind. If the plaintiff in doing the work on the railway is to be looked upon F as the servant of the company, the decision of the Exchequer Division in his favour cannot, as it seems to me, be upheld. It could not be said that any deception was practised on the plaintiff as to the degree of danger to which he would be exposed. He must be taken to have been aware of the nature and character of the work, and its attendant risk, when he entered into the employ of the contractor for the job in question; or, at all events, he must have become G fully aware of it as soon as he began to work. If he had been misled in supposing that precautionary measures, such as the dangerous nature of the service rendered reasonably necessary, would be taken, he had a right to throw up his engagement, and to decline to go on with the work; and such would have been his proper course. But, with a full knowledge of the danger, he continued in the employment, and had been working in the tunnel for a fortnight when the accident happened.

H A man who enters upon a necessarily dangerous employment with his eyes open takes it with the accompanying risks. On the other hand, if the danger is concealed from him, and an accident happens before he becomes aware of it, or if he is led to expect, or may reasonably expect, that proper precautions will be adopted by the employer to prevent or lessen the danger, and from the want of such precautions an accident happens to him before he has become aware of their absence, he may I hold the employer liable. If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance. He must be taken to waive his right to call upon the employer to do what is necessary for his protection, or, in the alternative, to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. He cannot put on the employer terms

to which he has now full notice that the employer never intended to bind himself. It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for them under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employment, or to continue in it, with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. The workman, who depends on his employment for the bread of himself and his family, is thus tempted to incur risks to which, as matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it, or continues in it, with a knowledge of its risks, he must trust to himself to keep clear of injury.

It may be said the plaintiff was not in the service of the defendants at all. He was on their premises, not only on lawful business, but it may be said by their invitation, as he was working under a contractor employed by them to do the work in question. He sustained the injury complained of through what the jury have found to have been negligence on the part of the company; he is, therefore, entitled to damages. But this reasoning appears to me to be fallacious. That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it. The same observation arises as before. With full knowledge of the manner in which the traffic was carried on, and of the danger attendant on it, the plaintiff thought proper to remain in the employment. No doubt, he thought that, by the exercise of extra vigilance and care on his part the danger might be avoided; by a want of particular care in depositing one of his tools, he exposed himself to the danger, and, unfortunately, suffered from it. He cannot, I think, make the company liable for injury arising from danger to which he voluntarily exposed himself. The contractor, the immediate employer of the plaintiff, undertook to execute work which he knew would be attended with danger in the service under which it was to be executed. The plaintiff, as his servant, did the same. They are in a very different position from that in which they would have stood had they been at work on the defendants' premises in ignorance of the danger. The conclusion therefore, at which I have arrived, I must say with much regret, as I think the conduct of the defendants open to great reprehension, is, that the judgment of the Exchequer Division is wrong and must be reversed.

MELLISH, L.J.—The course which the argument in this case has taken makes it desirable to consider, in the first place, whether railway companies are under any obligation to take reasonable care that the servants of contractors, who are brought on the line for the purpose of repairing the works of the railway do not suffer personal injury from the passing trains. In the court below it seems to have been taken for granted that railway companies were under such an obligation, but it is now contended that they are under no such obligation, and that the servant of the contractor, if he does not like to incur the risk of being run over, must throw up his employment with his master, and that, however great may be the risk to which he is exposed, and however great may be the negligence of the arrangements of the railway company with respect to the running of their trains, he has no action against the railway company for any injury he may suffer.

There can be no doubt that by the law of this country every person who carries on a dangerous trade is bound to take reasonable care that no other person (not being his own servant) suffers a personal injury from the manner in which his trade

A is carried on. No one has a right to carry on his trade in such a manner as is likely to cause personal injury to others. This liability is not founded on contract. It may be modified or taken away by contract, but it is founded on the right which is inherent in everyone not to be subject to personal injury from the wrongful or careless act of another. In the case of a servant, who enters into the service of a master who carries on a dangerous trade, the right of the servant to be B protected in his person is largely modified by the contract between master and servant. The servant is considered to contract that he will run all the ordinary risks arising from the nature of his master's business, and from the regulations under which it is carried on, and all risks arising from the negligence of his co-servants [the doctrine of common employment was abolished by the Law Reform (Personal C Injuries) Act, 1948], but the servant of the contractor enters into no such contract with the railway company because he enters into no contract with the railway company at all, and his contract with his own master is res inter alios acta, and, in my opinion, is altogether immaterial. I am unable to discover any principle by which railway companies are freed from the liability of taking reasonable care that the servants of contractors are not injured by the passing trains [see note, supra]. D I think the company is entitled to assume that contractors' labourers, who are brought on their line to do repairs, are persons who have reasonable nerve and reasonable skill in avoiding danger, but if the company's arrangements are such that persons, who have as much nerve and as much skill in avoiding danger as it can be expected contractors' labourers would have, are nevertheless exposed to an undue risk of personal injury, I think that the company are liable for any personal E injury they may in consequence suffer. The work which the plaintiff in this case was employed to do was not in itself dangerous at all; it was disagreeable work, because it was to be performed in a dark and dirty tunnel, but the danger to which the plaintiff was exposed arose entirely from the act of the company in running their trains, and it is because the danger arose from the acts of the company that the company were the persons upon whom the duty lay to see that the trains F were run in such a manner and with such precautions that the servants of the contractors, who were working in the tunnel with the leave and for the benefit of the company, were exposed to no undue risk.

This being, in my opinion, the nature of the liability of the company, I have next to consider whether there was any evidence that the plaintiff, on the occasion in question, was through the negligent arrangements of the company exposed to a G greater risk of personal injury than he ought to have been, and I agree with the court below there was such evidence. The question I have to decide is not, whether I myself if I had been on the jury, should have found that the company's arrangements were negligent, but whether there was evidence from which a jury might reasonably so find. This question mainly depends upon the degree of skill and nerve in avoiding passing trains, which may reasonably be expected from a brick- H layer's labourer in a dark tunnel. This is obviously a question of fact on which it it utterly impossible to lay down any rule of law. The jury, under the direction of the judge, have found, that under all the circumstances of the case—the darkness of the tunnel, there being a curve at the place where the plaintiff was working, so that an approaching train could not be seen, the noise of the work, and of trains I passing on the other side making it difficult to hear an approaching train—the plaintiff was not sufficiently protected from the risk of personal injury. The jury have also expressed an opinion that the proper precaution to have taken was for the company to have placed a man to warn the workmen when a train was coming. I am quite unable to say, whether this would have been a proper or a sufficient precaution, but I cannot hold that the conclusions to which the jury have come on pure questions of fact, on which, as it seems to me, some men might reasonably come to one conclusion and some to another, was so wrong that the court is entitled to enter a verdict for the defendants on the ground that there was no evidence to go to the jury.

It was argued, however, strongly on the part of the defendants, that as the plaintiff had been working in the tunnel for a fortnight, though not at the spot at which he was working, when the accident happened, and knew that the company were running their trains as usual without taking any precautions for the protection of the workmen in the tunnel, he must be taken to have assented to the trains being so run, and on that account cannot recover. This as I understand is the objection, which made CLEASBY, B., doubt in the court below whether the rule should not be made absolute to enter a verdict for the defendants. This defence in substance amounts to a defence of leave and licence, and it is posssible that though the plaintiff has not bound himself by any contract with the defendants to take upon himself all risk arising from the passing trains, yet he may have licensed the defendants to run their trains as usual without taking any precautions to protect him, and it is necessary to consider whether it was proved that he did so. Is it, then, a necessary inference in point of law from the fact of the plaintiff having worked in the tunnel for a fortnight without making any objection, and without abandoning his service with his master, that he consented to the company's running their trains as usual without taking any precautions for the safety of the workmen in the tunnel? In my opinion, it is not. In the first place, it is by no means certain that the plaintiff, an ordinary bricklayer's labourer, understood at all what the extent of the risk was which he was running, or what the precautions were, which were reasonably necessary. In the next place, assuming that he did understand what the risk was which he was running, and that he knew that the workmen in the tunnel were not reasonably protected, it seems to me it would be extremely unjust to hold that he was obliged either at once to quit his master's employment or else to lose his right of action against the railway company for negligently running over him. I think he is entitled to say: "I know I was running great risk, and did not like it at all, but I could not afford to give up my good place from which I get my livelihood, and I supposed that if I was injured by their carelessness I should have an action against the company, and that if I was killed my wife and children would have their action also."

Suppose this case. A man is employed by a contractor for cleansing the streets to scrape a particular street, and for the space of a fortnight, he has the opportunity of observing that a particular hansom cabman drives his cab with extremely little regard for the safety of the men who scrape the streets. At the end of a fortnight the man who scrapes the streets is negligently run over by the cabman. An action is brought in the county court, and the cabman says in his defence: "You knew my style of driving. You had seen me drive for a fortnight. I was only driving in my usual style." It is answered: "Yes, but your usual style of driving is a very negligent style, and my having seen you drive for a fortnight has nothing to do with it." It will not be disputed that the scraper of the streets in the case I have supposed is entitled to maintain his action, and, in my opinion, his case does not differ from the case we have to determine, there being no contract between the defendants and the plaintiff any more than between the cabman and the scraper of the streets. On the whole, I am of opinion that the judgment of the court below ought to be affirmed.

BAGGALLAY, L.J.—I agree with MELLISH, L.J., in thinking that the judgment of the court below should be affirmed. In the view which I take of the case, the plaintiff cannot be regarded as a servant of the company. He was the servant of the contractor; and at the time when the accident occurred he was upon the premises of the company in the course of fulfilling on behalf of his employer a contract in which his employer and the company were jointly interested. He was there upon lawful business, and not upon bare permission. If this be the true view of the case, it appears to me that it cannot be distinguished in principle from that of *Indermaur* v. *Dames* (2), and that there was a duty imposed by law on the company either

A to avert the danger or to give the plaintiff reasonable notice of it so that he might protect himself. Was there, then, in fact, neglect on the part of the company in either of these respects? I fully assent to the view that the company had a right to expect that the contractor's labourers would be men possessed of a reasonable amount of skill in the performance of their duties, of knowledge of the ordinary risks to which their employment exposed them, and of prudence in avoiding the B dangers to which they were subjected; but the circumstances of the present case were very peculiar; the accident which occurred to the plaintiff was not occasioned by the work upon which he was engaged, as by the falling of any portion of the brickwork, or the giving way of a scaffold, but by the company running their trains at the time when that work was going on.

C The real question is whether the company's train was run in such a manner and with such precautions that the plaintiff was not exposed to any undue risk, and this was essentially a question for the jury. As has been stated by the lord justice, it is impossible to lay down any general rule of law applicable to cases of this description; each must depend upon its own circumstances. The jury found a verdict for the plaintiff. The learned judge by whom the case was tried was not D dissatisfied with that verdict, and the Court of Exchequer have concurred in it. So far as I am competent to form an opinion from the material facts before us, I agree with the jury in thinking that reasonable precautions were not taken by the company for the protection of the plaintiff. Whether the jury were right or not in the opinion which they expressed as to what would have been a sufficient precaution it is immaterial to consider. It was contended E on the part of the company that they were under no obligation to adopt measures for the protection of the servants of a contractor against the careless or negligent acts of their own servants, that the plaintiffs and other persons similarly situated must enter upon such employment at their own risk, and that unless they were willing to do so they should refuse to be so employed. If this is the true state of the law, the company would probably be entitled to have F the judgment of the court below reversed, but I cannot adopt this view, concurring, as I do most entirely, in the reasons assigned by WILLES, J., in delivering the judgment of the court in *Indermaur* v. *Dames* (2).

MELLOR, J.—I am of opinion that the judgment of the Court of Exchequer must be reversed. The defendants can only be made liable on the proof of some G negligent conduct on their part, which occasioned the accident by which the plaintiff was injured, and I can discover none. KELLY, C.B., in his judgment, suggests, and it is upon this matter alone that he relies as the foundation of the liability of the defendants,

> H "that it was reasonable for the jury to hold that there was an obligation and duty imposed upon the company in this case, for the preservation of human life, to have stationed a man at the bend of the curve, who would have been enabled, on the approach of the train, to have warned the workman and enabled him to escape danger."

Whether any such precaution would have been of any practical value may be I doubtful, considering the number of trains passing, even were it possible in the tunnel; but, if it were, I can see no ground for inferring such an obligation and duty to have existed under the circumstances on the part of the company. Whether it might have been a prudent thing for the contractor to have stipulated for additional precautions when he undertook the repair of the tunnel is quite a different question, but I can see no implied obligation on the part of the company, at their expense, to employ such a person as the Lord Chief Baron referred to. No such person was in any sense necessary for the proper and ordinary working of the defendants' trains, or conducting their business, and it is not suggested that there was anything done by the company or omitted by the

company in the mode of working their trains or carrying on their business of an unusual character, or in any respect differing from the course of working which they had used during the period of the plaintiff's employment; and it seems to me that in principle, so far as the liability of the defendants is concerned, the case does not differ from *Ellis* v. *Great Western Rail. Co.* (3).

It is now completely settled that a master is not liable to one servant for the consequences resulting from the negligence of a fellow servant in the course of the same employment, on the ground that the servant undertakes, as between himself and his master, the natural risks and perils incident to the performance of his duty, and the presumption is that such risks are considered in the wages: *Morgan* v. *Vale of Neath Rail. Co.* (4) [the doctrine of common employment was abolished by the Law Reform (Personal Injuries) Act, 1948]. When, therefore, the contractor in this case undertook to perform the work in question, in the performance of which the plaintiff was engaged at the time of the accident, it is reasonable to assume that the character and nature of the work was duly considered and included in the price paid for it, and if he thought there was danger of an unusual character in the nature of the work, he ought either to have stipulated with his master, or the company, to provide some additional means or precautions against such possible danger, or as he was better able to judge than they whether the work could safely be performed without additional precautions, he ought to have refused the task unless they were provided.

Whether the master has done anything which may make him liable as between himself and the plaintiff we are not concerned to decide. *Priestly* v. *Fowler* (5), which is a leading case on the subject, has a strong bearing upon this state of things, and throws light upon the principle upon which this case may be decided. In that case it was said by Lord Abinger, in delivering the judgment of the court:

> "The mere relation of master and servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of the servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends danger to himself; and in most cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as his master."

In the present case the plaintiff had probably the same opportunity of judging of the possible danger as his master had, and might have declined the work and refused to undertake it without additional precautions being taken or means provided by his master, but, as it appears to me, that was a matter affecting his relation with his master, and not as in any way affecting the duty of the company, I think that the company can in no respect be said to be guilty of negligence; they conducted the business in the ordinary way, and the accident did not occur through any misconduct or mismanagement on their part; but that the plaintiff, who must be presumed to know the ordinary traffic of the company, and the limited space within which he had to work, came within the maxim volenti non fit injuria, and has at all events no remedy against the defendants.

BAGGALLAY, L.J.—GROVE, J., has not delivered a separate judgment, but he agrees in that of Mellor, J., and, as the majority of the court are in favour of the defendants, the form of judgment will be to enter the verdict for the defendants.

Appeal allowed.

Solicitors: *Aston & Co.; Burchells.*

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

TWYCROSS AND OTHERS *v.* DREYFUS BROTHERS AND OTHERS

[Court of Appeal (Sir George Jessel, M.R., James and Mellish, L.JJ.), April 18, 1877]

[Reported 5 Ch.D. 605; 46 L.J.Ch. 510; 36 L.T. 752]

Constitutional Law—Foreign sovereign State—Immunity from legal process—Issue of bonds—Arrears of interest—Claim against State and English agents.

An action against a foreign government for arrears of interest on bonds issued by that government will not lie, and, as an agent cannot be sued in the absence of a principal, no action will lie against agents of the foreign government who have issued the bonds in this country.

Notes. Applied: *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1949] 1 All E.R. 946.

As to immunity from process of foreign governments, see 7 Halsbury's Laws 265-279; and for cases see 11 Digest (Repl.) 628 et seq.

Appeal from a decision of Hall, V.-C., in an action brought by the plaintiff, James Twycross on behalf of himself and all others the holders of the bonds of the republic of Peru forming the six per cent. loan of 1870, against the defendants, Dreyfus Brothers, J. Henry Schröder & Co., and the Peruvian Guano Co. Ltd., for a declaration that the plaintiff and the other persons on whose behalf he claimed to sue had, by virtue of their bonds, a first charge on the guano, moneys, funds, and securities now in possession of the defendants, in priority to any claim on their part, and to have such guano, funds, and securities sold, and the proceeds, together with such moneys, applied in payment of the interest due on their bonds, and to have their bonds enforced as to the court might seem just.

According to the statement of claim the prospectus, on the faith of which the plaintiff purchased his bonds, was issued by Dreyfus Brothers and J. Henry Schröder & Co., as agents for the Peruvian government in June, 1870. It announced the issue by the government at the price of 82½ per cent. of £11,920,000 six per cent. consolidated bonds for the construction of railways, and it declared that the securities specially hypothecated for the due payment of the principal and interest on the bonds were, first, "the national credit of the republic solemnly pledged by the government of Peru in the name of the republic, with the general hypothecation of all its real property and revenues"; secondly, the customs dues of the republic, amounting annually to £800,000; thirdly, certain railways to be constructed and already completed, which latter had cost £2,400,000; fourthly, the surplus proceeds of guano to be imported into the United Kingdom, her colonies, the continent of Europe, and the United States, after providing for certain prior charges.

The plaintiff purchased several of these bonds, and paid for them the sum of £3,265 12s. 6d., and on each of these bonds was printed a statement that, as a guarantee for the fulfilment of the obligations contracted in the bond, the government of Peru, "under the national faith," pledged the general revenue of the republic, and especially the free proceeds of the guano in Europe and America, after the engagements which it contracted on them were covered, and bound itself, in all the contracts which it might enter into for the sale of guano, to direct the setting aside out of the proceeds of each half year a sum sufficient for the service of that half year, and, after such service was secured, to dispose freely of the surplus. The statement of claim then alleged that interest was paid by the republic on the bonds up to July, 1875, since which time no interest or

principal had been paid; that the republic had from time to time forwarded to the defendants large quantities of the guano which formed the security of the bondholders for the purpose of paying thereout, or out of the proceeds of the sale thereof, the unpaid interest on and the amortization of the bonds; that the defendants had sold parts of the guano, but refused to apply the sale moneys or the unsold guano in their possession towards payment of the unpaid interest on the bonds, and that they claimed to have some charge on these properties. The plaintiff then offered to make the republic a defendant to the action if the republic should so desire, but stated that notice of the action had been given to the republic, and that it made no claim to the guano or sale moneys in question, or to any interest therein.

The defendants, Dreyfus Brothers and J. Henry Schröder & Co., demurred to this statement of claim on the ground that the matters in question were none of them within the jurisdiction of the court, and that the plaintiff and those on whose behalf he sued had no such charge upon the guano and sale moneys referred to (if any such there were) as could be enforced by this court—at all events in the absence of the republic of Peru, which was a necessary party to the action, and a sovereign power over which the court had no jurisdiction. HALL, V.-C., allowed the demurrer, and the plaintiff appealed.

Hastings, *Q.C.*, and *Romer* for the plaintiff.

Davey, *Q.C.*, and *Ingle Joyce* for the defendants, were not called on to argue.

SIR GEORGE JESSEL, M.R.—The first and most important point we are called upon to decide is: What is the meaning of a bond given by a foreign government to secure the payment of a loan? As I understand the law, the municipal law of this country does not enable our tribunals to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is, that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign country, or even by the ordinary tribunals of the country which issued them, without the consent of the government of that country. That being so, it appears to me that the bond in question confers no right of action on the plaintiffs, and on that ground it follows that the demurrer ought to be allowed.

But I wish to say a word or two also as to the special circumstances of the case. First of all, a prospectus is set out which contains certain statements of what is about to be hypothecated; but it states also that bonds will be issued. Bonds were issued and accepted by the subscribers to the prospectus, and those bonds stated in a definite way, under seal of the financial agent of the republic of Peru, the terms on which the loan was issued. It appears to me that after that there was an end of the prospectus. A fortiori, that observation applies with respect to all bonds purchased in the market by persons who had nothing whatever to do with the prospectus. I think they are both in the same position as to that. What does the bond offer to them? In my opinion, the bond, rightly construed, and having reference to the nature of the government which issued it, did not amount to what, as regards a private individual, would be treated as a mortgage. It was:

> "As a guarantee for the fulfilment of the obligations contracted in this bond, the government of Peru under the national faith pledges the general revenue of the republic, and especially the free proceeds of the guano in Europe and America, after the engagements which it has contracted on them are covered."

"Under the national faith" means "in good faith." It also pledged the property of certain railroads, the free revenue of the working thereof, and the receipts of the Custom House of the nation.

What is the meaning of the word "engagements?" Everybody knows that the first engagement a government contracts to pay out of its own revenues is the engagement necessary to continue its own existence as a government, namely, to pay for its military and civil service to any extent the government thinks necessary. How can any rational person call that a mortgage or pledge which is preceded by the right of the pledgor to appropriate so much of the property as he pleases to any purpose he thinks desirable for his own use? It is impossible to look upon that seriously as a pledge. It is so much as the government chooses to leave after satisfying the ordinary engagements and wants of the government. There is another stipulation:

> "In all the contracts which the government may enter into for the sale of guano, or under whatever form this sale may have, it binds itself to direct that there be set aside out of the proceeds of each half year, a sum sufficient for the service of that same half year, and after such service being secured, to dispose freely of the surplus."

That is, the government binds itself to direct it. If it does not direct it, you have nothing but the national faith to appeal to.

It is said that the government of Peru has sent guano to some agents in Europe who are made defendants; that these defendants have sold the guano; that they have notice of the bonds; that they claim some charge or lien on the guano—it is not said what it is, because the plaintiffs do not know, and cannot ascertain—and that the republic makes no claim. All that is perfectly consistent with this, which for aught I know may be the case, that the Peruvian government has borrowed money to more than the extent of the proceeds of the guano from these agents, and that the agents are entitled to retain the proceeds in repayment of that loan. That loan may be contracted for the purpose of satisfying its most pressing wants and needs as a government—wants which must be satisfied in order to secure the existence of the government as such. All that is perfectly reconcilable with these statements. But even if it were otherwise, I think the same result would follow. You cannot sue the agent in the absence of the principal. The principal is the Peruvian government. You cannot sue the Peruvian government at all, and, therefore, you cannot sue its agents. There is no question of trusteeship, it is simply a case of agency. I am of opinion that the decision of the Vice-Chancellor was correct, and that it must be affirmed.

JAMES, L.J.—I am of the same opinion. It appears to me clear that the defendants are nothing but agents of the Peruvian government, and that they fill no other character whatever. On the balance of account between them and the government they may have the proceeds of the guano or other moneys available for the payment of the bonds, but that is a matter between them and the Peruvian government. You cannot sue the Peruvian government, and, in my opinion, it would be a monstrous usurpation of jurisdiction to endeavour to sue a foreign government indirectly by making its agents in this country defendants, and then saying: "You have got money of the government, and you ought to apply that." It really would be indirectly endeavouring to make the foreign government responsible to the jurisdiction of this court.

MELLISH, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Mercer & Mercer; G. M. Clements.*

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

A

CORY AND OTHERS *v.* BRISTOW

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan, Lord Blackburn and Lord Gordon), February 22, 1877]

B

[Reported 2 App. Cas. 262; 46 L.J.M.C. 273; 36 L.T. 594; 41 J.P. 709; 25 W.R. 383]

Rates—Rateable occupation—Moorings—Coal derrick permanently fixed to river bed.

Coal derricks, the property of the appellants, were, with the permission of the Conservators of the River Thames in whom was vested the bed of the river, moored to the river bed by moorings so firm and permanent that the persons in charge of the derricks could not weigh the apparatus employed to secure the derricks in the way in which ships weighed anchor, and that, if the derricks had to be moved, the cables attached to the apparatus would have to be cast off and the apparatus left in the bed of the river.

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Held: the appellants, having put down and used the moorings in their business, were in beneficial occupation of them; in view of the character of the moorings their occupation was also permanent; and, therefore, they were rateable in respect of the moorings.

Notes. Distinguished: *R.* v. *St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581; *Smith* v. *Lambeth Assessment Committee* (1882), 10 Q.B.D. 327. Considered: *Lancashire and Cheshire Telephone Exchange Co.* v. *Manchester Overseers* (1884), 14 Q.B.D. 267. Applied: *Reynolds* v. *Sculcoates Assessment Committee* (1886), 51 J.P. 87. Considered: *River Thames Conservators* v. *I.R. Comrs.* (1886), 18 Q.B.D. 279. Distinguished: *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Kingston-upon-Hull (Governor and Guardians)* (1896), 75 L.T. 127. Applied: *Gooding* v. *Benfleet U.D.C.* (1933), 49 T.L.R. 298. Considered: *Re Southern Rail. Co.* (1935), 153 L.T. 105; *Westminster Corpn.* v. *Southern Rail. Co.*, [1936] 2 All E.R. 322; *Bradshaw* v. *Davey*, [1952] 1 All E.R. 350. Referred to: *Taylor* v. *Pendleton Overseers* (1887), 19 Q.B.D. 288; *Rochdale Canal Co.* v. *Brewster* (1894), 71 L.T. 243; *Holywell Union Assessment Committee* v. *Halkyn District Mines Drainage Co.*, [1891-4] All E.R. Rep. 158; *New Liverpool Eastham Ferry and Hotel Co., Ltd.* v. *Ocean Accident and Guarantee Corpn., Ltd.* (1929), 142 L.T. 349; *John Laing & Son* v. *Kingswood Assessment Committee*, [1949] 1 All E.R. 224.

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As to rateable occupation, see 32 Halsbury's Laws (3rd Edn.) 16-34; and for cases see 38 Digest (Repl.) 479 et seq.

Cases referred to:

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(1) *Cory* v. *Churchwardens of Greenwich* (1872), L.R. 7 C.P. 499; 41 L.J.M.C. 142; 27 L.T. 150; 36 J.P. 599; 38 Digest (Repl.) 562, *494*.

(2) *Watkins* v. *Milton-next-Gravesend Overseers* (1868), L.R. 3 Q.B. 350; 37 L.J.M.C. 73; 18 L.T. 601; 32 J.P. 294; 16 W.R. 1059; 38 Digest (Repl.) 561, *493*.

I

(3) *Forrest* v. *Greenwich Overseers* (1858), 8 E. & B. 890; 120 E.R. 332; sub nom. *R.* v. *Forrest*, 27 L.J.M.C. 96; 30 L.T.O.S. 284; 4 Jur.N.S. 480; 6 W.R. 279; sub nom. *Greenwich (Churchwardens, etc.)* v. *Forrest*, 22 J.P. 130; 38 Digest (Repl.) 560, *488*.

Also referred to in argument:

R. v. *Morrison* (1852), 1 E. & B. 150; 22 L.J.M.C. 14; 20 L.T.O.S. 90; 17 J.P. 24; 17 Jur. 485; 118 E.R. 395; 38 Digest (Repl.) 561, *491*.

Allan v. *Liverpool*, *Inman* v. *Kirkdale* (1874), L.R. 9 Q.B. 180; 43 L.J.M.C. 69; 30 L.T. 93; 38 J.P. 261; 22 W.R. 330; 38 Digest (Repl.) 499, *165*.

A *London and North Western Rail. Co.* v. *Buckmaster* (1874), L.R. 10 Q.B. 70; 44 L.J.M.C. 29; 31 L.T. 835; 39 J.P. 149; 23 W.R. 16; affirmed (1875), L.R. 10 Q.B. 444; 44 L.J.M.C. 180; 33 L.T. 329; 39 J.P. 692; 24 W.R. 16, Ex. Ch.; 38 Digest (Repl.) 500, *166.*

Lancaster v. *Eve* (1859), 5 C.B.N.S. 717; 28 L.J.C.P. 235; 32 L.T.O.S. 278; 5 Jur.N.S. 683; 7 W.R. 260; 141 E.R. 288; 31 Digest (Repl.) 205, *3369.*

B *R.* v. *Leith* (1852), 1 E. & B. 121; 21 L.J.M.C. 119; 18 L.T.O.S. 221; 16 J.P. 310; 16 Jur. 522; 118 E.R. 382; 38 Digest (Repl.) 560, *487.*

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (JAMES, MELLISH and BAGGALLAY, L.JJ., and BLACKBURN, J.), in an action brought against the defendant, a clerk to the churchwardens, etc., of Greenwich, C to recover £500 for damages sustained by the plaintiffs by the seizure and conversion by the churchwardens, etc., of a ship known by the name of the *Atlas*, and for money had and received to the use of the plaintiffs.

The cause was tried before BRETT, J., in 1874, when a verdict was found for the plaintiffs subject to the opinion of the court upon a Special Case Stated whether the plaintiffs were occupiers of land in the parish of Greenwich. This D matter was argued before the Court of Common Pleas (LORD COLERIDGE, C.J., BRETT, J., and DENMAN, J.) and judgment was given for the plaintiffs (L.R. 10 C.P. 504). Against this judgment the defendant appealed and the Court of Appeal reversed the judgment of the court below (1 C.P.D. 54). Against this decision the plaintiffs now appealed.

E *Thesiger, Q.C.*, and *Patchett, Q.C.* for the appellants
Brown, Q.C., and *Oswald* for the respondent, were not called on to argue.

LORD CAIRNS, L.C.—The question raised by this appeal is whether the appellants are rateable to the relief of the poor of the parish of Greenwich under an assessment which has been made against them. In the assessment the F description of the property rated is thus given. First: "Moorings to which coal derrick and apparatus, *Atlas* No. 1, are moored to bed of river." Secondly: "Moorings to which coal derrick and apparatus, *Atlas* No. 2, are moored to bed of river." So that the subject-matter in respect of which the appellants are said to be rateable is moorings by which a coal derrick is moored to the bed of the river Thames.

G To place the facts of the case upon a distinct footing, and to distinguish them from one or two authorities which have been very much pressed upon your Lordships I will direct your Lordships' attention to the statement in the Case as to the nature of these moorings. With regard to *Atlas* No. 1 the Case states that it is

H "moored or retained at the spot where she floats in the following way, viz., by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at her head and the other at her stern."

It is also stated that, having been formerly in another position than that which she now occupies in moving her from the former position the four anchors and I the chain cables by which she had then been attached to the mooring were removed with her, that two of them were put down again in mooring her at her present moorings, and that those two are two of the four to which I have already referred. It is stated that the moorings as actually laid down for *Atlas* No. 1 consist of four anchors and two stones, and that of those anchors the two which had been brought with her from the place where she previously had been moored, are "small and of little importance."

It is not contended on the part of the respondent that any liability to be rated in respect of the soil occupied by them attaches to the appellants. I ask your

Lordships' attention to that, because it appears that there are two of these anchors which are part of the equipment of the ship, followed her from her previous moorings, and are dropped at her present moorings, and it is not said that they constitute any moorings in respect of which rateability will arise. But the other two anchors are made with only one fluke each, and are such as are never used as anchors on board ship, but only for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors, a hole was dredged out, large enough to contain the whole of the anchor, and to a depth between 7 and 8 ft. below the bed of the river. The anchor was then carefully laid on with the fluke downwards, and the hole was afterwards filled up to the level of the bed of the river with ballast, which lies all round and over the anchor, through which ballast the chain cable is led up to the derrick. Again, the two stones used are each of them about 7 ft. long by 5 ft. wide and 3 ft. thick. In order to put each of these in their places, a hole was dredged out large enough to contain the stone and about 7 ft. deep. The stone was then let down into the hole, and the hole was then filled up to the level of the bed of the river with ballast. There is about 4 ft. thickness of ballast on each stone, and about seventy tons of ballast are used in each hole, a chain cable being led up through the ballast to the derrick.

The moorings formed by these two anchors and stones are as firm moorings as it is possible to place in the river. It is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor. If the derrick had to be moved, it could only be by casting off the cables and leaving these anchors and stones behind. By whom was this work done of embedding these moorings in the soil of the river? That is thus stated in the Case:

> "Instead of themselves laying down the moorings contemplated by the [resolution of the Thames Conservators authorising this work] the plaintiffs caused and procured the necessary work to be done by the workmen of the [Conservators] and paid the said conservators the whole of the costs and charges of the materials and labour expended in and about the same."

Therefore, your Lordships will take it just as if the appellants had themselves by their own servants purchased the materials which were necessary for these moorings, and then by permission of those who could authorise them, laid the moorings down in the bed of the river.

With regard to the other moorings there is some difference in the way in which they have been made. The Case states:

> "The material position of the moorings of *Atlas* No. 2 consists of two anchors . . . which bury themselves by their own weight in the bed of the river, so that it was not necessary to dredge holes to receive them. But instead of the stones used for *Atlas* No. 1, two large fan-shaped screws have been used. These are screwed into the bed of the river to a depth of 10 ft. These screws, together with the two single fluke anchors, form moorings as permanent as those used for *Atlas* No. 1, and it would be equally impossible for the derrick using them to weigh them in the ordinary way."

These being the facts with regard to these moorings, I will ask your Lordships to observe how completely they differ from the facts in *Cory* v. *Churchwardens of Greenwich* (1). The facts of that case were these. There was a derrick which, as regards that which was above water, appears to have been of the same character as those which I have just mentioned, and it was moored in the river, but it was moored simply

> "by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at the head and the

A other at the stern. The anchors and stones were merely dropped into the river, no force being used for the purpose of fastening either anchors or stones. Before dropping the stones, a small quantity of ballast was removed in the bed of the river, so that the stones might be flat."

B Under those circumstances it was held that the moorings were not immovable from the bed of the river; that they were only, as WILLES, J., expressed it, "part of the equipment of the vessel itself"; and that, therefore, there were no moorings which could be said to be fixed to the soil of the river and to be occupied as part of the soil by the plaintiffs. That I think puts aside that authority, and will enable your Lordships, having regard to the facts which are C found in the present case, to arrive, as I think you will without hesitation, at the conclusion that you have here moorings which are clearly fixed into and bedded in the soil of the river Thames, just as much as if piles had been driven 10 ft. or 20 ft. deep into the soil, and that, if you find any person in occupation of these moorings, and that occupation is a beneficial occupation, the person so occupying is occupying hereditaments within the statutes which create charge- D ability to the assessment to the poor rate.

There arises, then, this other question. Who is the occupier of these moorings? In the first place, to whom do they belong? Unquestionably they belong to the appellants. They do not belong to the Conservators of the river; they were provided by the appellants out of their own money, and put down at their own expense. This circumstance differs the present case most materially from a case E which was much pressed in argument upon your Lordships. I mean the case within the jurisdiction of the Conservators of the river, *Watkins* v. *Milton-next-Gravesend Overseers* (2). In that case there was a coal hulk moored in the Thames for the purpose of containing coal which was put out of lighters into the hulk, and then distributed into other lighters when wanted for use. This hulk was moored in the Thames, in the parish of Milton, near Gravesend, and it F was moored in this way. There were two screw piles belonging to the Conservators driven into the bed of the river by the Conservators, and a licence was granted by the Conservators to the owner of the hulk to moor or attach his hulk to these piles so driven into the bed of the river. It does not appear that there was exclusive permission given to the owner of this hulk only, and I should have said that it might have been in the power of the Conservators either to have G attached a vessel of their own, or to have allowed some other person to attach a vessel or hulk of his, to these screw piles. I see, however, that the learned judges assumed that the matter ought to be looked at, and, therefore, I look at it, as if exclusive permission had been given to the owner of the hulk to attach, as in point of fact for several years he had attached, his hulk to the piles. But that case turns entirely upon this, that the owner of the hulk who was the person H rated was not in occupation of these moorings. The moorings were not his, but were the moorings of the Conservators, who, having these moorings belonging to themselves, gave him permission to attach his hulk to these moorings. The court held, and I will assume rightly held, because it does not bear in any way upon the facts of the present case, that that was merely permission to attach the hulk to the moorings of the Conservators, and that there was no occupation by I the owner of the hulk of the moorings of the Conservators. Whether that case be rightly decided or not, it has no bearing upon the facts of the present case, where your Lordships find moorings put down by the appellants, and used by the appellants alone, and with regard to which either you must arrive, as it seems to me, at the conclusion that they are occupied by no person whatever, or if they are occupied by anyone, that they are occupied by the appellants.

It remains to look more accurately at what is the character of the occupation of the appellants, and how it is that they come to have the occupation of these moorings. For the purpose of rating, it might, indeed, be sufficient to look

at the mere fact of occupation. They are found in occupation, and that is to them a valuable occupation, of this fixed property, and they are, therefore, rateable to the relief of the poor, even though it might turn out that their occupation is a wrongful one, or one the propriety of which they cannot justify. But when your Lordships look at the circumstances under which they have come into that occupation, it appears to me that their possession of the moorings is a rightful one, and is itself to be designated according to the most accurate expression "an occupation" of the moorings. Their occupation arises in this way. The Conservators of the Thames have under the Thames Conservancy Act, 1857, brought into their proprietorship all the rights in the bed and soil of the Thames which belonged to the Crown or were claimed by the corporation of London. They are made the guardians, as it were, of the navigation of the Thames, and the protectors of the bed and soil, for the purpose of the navigation. They have certain very wide powers given to them for the protection of the navigation, and may make byelaws for the same purpose. They have power to make piers and landing-places for the accommodation of the public, and they have powers to authorise riparian owners to make landing places, and wharves, and jetties, and to put down mooring chains and moorings for the better and more convenient enjoyment of access to their lands.

In the present case, the Conservators passed a resolution giving the appellants permission, not as a matter of favour or indulgence, but upon the proper assessment of rent by the proper officer as to the value of such permission, to occupy the moorings in accordance with the terms of that resolution, and the appellants are warned at the end of their agreement that the Conservators will retain the statutory rights given them by s. 91 of the Conservancy Act, 1857, of causing the moorings, at any time they think fit, to be removed on giving a week's notice, but subject to that right of removing them by their statutory power at a week's notice, the moorings will be allowed to remain, the rent assessed upon them being regularly paid. As I read that, putting aside the words and looking at the real substance of the transaction, I cannot look upon it as otherwise than an exercise upon the part of the Conservators of their Parliamentary powers, by giving to the appellants a right to lay down these moorings, and also a right, after the moorings are laid down, to occupy them through the instrumentality of this derrick, until, in the exercise of the same Parliamentary powers, and upon a week's notice being given, the Conservators shall remove them from their occupation.

It, therefore, seems to me that your Lordships have here a fixed property, found in the occupation of the appellants, to an occupation of which fixed property no person else can succeed on any claim, and that done by an exercise by the Conservators of powers which appear to me to provide for, and to authorise, if it were necessary to find authority for it, an occupation of that kind. On the whole, my Lords, I must say I am entirely satisfied with the unanimous judgment of the Court of Appeal, and I submit, therefore, to your Lordships that judgment should pass for the defendant in error.

LORD HATHERLEY.—I take the same view of the case as my noble and learned friend on the Woolsack. There are two questions to which, as it appears to me, we must direct our attention. First, what is the nature of the interest conferred by the agreement or permission set forth in the case before us? Secondly, when we have ascertained the character of that interest, what is the nature of the occupation which has been exercised by the appellants in this case?

As LORD CAMPBELL expresses it in *Forrest* v. *Greenwich Overseers* (3), as regards the nature of the occupation, the question is whether it be "a permanent and profitable occupation of land within the parish," which seeks to assess the person in respect of such occupation. As regards the interest of the person who

A is to be rated, it must be an interest in himself exclusively. On the first point, the argument turned upon the latter branch of the case, viz., whether the appellants had got such an occupation under this instrument as would make them liable to rating. I apprehend that in ascertaining the answer to that question, the courts have not meant by the term "exclusively" that the interest may not be determined on certain terms and conditions, but merely that the person so B occupying should have the right, unattended by a simultaneous right of any other person in respect of the same subject matter. The common illustration in cases of this character is that of a landlord of an hotel or of a lodging house, in which case, although a person sleeping at the hotel may have the exclusive use of his bedroom for the night, or the exclusive use of a sitting room during the day, or C a lodger the exclusive use of the chambers he occupies, still there is a concurrent right reserved by the landlord of the hotel or the person who lets the lodgings of using the hotel or lodging house for whatever purposes he may think fit for managing the establishment and all purposes connected with it. That is not such an occupation on the part of the lodger as would make him liable to be rated. In the present case all the argument has turned upon this, that independently of D the question whether or not this be a license or in the nature of a demise, inasmuch as there are certain byelaws which may be made from time to time by the Conservators who have given this permission, and inasmuch as by s. 91 of the Thames Conservancy Act, 1857, the power of any person to have this beneficial occupation may be determined on a week's notice, therefore there is not conferred on the appellants the exclusive possession of these mooring chains, E which they have been permitted to place in the river as is described in the Case. I apprehend, my Lords, that it would be a confusion of ideas to say that it interferes with the exclusive possession any more than the right of re-entry on the part of a landlord in certain given events could be said to interfere in any way with the right of the tenant during the time he is holding. He is in beneficial occupation for a term, though that term is limited by certain contingencies which F may possibly determine his interest at an earlier period.

What is the effect of this agreement? A permission is granted to the appellants to lay down mooring chains according to the powers vested in the Conservators pursuant to s. 58 of their Act, and when laid down they are to remain. They are to do that at their own expense, and they are to do it to the satisfaction of the officers appointed for that purpose by the Conservators, a phrase which would G not be used with respect to any work they were to do themselves. Independently of the byelaws, and independently of anything arising upon s. 91, the mooring chains are to remain, and during the whole of that time the appellants are in exclusive possession, and in permanent possession, in the sense in which that word is used in cases of this description, and in profitable possession. I cannot find anything on the face of the instrument that can intimate any doubt at all H upon that being the character of their possession, the remaining of these mooring chains of which they are to make use being secured to them, subject only to those contingencies which they have agreed upon, but the possession being full and complete until these contingencies occur. It was observed by counsel for the appellants that in *Watkins* v. *Milton-next-Gravesend Overseers* (2) the Conservators did the work, and, he said, so they did here, but that is a transparent fallacy. I They did not do any portion of the work here. It was simply that, instead of hiring another set of labourers, the appellants hired the labourers of the Conservators, and paid the Conservators for those labourers whom they so employed in execution of the work. In other words, the appellants did the work through the medium of a particular agency. That agency makes no difference in their position. The work was entirely done by the appellants, and, they having done this work, all the other conditions in the agreement were fulfilled, one of which was that the rent was to be assessed in the course provided by the Act, and it was assessed at a tolerably high figure. All that having been done, it seems to me that the

appellants became the owners, and, subject to the events which might determine the ownership under the permission, the sole and complete owners of this profitable hereditament. A

Then arises the question: Are the appellants the owners in the sense of being occupiers of land situate within the parish? I can have no doubt upon that point when I look at the nature and the character of these mooring chains. They are described in the papers before us, and the case is thereby at once distinguished from two or three of the cases which have been cited, one being with reference to a floating dock and another being with reference to an arrangement by which mooring chains were sunk, as they were sunk here, but fixed so far less than here that they were capable of being moved like other anchors, whereas here they were sunk and fixed, and would have to be hauled up by machinery fixed in a derrick. That alters the present case from the case of a floating dock, which is, as it were, a vessel floating about upon the water, and which cannot be said to have any immovability whatever in any given parish, and so can hardly be subject to rates. The circumstance in the other case that the derrick itself by its own instrumentality could haul up the stones and mooring chains just as it could any anchor reduced it again to the case of a ship of which it could not be predicated that it occupied land situated within a parish. But here we are told that the derrick cannot be removed at all except by slipping its chains and cables, because the stones and the rest of the apparatus are so fixed in the bed of the river as to prevent their being hauled up. The circumstances indicate the intention from the very first of all the parties to the agreement that it should be a fixed and permanent mooring chain subject only to such contingencies as might arise in the execution of the works of the Conservators if anything should occur to require its removal. B C D E

I think that not one of the cases has been in the slightest degree brought up to such a case as we have here before us. I cannot have any doubt whatever that there is a permanent beneficial interest liable to be divested in certain given contingencies as I have described, that it is a valuable and exclusive interest, and that it is an interest situate in the bed of the river within the parish of Greenwich, and, therefore, that it is liable to be rated. F

LORD O'HAGAN.—In this case there is no real conflict about legal principles. All the judges of the courts below have agreed as to the grounds of rateability. The occupation to which it is attached must be an actual and exclusive and a profitable occupation. The only question is whether the appellants had such an occupation? I think they clearly had, and were, therefore, liable to be rated. G

It is not necessary to consider the nature of the powers of the Conservators for the purpose of the argument; but, if it were, I have no doubt that they acted within those powers in their dealings with the appellants. Under s. 50 of the Thames Conservancy Act, 1857, they had vested in them all the interests of the corporation of London and the Crown in the bed and soil of the Thames, with authority to make jetties, piers, and landing places, and to permit the construction of such moorings as are the subject of our inquiry. Exercising their statutable powers they entered into a bargain that for certain considerations the appellants should have liberty to plant their moorings in the bed and soil of the river with an understanding that if the Conservators should at any time find it inexpedient to permit these moorings to remain they might cause their removal under s. 91 of the Act by giving a week's notice. The appellants proceeded with their work, and completed a large and costly erection, digging down several feet in the bed of the river, filling the excavation with great stones, passing heavy chains through them, and piling on the whole some seventy tons of ballast. All this was done with their own money, and under their own control, and the erection so completed was their own property. The Conservators did not spend a penny, or do an act in the course of construction, or meddle in any way with it when it was com- H I

A pleted; it remained in the hands and under the full dominion of those who had created it, subject to the right of removal of the Conservators when they might find it desirable to fulfil the statutable conditions for that purpose.

In this state of undisputed facts it appears to me that the appellants had an occupation of a very real and substantial kind, and an occupation which was not merely actual but rightful, fairly purchased and warranted by law. If the occupa-
B tion was not in them it was in nobody, and I cannot, in my view of the circumstances, concur with some of the learned judges in holding that the occupation, actual or constructive, remained in the Conservators. If by their permission a great stage had been put upon piles driven into the river's bed for 20 ft. or 30 ft., to which the appellants could alone have access, as they alone had erected it, or if a great house had been built with the same licence and in the same way,
C having its foundation in the river, the Conservators might as well have been called the occupants of both, though neither belonged to them, and upon neither could they have entered for a moment. There was, therefore, in my judgment, an actual occupation in the appellants, and if their occupation was actual, it was exclusive. The licence or permission, call it what you will, under which
D the moorings were created, was not to be capriciously determined at any instant, or without the formal notice prescribed by the statute, and until that notice was given, the Conservators, if they had ventured to intrude upon them, would have acted illegally and been liable to answer in an action. For the time, and subject to the conditions, the appellants were exclusive occupants as completely as if their occupation had been of their own fee simple estate. If the occupation was actual
E and exclusive, it was confessedly profitable, and so had all the qualities needful to render the occupants subject to the rate.

I need add nothing as to the authorities cited, as not one of them appears to me to sustain the appellants' contention. Their counsel ably urged the public importance of preserving to the Conservators the control of the river, and the inconvenience of the construction which would recognise the exclusive occu-
F pancy of the appellants. But the contract is clear and specific, and the effect of its express provisions cannot be destroyed by any allegation of its interference with the interests of commerce. The Conservators had a perfect legal right to do what they did; their bargain equally bound them and those with whom they dealt, and we must accept its terms and their consequences. Besides, unless the provision as to this statutable notice was a mere nullity—and this has not been
G asserted—it undoubtedly limited and suspended the control of the Conservators over the bed of the river, and that result, if an evil one, could not be avoided on either view of the case. On the whole I am of opinion that the judgment of the Court of Appeal ought to be sustained.

LORD BLACKBURN.—I am of the same opinion. Neither the Court of
H Common Pleas nor the Court of Appeal entertained any doubt that there was an occupation of land here, so that the appellants might be liable to be rated.

Upon that I will only make one remark to show that *Cory* v. *Churchwardens of Greenwich* (1), in which case the Court of Common Pleas, on this very same rate and very same derrick, decided that it was not rateable, is really not in point of law in conflict with the decision of the present case, either as it was determined
I by the court below, or as it will now be affirmed by your Lordships. The manner in which the case was raised was different, and that made a difference in the result. In *Cory* v. *Churchwardens of Greenwich* (1) the churchwardens went before the stipendiary police magistrate and asked him to enforce the rate. Upon hearing the case, he thought that Messrs. Cory were rateable, and he did enforce the rate. Then he was required to state a Case for the Common Pleas, which Case he stated, giving powers (I suppose by consent of the parties) to the Court of Common Pleas to draw all inferences of fact from the Case so stated. How they came to be so stated as they were I do not know, but on the facts as appearing

upon that Case, the Court of Common Pleas, as then informed, drew the inference of fact that this derrick was no more occupying the land than any ship whose anchor has been dropped upon the ground and rides at anchor can be said in the legal sense of the term to have an occupation of the ground. If that representation of facts was right, the conclusion of law would follow that Messrs. Cory did not occupy any land and could not be rated. That much was clear. Whether or not that conclusion was properly drawn from the evidence, as stated by the magistrate, is not a question now before your Lordships, and we need not form any opinion upon it. If the representation of fact was correctly made, the conclusion of law that the Messrs. Cory were not rateable would be perfectly irresistible. But now, my Lords, the parties have raised the question in a different way. The magistrate, after the decision of the Court of Common Pleas, of course refused to grant a warrant of distress, but the overseers had a right under the Justices' Protection Act, 1848, s. 5 (Jervis's Act) to apply for a rule in lieu of a mandamus to raise the question before a jury, and, ultimately, as they have done here before, the final Court of Appeal. That course having been taken, and an action having been brought, the facts were more accurately determined, and what your Lordships have now to do is to see what is the effect of the facts as found and stated at the trial, not as found and stated by the magistrate previously. Taking the facts as they are found now, I apprehend that no one of your Lordships could for a moment doubt that here there was a complete occupation of the soil (whoever it was that occupied it) by the derrick occupying by means of those moorings which were fixed in the soil, I think I may say quite as permanently as the foundations of an ordinary house would be fixed. No doubt they were capable of being removed and taken up, and so the foundations of a house would be, still it is clear that they were fixed and occupying the soil.

The only other question was: Who was the occupier? Were the appellants merely persons having an easement without occupying, or were they the rightful occupiers? Upon that I do not think it necessary, nor would it be becoming in me, as I was one of the judges in the court below, to say more than that I have not seen any reason to change the opinion which I then formed as one of the judges of the Court of Appeal, viz., that the appellants are the occupiers, and that as such occupiers they are properly rateable.

LORD GORDON concurred.

Appeal dismissed.

Solicitors: *Mark Shepherd; W. Bristow.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

STEEL AND ANOTHER *v.* STATE LINE STEAMSHIP CO.

[House of Lords (Lord Cairns, L.C., Lord O'Hagan, Lord Selborne, Lord Blackburn and Lord Gordon), July 19, 20, 1877]

B [Reported 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516]

Shipping—Seaworthiness—Implied warranty—Fitness of ship for purpose specified in contract of carriage of cargo.

Where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading or in any other form, there is a duty on the part of the C person who furnishes or supplies the ship, unless something be stipulated which prevents it, that the ship shall be fit for its purpose, and the law will imply a warranty to that effect.

Notes. Applied: *The Marathon* (1879), 40 L.T. 163; *The United Service* (1883), 8 P.D. 56; *Tattersall* v. *National Steamship Co.* (1884), 12 Q.B.D. 297; *The Glenfruin*, [1881-5] All E.R. Rep. 461. Distinguished: *The Laertes* (1887), 12 P.D. 187. Applied: *Gilroy* v. *Price*, [1893] A.C. 56. Considered: *Hedley* v. *Pinkney Steamship Co.*, [1894] A.C. 222; *Dobell* v. *Steamship Rossmore Co., Ltd.*, [1895-9] All E.R. Rep. 885. Applied: *The Maori King* v. *Hughes*, [1895] 2 Q.B. 550; *Queensland and National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (1898), 67 L.J.Q.B. 402. Considered: *Rathbone* v. *McIver*, [1903] 2 K.B. 378; *The Schwan*, E [1909] A.C. 450; *Kish* v. *Taylor Sons & Co.*, [1911-13] All E.R. Rep. 481; *The Christel Vinnen*, [1924] All E.R. Rep. 197; *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co.*, [1924] All E.R. Rep. 135; *Aslan* v. *Imperial Airways, Ltd.*, [1933] All E.R. Rep. 567; *Elof Hasson Agency, Ltd.* v. *Victoria Motor Haulage Co.* (1938), 54 T.L.R. 666; *The Stranna*, [1938] 1 All E.R. 458. Referred to: *Hyman* v. *Nye*, [1881-5] All E.R. Rep. 183; *The Undaunted* (1886), 55 L.J.P. 24; *Hamilton, Fraser* F *& Co.* v. *Pandorf & Co.*, [1886-90] All E.R. Rep. 220; *The Carron Park* (1890), 15 P.D. 203; *The Vortigen*, [1895-9] All E.R. Rep. 387; *Morris and Morris* v. *Oceanic Steam Navigation Co.* (1900), 16 T.L.R. 533; *Ajum Goolam Hossen* v. *Union Marine Insurance, Hajee Cassim Joosub* v. *Ajum Goolam Hossen*, [1901] A.C. 362; *Rowson* v. *Atlantic Transport Co.* (1902), 72 L.J.K.B. 87; *Upperton* v. *Union Castle Mail Steamship Co.* (1903), 89 L.T. 289; *The Northumbria* (1906), 95 L.T. 618; *Nelson & Sons,* G *Ltd.* v. *Nelson Line (Liverpool)* (1907), 96 L.T. 402; *The Europa*, [1904-7] All E.R. Rep. 394; *The West Cock*, [1911] P. 208; *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steamship Co.*, [1912] 1 K.B. 229; *Ingram and Royle, Ltd.* v. *Services Maritimes du Tréport* (1913), 109 L.T. 733; *Liebig's Extract of Meat Co.* v. *Mersey Docks and Harbour Board and Nelson*, [1918] 2 K.B. 381; *Cosmopolitan* H *Shipping Co. (Inc.)* v. *Hatton and Cookson, Ltd. (Liverpool)* (1929), 13 L.T. 296; *Fiumana Societa Di Navigazione* v. *Bunge & Co.*, [1930] 2 K.B. 47; *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*, [1931] All E.R. Rep. 577; *The Napier Star*, [1939] P. 330; *Smith Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405.

As to seaworthiness, see 35 Halsbury's Laws (3rd Edn.) 401-410; and for cases I see 41 Digest 428-435.

Cases referred to:

(1) *Lyon* v. *Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 41 Digest 472, *3039*.

(2) *Gibson* v. *Small* (1853), 4 H.L.Cas. 353; 21 L.T.O.S. 240; 17 Jur. 1131; 1 C.L.R. 363; 10 E.R. 499, H.L.; 17 Digest (Repl.) 39, *466*.

(3) *Readhead* v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead* v. *Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628, Ex. Ch.; 8 Digest (Repl.) 75, *496*.

(4) *Kopitoff* v. *Wilson* (1876), 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp.M.L.C. 163; 41 Digest 473, *3045*.

(5) *Phillips* v. *Clark* (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, *2664*.

(6) *Moes, Moliere and Tromp* v. *Leith and Amsterdam Shipping Co.* (1867), 5 Macph. (Ct. of Sess.) 988; 39 Sc. Jur. 546; 41 Digest 442, *e*.

Also referred to in argument:

Merchants Trading Co. v. *Universal Marine Co.* (1870), cited in L.R. 9 Q.B. at p. 596; 2 Asp.M.L.C. 431, n., C.A.; 29 Digest (Repl.) 233, *1744*.

Stanton v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 21 W.R. 71; 1 Asp.M.L.C. 449; affirmed (1874), L.R. 9 C.P. 390; 30 L.T. 643, Ex. Ch.; affirmed (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp.M.L.C. 23, H.L.; 41 Digest 303, *1651*.

Dudgeon v. *Pembroke* (1874), L.R. 9 Q.B. 581; 43 L.J.Q.B. 220; 31 L.T. 31; 22 W.R. 914; 2 Asp.M.L.C. 323; on appeal (1875), 1 Q.B.D. 96; 34 L.T. 36; 3 Asp.M.L.C. 101, Ex. Ch.; reversed (1877), 2 App. Cas. 284; 46 L.J.Q.B. 409; 36 L.T. 382; 25 W.R. 499; 3 Asp.M.L.C. 393, H.L.; 29 Digest (Repl.) 186, *1248*.

McManus v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327; 28 L.J.Ex. 353; 33 L.T.O.S. 259; 24 J.P. 4; 5 Jur.N.S. 651; 7 W.R. 547; 157 E.R. 865, Ex. Ch.; 8 Digest (Repl.) 63, *416*.

Carr v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Exch. 707; 7 Ry. & Can. Cas. 426; 21 L.J.Ex. 261; 19 L.T.O.S. 124; 17 Jur. 397; 155 E.R. 1133; 8 Digest (Repl.) 146, *931*.

Daniels v. *Harris* (1874), L.R. 10 C.P. 1; 44 L.J.C.P. 1; 31 L.T. 408; 23 W.R. 86; 2 Asp.M.L.C. 413; 29 Digest (Repl.) 221, *1623*.

Smith v. *Kirby* (1875), 1 Q.B.D. 131; 24 W.R. 207; 41 Digest 915, *8063*.

Allday v. *Great Western Rail. Co.* (1864), 5 B. & S. 903; 5 New Rep. 9; 34 L.J.Q.B. 5; 11 L.T. 267; 29 J.P. 99; 11 Jur.N.S. 12; 13 W.R. 43; 122 E.R. 1066; 2 Digest (Repl.) 368, *470*.

Appeal by the pursuers in the action from a decision of the First Division of the Court of Session in an action by the pursuers against the respondents, the State Line Steamship Co. in respect of damage to a cargo of wheat shipped under a bill of lading of which the pursuers were endorsees.

The respondents were the owners of a line of steamers trading between New York and Glasgow. One of their steamers, the *State of Virginia*, sailed from New York with a cargo of wheat. On the voyage, after the ship had been five days at sea, she was found to be leaking very fast, and it was discovered that one of the orlop-deck ports was unfastened. The wheat was much injured by the sea-water, and the appellants, who were the endorsees of the bill of lading, brought this action to recover the damage they had sustained. The bill of lading contained these exceptions,

> "bursting of bags, risks of craft or hulk, trans-shipment, explosion, heat, or fire at sea in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other perils of the seas, rivers, navigation, or land transit, of whatever nature or kind soever, and howsoever caused, excepted."

The case was tried before Lord Young, when the jury found a special verdict in the following terms:

> "That the wheat was shipped to be conveyed according to the terms of the bill of lading; that the wheat was carried to Glasgow and delivered to the pursuers; that when delivered it was not in the like good order and

A condition in which it was shipped; that through the negligence of some of the crew one of the orlop-deck ports of the said steamship was insufficiently fastened, and that in consequence the said sea-water was thereby admitted to the hold after the ship had been five days at sea; that as the said ship was loaded, the said port was situated about a foot above the water line, and that if properly fastened by means of the screws thereto attached the B said port would have been watertight throughout the voyage; that the said sea-water was not admitted to the hold till the morning of Sept. 6, and that for the first seven days of the voyage the weather encountered was substantially as set forth in the mate's log, which forms part of the process."

Upon these findings the First Division of the Court of Session (the Lord C President (LORD INGLIS) and LORDS DEAS, MURE, and SHAND), entered a verdict for the shipowners (the defenders). The pursuers appealed to the House of Lords.

Benjamin, Q.C., and *Watkin Williams, Q.C.*, for the appellants.
Cohen, Q.C., and *J. C. Mathew* for the respondents.

D **LORD CAIRNS, L.C.**—There is some difficulty in this case by reason of the course which it has taken in the court below; but I think, when your Lordships consider the whole of the facts, so far as they appear, and the arguments which your Lordships have heard, there cannot be much doubt as to the result at which your Lordships should now arrive.

E The question arises upon the shipment of a considerable quantity of wheat at New York in one of the State Line steamers named the *State of Virginia*. The appellants are the endorsees of the bill of lading of that wheat, but, having regard to the provisions of the Bills of Lading Act, 1855, they are onerous endorsees, and they stand in the position of the original shippers. They have whatever right of action the original shippers had, and I may speak of them F as if they had been in point of fact the shippers of the wheat. On the shipment of the wheat, a bill of lading was given, and I will in the first place direct your Lordships' attention to that bill of lading. It contains an affirmative portion, and also a portion which we may call a negative portion, or rather a portion which, by way of exception and curtailment of some antecedent liability created by the earlier portion, endeavours to protect the shipowners from certain G consequences. The affirmative part of the bill of lading states that the wheat in question, marked and numbered as in the margin, has been shipped and is

> "to be delivered from the ship's deck, where the ship's responsibility shall cease, in the like good order and condition, at the aforesaid port of Glasgow."

H It is an engagement, therefore, to carry to and to deliver at a certain port in this kingdom the wheat so shipped on board.

What is the meaning of the contract created by those words, supposing they stood alone? I think there cannot be any reasonable doubt entertained that this is a contract which not merely engages the shipowner to deliver the goods in the condition mentioned, but that it also contains in it a representation and I an engagement—a contract by the shipowner that the ship in which the wheat is placed is at the time of her departure reasonably fit for accomplishing the service which he engages to undertake and perform. Reasonably fit to accomplish that service the ship cannot be unless it is seaworthy. By "seaworthy" I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic. If there were no authority upon the question, it appears to me that it would be scarcely possible to arrive at any other conclusion than that this is the meaning of the contract.

I took the liberty of asking the learned counsel for the respondents whether they were prepared to say that, if the owner of goods engaged room in a ship of this kind and on bringing his goods alongside at the time the ship was ready for departure found that it was not seaworthy, he could not refuse the fulfilment of his promise to put his goods on board, and whether, on the other hand, he could not maintain proceedings against the owner of the ship for not having accommodation for his goods in a ship that was fit to carry them. I did not understand the learned counsel for the respondents to say that that was not the relative position of the owner of the goods that I supposed and the shipowners—that, on the one hand, the owner of the goods was entitled to refuse to put his goods on board, and, on the other hand, the owner of the ship did not incur liability by not having a ship fit to fulfil the engagement he had entered into. But if that is so it must be from this, and only from this, that in a contract of this kind there is implied as part of the contract an engagement that the ship shall be reasonably fit for performing the service which she undertakes. In principle I think there could be no doubt that this would be the meaning of the contract, but having regard to authority it appears to me that the question is really concluded by authority. It is sufficient to refer to *Lyon* v. *Mells* (1), in the Court of King's Bench, in the time of Lord Ellenborough, C.J., and to the very strong and extremely well-considered expression of the law which fell from Lord Wensleydale, when he was a judge of the Court of Exchequer, and was advising your Lordships' House in *Gibson* v. *Small* (2).

That being, as I submit to your Lordships, the effect of the earlier part of the bill of lading, it then becomes material to consider, still upon the construction of the bill of lading, what is the effect of the latter part, the qualified or exceptional part of the bill of lading. It is not very happily expressed as regards its grammar and the collocation of the words, but I will assume in favour of the respondents that everything that is mentioned is meant to be matter in respect of which there is to be no liability on the part of the shipowner. But it appears to me that everything which is mentioned is matter subsequent to the sailing of the ship with the goods on board. There is mentioned there "the bursting of bags," and "risks of craft or hulk"—which was found by the verdict, which I shall afterwards have to refer to, not to mean the risk of the ship herself—

> "transhipment, explosion, heat or fire at sea in craft or hulk, or on shore, boilers, steam or machinery, or from the consequences of any damage or injury thereto, however such damage or injury may be caused, collision, straining, or other perils of the seas, rivers, navigation, or land transit, of whatever nature or kind soever and howsoever caused, excepted."

The only attempt to give any of these words a meaning which would refer them to what happened antecedent to or at the time of the departure of the ship was to construe the words "perils of the seas . . . however caused," so as to make them point to unseaworthiness ending in a loss at sea. But it appears obvious to me that what is here referred to as "perils of the seas" is, as described, something which happens on the transit, whether land or sea transit, and that, of course, does not commence till the ship leaves the port. Therefore, if it be the case, as I submit to your Lordships it is, that in the earlier part of the bill of lading there is an engagement that the ship shall be reasonably fit to perform the service which she undertakes, there is, in my opinion, nothing in the latter part of the bill of lading which qualifies that engagement.

That being the view of the construction of the bill of lading which I shall submit to your Lordships, let me proceed to apply it to what is found to have occurred in the present case. With regard to the pleadings, there is a statement in art. 5 of the condescendence of the pursuers (the appellants) that,

A "when the said vessel left New York she was not in a seaworthy condition in respect of one of her side ports being open, or, at least, not sufficiently secured or fastened to prevent the influx of water into the hold; and the said port was allowed to remain open, or insecurely fastened, through the gross carelessness of those in charge of the vessel, and the result was that water flowed into the hold through the said port; and so little care was taken of the cargo that there were about fifteen feet of water in the hold before the fact of the leakage was discovered, and it is the damage done to the wheat in consequence of this influx of water which forms the subject of complaint in the action."

C There is a denial to that, but it is explained that on Sept. 6, when the *State of Virginia* was about 1100 miles from New York, one of the side ports was burst open to some extent by the heavy seas which she encountered, and water overflowed into the hold through the said port. That will show your Lordships sufficiently the character of the allegations on the one side and on the other on that point, and to that I may add, in the statement on the part of the pursuers it is said, "when the said vessel sailed from New York on D the said voyage she was unseaworthy," and to that there is a denial that the vessel was unseaworthy when she sailed from New York. There is one statement to which I will refer in the condescendence; but, upon the general averment and denial, the first plea in law for the pursuers, before the additional pleas, was this:

E "The pursuers having sustained loss and damage to the extent aforesaid through the unseaworthiness of the defenders' vessel, and the failure of the defenders to fulfil the said contract of carriage and safe custody, are entitled to decree for the sum sued for with interest and expenses."

F The case came on for a jury trial in Scotland, and the jury found on the issue a special verdict. Looking to this special verdict, and looking to that alone for the facts with which we have to deal, it appears to me that if our attention was confined merely to that special verdict there would be very great incertitude and ambiguity as to what the facts really were. Whether the ship at the time she left New York was or was not in a condition fit to perform the service which she had undertaken with reference to these goods, whether she was or was not G "seaworthy" in the sense in which I have used that term, was a question of fact, and in the view which I have taken of the construction of the bill of lading, it was a question of fact which lies at the very root of this case. But your Lordships do not find in the special verdict, as I read it, any answer whatever to that question of fact. And although the Court in Scotland thought themselves able to apply the verdict, and to enter upon it a judgment for the defenders, H and although the appellants in the first instance asked your Lordships to reverse that judgment and to enter a judgment for them, I think it has come to be admitted in argument on both sides that, if the construction of the bill of lading be such as I have submitted to your Lordships it is, there is not here any finding upon the question of fact whether the ship was or was not seaworthy upon which judgment can be entered either way. Therefore, I fear, I although I regret the result, that nothing can be done by your Lordships now but remit the case to the Court of Session in Scotland, and to direct that a new trial shall be had.

The judgment of the Court of Session was unanimous, but I do not see that in point of fact there was any opinion expressed by the learned judges in that judgment which is at variance with the law as I understand it, and as I have endeavoured to submit it to your Lordships. I do not understand that any of those learned judges would have said that, if the question was: What is the construction of the affirmative part of this bill of lading, they would have

placed that construction on any other footing than that on which I have endeavoured to place it. But what it appears to me was the error of those very learned persons was this, that although at one part of the judgment they appear to recognise the construction which I have mentioned of the earlier part of the bill of lading, they seem afterwards to have been entirely occupied with the other part of the bill of lading, and the exceptions in it, and to have assumed that those exceptions would be sufficient to wipe out or to destroy what was the stipulation in the earlier part of the bill of lading.

I say that for this reason. I find that the Lord President in the earlier part of his judgment expressed himself thus:

> "I think it is conceded on the part of the shipowners, the defenders here, that the object of this clause was to save them from all liability implied in the obligation to deliver in like good order and condition, except a liability which might arise from the unseaworthiness of the vessel. If they provided a seaworthy ship, tight, staunch, and strong, well manned and equipped for the carriage of goods, they say that in consequence of the manner in which the clause of excepted risks is conceived they are free from all 'other liability.' "

I understand the Lord President to recognise and to approve of that which he calls a concession in argument on the part of the shipowners, and I understand it to be a statement by the Lord President that the shipowners were bound to provide a "seaworthy ship, tight, staunch, and strong, and well manned, and equipped for the carriage of goods." That is simply the proposition which I have submitted to your Lordships to be correct in point of law. I do not understand that any of the learned judges differed from that proposition, and I again say that it appears to me that the only miscarriage which took place was that, having so laid down their views of the law, they did not apply it correctly with reference to the verdict which they had before them and with reference to the exceptions in the bill of lading. I submit, therefore, to your Lordships that this appeal must be allowed to the extent of reversing the interlocutor of the Court of Session, and remitting the case with a declaration that there ought to be a new trial of the case.

LORD O'HAGAN concurred.

LORD SELBORNE.—I also entirely agree with my noble and learned friends as to the law to be applied to this case, and also as to the construction of the bill of lading. It was suggested that the bill of lading covered risks by way of exception, some of which might occur during the loading of the cargo on board, and the stowing of it in the ship. I cannot agree to that construction. It appears to me to be clear on the face of the bill of lading that it represents the goods as already shipped. It is given in duplicate in the ordinary course, and I also find that it is expressly stated by the pursuers in their condescendence that the wheat had been loaded on board the ship before and on the day which is the date of the bill of lading. I, therefore, quite agree that all the perils which were excepted were perils subsequent to the loading of the wheat on board the ship, and that they are capable of, and ought to receive, a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken.

I also concur as to the course which it is necessary for your Lordships to take, looking to the issues raised, and to the nature of the special verdict, which are necessary for the satisfactory determination of the case. My noble and learned friend on the Woolsack has submitted his view of the opinions given in the Court of Session. I must own that mine is upon that point not

precisely the same. What I should myself collect is that the learned judges, applying themselves to the special verdict alone, and dealing with the case as if they had nothing to do but necessarily to enter a judgment for the one party or for the other, found the special verdict to be insufficient to raise a case of anything more than negligence, default, or error in judgment on the part of the persons in the service of the ship; and as, consistently with the special verdict, that might have been during the course of the voyage, and was not found otherwise. I should conjecture that the learned Lords thought that the onus probandi upon that point lay with the pursuers, and not with the defenders, and on that ground entered the judgment in the defenders' favour. I agree that that is not a satisfactory way of dealing with the case.

LORD BLACKBURN.—I entirely agree in the course which is proposed to be taken in sending the case down for a new trial on the ground that the special verdict does not really find the cardinal fact upon which it depends whether the judgment ought to be for the respondents or for the appellants.

I take it to be quite clear that, where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be "seaworthy;" and I think also that in marine contracts, contracts for sea carriage, that is properly called a "warranty," not merely that they should do their best to make the ship fit, but that the ship should really be fit. I think it is impossible to read the opinion of LORD TENTERDEN, as early as the first edition of ABBOTT ON SHIPPING, at the very beginning of this century, of LORD ELLENBOROUGH following him, of PARKE, B., in *Gibson* v. *Small* (2), without seeing that these three great masters of marine law all concurred in that; and their opinions are spread over a period of forty or fifty years. I think, therefore, that it may fairly be said that it is clear that there is such a warranty, or such an obligation in the case of a contract to carry on board ship.

In *Readhead* v. *Midland Rail. Co.* (3), which was the case of a contract to carry passengers upon land, there had been a good deal of reasoning in the Exchequer Chamber to the effect that the obligation there was to furnish a carriage which was fit as far as they could reasonably make it, which is a different kind of contract from that which is now supposed. In *Kopitoff* v. *Wilson* (4), where I had directed the jury that there was an obligation, I did certainly conceive the law to be that the shipowner in such a case warranted the fitness of his ship when she sailed, and not merely that he had loyally, honestly, and bona fide endeavoured to make her fit. The court, when it came to be considered, had to see whether that did not clash with the reasoning in *Readhead* v. *Midland Rail. Co.* (3), and we all agreed that it was immaterial to decide whether it did or not, because there was nothing in that case to raise the question whether it was an absolute warranty, or merely a duty to furnish it as far as could be properly done. Nor do I think that that question would really arise here; for here, if there was such a defect as would make the ship not reasonably fit to carry the wheat across the Atlantic, there can be no doubt that it must have been owing to negligence on the part of the shipowners or of some of their servants, and it cannot be said to have arisen from that kind of latent defect which no prudence could perceive.

Taking that to be so, it is settled that in a contract where there are excepted causes—a contract to carry the goods, excepting the perils of the seas, and excepting breakage, and excepting leakage—it has been decided that there still remains a duty upon the shipowner not merely to carry the goods, if not prevented by the excepted perils, but also that he and his servants shall use

due care and skill about carrying the goods, and shall not be negligent. That has been determined in several cases, of which *Phillips* v. *Clark* (5) is the leading one, and that decision has been followed in several cases. In *Moes, Moliere and Tromp* v. *Leith and Amsterdam Shipping Co.* (6), decided in Scotland, the same thing seems to have been determined, namely, that where there is such an exception, if the shipowner or his servants are guilty of negligence producing the misfortune, they are liable on that account. I think myself that the right and proper way of enunciating it in such a case would be to say that, if, owing to the negligence of the crew, the ship sinks while at sea, although the things perish by a "peril of the sea," still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception. They may protect themselves against that, and they do so in many cases by saying that these perils are to be excepted whether caused by negligence of the ship's crew or not. When they do so, of course, that no longer applies.

I think that exactly the same considerations would arise here as to the implied duty, which, though not expressly mentioned, arises by implication of law on the part of the shipowner, to furnish a ship really fit for the purpose. If that duty is neglected, and if in consequence of that neglect of duty the ship sinks, as it did in *Kopitoff* v. *Wilson* (4), the shipowner is liable. If, as is alleged here, a port gives way, and the seas come in and wet the cargo, and if it is a consequence of the ship having started unfit that the mischief is produced, it seems to me to be exactly like *Phillips* v. *Clark* (5), where negligence not provided for by the contract occasioned the damage which it was said was covered by an exception, but which the court determined was not an exception of which the shipowners could avail themselves, seeing that the damage was brought about by their negligence. I perfectly agree with what has been said on the construction of the contract in this case—that it does not provide for this case of an unseaworthy ship producing the mischief. The shipowners might have stipulated if they had pleased: "We will take the goods on board, but we will not be responsible though our ship be ever so unseaworthy—look out for yourselves. If we put your goods on board a rotten ship that is your look out; you shall not have any remedy against us if we do." They might have so contracted. Or the shipowner might have said: "I will furnish a seaworthy ship, but I stipulate that, although the ship is seaworthy, and although I have furnished it, I shall only be answerable for the vitiation of your policy of insurance, if you have one, in case the ship turns out not to be seaworthy, and I will protect myself against any perils of the seas, though the loss should be caused by that unseaworthiness." They might have contracted in that way.

I think that, when this contract is fairly looked at, it appears that they do not so contract as to apply it to this case. I think that they have here sufficiently expressed in the contract that they will not be responsible or answerable for the consequences of a loss by perils of the seas, or any of the excepted perils, even though it may be produced by the negligence of the mariners. I think that they have done that, and that is what the Court of Session appear to have thought was all that it was necessary to say. But the court below lost sight of the fact that if there was a want of seaworthiness in the ship—using the common phrase, which is used as meaning if the duty to make the ship reasonably fit for the voyage had not been fulfilled—if there was a want of seaworthiness in that sense, and that want of seaworthiness caused the loss, the contract did not protect the shipowners, and, therefore, it was incumbent upon them to see whether there was a want of seaworthiness, and whether it did produce the loss.

I cannot see that the special verdict in this case finds, either one way or the other, whether or not there was a want of seaworthiness or reasonable fitness

to encounter the ordinary perils of the voyage. That is left quite ambiguous and uncertain. I quite agree that it was a question of fact for the jury whether or not the vessel was made fit to encounter those ordinary perils. That being so, I think it is impossible to decide either way, and consequently the case must be remitted to the Court of Session to ascertain whether or no the ship was seaworthy at the time she sailed, and whether the loss was occasioned by the want of seaworthiness, if such there was.

LORD GORDON concurred.

Case remitted to Court of Session for new trial.

Solicitors: *Simson, Wakeford & Simson, for J. Henry*, Edinburgh; *Hollams, Son & Coward*, for *Webster, Will & Ritchie*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HAMMOND *v.* ST. PANCRAS VESTRY

[COURT OF COMMON PLEAS (Brett and Denman, JJ.), April 16, 18, 1874]

[Reported L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826]

Sewer—Overflowing—Damage to adjacent property—Obstruction in sewer—Duty of local authority to keep sewer open—Imposition of absolute duty—Need for clearest words.

Where a statute imposes on a public body a duty in such terms that the enactment may be construed either as imposing an absolute duty or as imposing a duty to manage with reasonable care and skill the statute should be given the latter construction. If the legislature intend to impose on a public authority an absolute duty to avoid an injury which by no skill on their part can be avoided, that intention must be expressed in the clearest possible terms.

By s. 72 of the Metropolis Management Act, 1855, a vestry constituted under the Act "shall cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied . . ." Owing to a sewer, which was vested in the defendants, having become blocked, its contents overflowed into the plaintiff's premises, causing, he alleged, damage to the premises and injury to his health. In an action by him for a declaration that the defendants were liable for the damage and injury he had suffered and for damages, the jury found that the defendants had not known of the obstruction before the overflow occurred and that they could not have known of it by the exercise of reasonable care.

Held: section 72 did not impose on the defendants in clear terms an absolute duty to keep the sewer open; therefore, it must be construed as imposing a duty to exercise reasonable care and skill, and, in view of the finding of the jury that the exercise by the defendants of reasonable care would not have led to the discovery of the obstruction, the action failed.

Notes. Section 72 of the Metropolis Management Act, 1855, has been replaced by s. 21 of the Public Health (London) Act, 1936 (15 HALSBURY'S STATUTES (2nd Edn.) 887).

Considered: *Fleming* v. *Manchester Corpn.* (1881), 44 L.T. 517. Followed: *Bateman* v. *Poplar District Board of Works (No. 2)* (1887), 37 Ch.D. 272. Considered: *Stretton's Derby Brewery Co.* v. *Derby Corpn.*, [1891-4] All E.R. Rep. 731. Distinguished: *Price* v. *South Metropolitan Gas Co.* (1895), 65 L.J.Q.B. 126. Applied:

Baron v. *Portslade-by-Sea Urban Council* (1899), 68 L.J.Q.B. 949; *Wilson's Music and General Printing Co.* v. *Finsbury Borough Council*, [1908] 1 K.B. 563. Considered: *Blundy, Clark & Co.* v. *London and North-Eastern Rail. Co.*, [1931] All E.R. Rep. 160. Distinguished: *J. and J. Makin, Ltd.* v. *London and North-Eastern Rail. Co.*, [1943] 1 All E.R. 362. Applied: *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923. Referred to: *Humphries* v. *Cousins* (1877), 2 C.P.D. 239; *Bateman* v. *Poplar District Board of Works* (1886), 33 Ch.D. 360; *Queenborough* v. *Smeed, Dean* (1904), 68 J.P. 244; *North Western Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1935] All E.R. Rep. 196; *Read* v. *Croydon Corpn.*, [1938] 4 All E.R. 631; *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1953] 1 All E.R. 179.

As to the duty of local authority to maintain sewers, see 31 HALSBURY'S LAWS (3rd Edn.) 209, 240; and for cases see 41 DIGEST 19 et seq.

Case referred to:

(1) *Meek* v. *Whitechapel Board of Works* (1860), 2 F. & F. 144, N.P.; 41 Digest 28, *219*.

Also referred to in argument:

Wilson v. *Halifax Corpn.* (1868), L.R. 3 Exch. 114; 37 L.J.Ex. 44; 17 L.T. 660; 32 J.P. 230; 16 W.R. 707; 38 Digest (Repl.) 25, *129*.

Whitehouse v. *Birmingham Canal Co.* (1857), 27 L.J.Ex. 25; 36 Digest (Repl.) 34, *158*.

Brown v. *Sargent* (1858), 1 F. & F. 112; 36 Digest (Repl.) 75, *402*.

Readhead v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead* v. *Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628, Ex.Ch.; 8 Digest (Repl.) 75, *496*.

Mersey Docks Trustees v. *Gibbs*, *Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 41 Digest 977, *8665*.

Sutton v. *Clarke* (1815), 6 Taunt. 29; 1 Marsh. 429; 128 E.R. 943; 38 Digest (Repl.) 13, *49*.

Whitehouse v. *Fellowes* (1861), 10 C.B.N.S. 765; 30 L.J.C.P. 305; 4 L.T. 177; 26 J.P. 40; 9 W.R. 557; 142 E.R. 654; 38 Digest (Repl.) 33, *169*.

Rule Nisi to arrest a judgment for the plaintiff entered on the hearing of an action by him for a declaration that a sewer and barrel drain were vested in the defendants, that the plaintiff was possessed of premises near thereto, and that the defendants did not keep the sewer and drain properly cleansed, whereby these became choked up and overflowed with foul water and other filth, which flowed into and over the premises of the plaintiff, whereby the premises were damaged, together with plant, then being in and near the premises, so that the plaintiff lost the use and enjoyment of the same, and suffered damage through loss of trade and injury to his health. The defendants denied liability.

The cause came on to be tried before BOVILL, C.J., and a special jury at the Middlesex Sittings, after Trinity Term, 1873, when the following facts appeared in evidence. The plaintiff was a licensed victualler, carrying on business at the Elephant and Castle, No. 1, King's Road, St. Pancras. The defendants were the vestry of the parish of St. Pancras, having the sewers of the parish vested in them by the Metropolis Management Act, 1855, s. 68. The Elephant and Castle was situate on the west side of King's Road, St. Pancras, just opposite the Vestry Hall. Adjoining it were two cottages of which the plaintiff was lessee and which were occupied by his tenants. The Elephant and Castle was entirely drained by a brick drain running through the yard at the back of the premises, and communicating with and draining the two cottages also. This brick drain, after passing through the plaintiff's premises, joined an 18in.

barrel drain running under a building on the adjoining premises, a timber yard. The outlet of the barrel drain was in the King's Road main sewer, and the barrel drain conveyed the plaintiff's sewage into the main sewer of the defendants, so long as both the brick and the barrel were in proper working order. The cellar of the plaintiff having been discovered to be flooded with water and filth which he was unable to remove; the foreman of the flushers of the vestry was communicated with, and after considerable time spent in searching for an impediment to the proper working of the drains, it was found that the brick drain was blocked up at its junction with the barrel drain by hard solid matter, upon the removal of which the brick drain began again to carry off the sewage of the plaintiff's house. The nuisance was consequently abated, but not before the plaintiff's health and premises had suffered considerable damage.

In answer to five several questions put to them by the learned judge, who had ruled that both the brick and the barrel drain were sewers within the meaning of the Act, the jury found: (i) that the brick drain, and not the barrel drain, was stopped up, and so occasioned the damage; (ii) that the vestry did not know of the existence of the brick drain; (iii) that the existence of the brick drain might have been known by the exercise of reasonable care and inquiry; (iv) that the obstruction was not known before the mischief occurred; and (v) that it could not have been known by reasonable care that the obstruction existed. A verdict then passed for the plaintiff with £50 damages. A rule was obtained, pursuant to leave reserved at the trial, to set aside this verdict and enter a verdict for the defendants, or a nonsuit on the ground that on the evidence given at the trial, and on the finding of the jury, no liability attached to the defendants. The rule was also to arrest judgment on the ground that no cause of action was stated in the declaration, and that no negligence was therein alleged.

Powell, Q.C., for the plaintiff showed cause.

Sir Henry James, Q.C., and *Beasley*, for the defendants, supported the rule.

Cur. adv. vult.

April 18, 1874. **BRETT, J.**—This was an action against a vestry brought by the plaintiff to recover damages for an injury sustained by him by reason of water flowing into his cellar from a certain drain. The plaintiff sought to maintain his action upon the authority of s. 72 of the Metropolis Management Act, 1855, by which section it is provided:

> "Every vestry . . . shall cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied, and for the purpose of clearing, cleansing and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary."

It was contended for the plaintiff that this section imposed an absolute duty to keep the sewers clear, cleansed, and emptied, and that, by reason of the sewers not having been so kept, water overflowed into his cellar causing damage for which the defendants are to be held responsible. It was contended for the defendants that the section does not impose upon them an absolute duty to keep the sewers clear, cleansed, and emptied in all events, but only a duty to use reasonable care and skill to keep them clear, cleansed, and emptied, so that if defendants have done all which reasonable men should have done, they are not to be held liable. At the trial a verdict passed for the plaintiff, but leave was reserved to the defendants to move to set this verdict aside and enter a verdict for them, if upon the facts and findings of the jury the court should be of opinion that the verdict should be so entered. A motion was made accordingly, and also in arrest of judgment on the ground that the declaration disclosed no cause of action.

The findings of the jury were that the vestry did not know of the existence of the brick drain which caused the damage, that the existence of it might have been discovered by the exercise of reasonable care, that the vestry did not know of the obstruction which caused the damage, and that they could not have known of it by the exercise of reasonable care. I think that the fact of the existence of the brick drain not being known to the defendants cannot absolve them, because the jury have found that they might have known of the existence of that drain by the exercise of reasonable care. The case must stand as if they had actually known of the existence of the brick drain. I think also that upon the facts and findings it must be taken that the brick drain was a sewer, for the reason that it drained more than one house, and, further, that the injury complained of was occasioned by this sewer not having been kept clear. If s. 72 throws an absolute duty on the defendants, i.e., the obligation of a guarantee that the sewers shall be kept clear, cleansed, and emptied, it follows that if injury occurs by reason of their not having been so kept, the defendants are liable in law for the consequences of that injury. The question, therefore, for the court to decide is simply this: What is the meaning of s. 72 of the Metropolis Management Act, 1855? The answer to this question will decide both points, both the nonsuit and the arrest of judgment. For as the declaration charges no negligence, no liability attaches at all, unless it attaches under the Act.

On a careful review of the words of this section, I am of opinion that they are capable of either meaning, i.e., that they may be construed as imposing an absolute duty, or as imposing a duty to manage with reasonable care and skill. In such a case what is the proper rule of interpretation? The defendants are a public body, and I think that the duty imposed on them with regard to this matter was not an absolute duty, but merely a duty to use all reasonable care to ascertain whether there was an obstruction or not. We must take it that there was in point of fact an obstruction. The finding of the jury assumes this, otherwise it would be inconsistent. But the jury have also found, not only that this obstruction was not known to the defendants, but also that it could not have been known to them. I think that it is contrary to all ideas of natural justice that the legislature should impose upon persons in the position of the defendants an absolute duty to avoid an injury which they by no skill on their part could have avoided. It may have been so intended by the legislature; but, if it was, the intention should have been expressed in the clearest possible terms. In construing all statutes regard must be had to their subject-matter. Where the conduct of individuals is complained of no legal liability attaches unless those individuals have been wanting in proper conduct. I think, therefore, that the duty imposed upon these defendants was a duty to keep the sewers clear when by the exercise of reasonable care and skill they might have kept them clear, and that the defendants are not liable unless they can be proved not to have exercised such reasonable care and skill. The want of skill is negatived by the jury, and, consequently, this rule ought to be made absolute on both points.

There is, no doubt, one authority of very great weight which is at any rate seemingly in conflict with our present decision—I mean the ruling of LORD PENZANCE in *Meek* v. *Whitechapel Board of Works* (1). I have some doubt whether that ruling is not after all consistent with our decision. I have some doubt whether LORD PENZANCE did not mean to leave a question of negligence to the jury in that case. If that be so, there is no inconsistency. But if that be not so, I can only say, with all respect for the most clear-headed of judges in my memory, that I must decline to follow his ruling, by which this court is not bound.

DENMAN, J.—I am of the same opinion. So far as I can see, our decision is not inconsistent with the ruling of LORD PENZANCE in *Meek* v. *Whitechapel*

Board of Works (1). Looking at the very sketchy character of the report of that case, it might be found that the question of negligence was in effect left to and considered by the jury. However that may be, this case turns upon the construction of s. 72 of the Metropolis Management Act, 1855. At first sight, indeed, the words of s. 72 seem positive, and it might plausibly be contended that upon an injury happening through those words not being complied with, an action would lie ipso facto. But on looking more closely at the section itself, I find the words

> "and for the purpose of clearing, cleansing and emptying the [sewers the vestry] may construct and place, either above or under ground, such reservoirs . . . and other works as may be necessary."

I think that these words contemplate works causing much expense and delay, and that the use of these words shows that the section does not impose an absolute liability such as that contended for on the part of the plaintiff, but is rather one of the many enabling clauses clothing the vestry with the powers which it was intended to clothe it with for the public benefit. I find in the evidence that one probable cause of the injury complained of was the existence of rats. It is quite possible that damage so caused might go on a long time in the drain without showing itself on the outside. The jury have found that the obstruction, however caused, could not have been known to the defendants. There is, therefore, an ample finding of no negligence. These being the circumstances, was there an absolute liability? I apprehend not. I am of opinion that s. 72 is merely one of many enabling clauses, and that this rule must be made absolute.

Rule absolute.

Solicitors: *J. L. Matthews; Cunliffe & Beaumont.*

[*Reported by* ETHERINGTON SMITH, ESQ., and J. M. LELY, ESQ., *Barristers-at-Law.*]

DAVENPORT *v.* REGINAM

[PRIVY COUNCIL (Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier), November 7, 8, 9, December 10, 1877]

[Reported 3 App. Cas. 115; 47 L.J.P.C. 8; 37 L.T. 727]

Landlord and Tenant—Lease—Forfeiture—Breach by lessee of condition—Avoidance of lease at lessor's option only—Exclusion of rule—Expression of clear intention—Forfeiture clause imposed by legislation.

A clause in a lease providing, in terms however clear and strong, that the lease shall be void on breach by the lessee of a specified condition is to be interpreted as meaning that the lease is voidable at the option of the lessor only. The fact that the forfeiture clause has been imposed in the lease by the legislature does not affect the applicability of this rule. It is contrary to justice that a man should be able to avoid his own contract by his own wrong, perhaps in order to escape the consequences of a bad bargain. The scope and purpose of an enactment or contract may be so opposed to the rule that it ought not to prevail, but the intention to exclude the rule should be clearly established.

Landlord and Tenant—Lease—Forfeiture—Waiver—Acceptance of rent after notice of forfeiture—Conditional acceptance—Right to insist on prior forfeiture—Intention of lessor in accepting rent—Materiality.

If a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after the forfeiture, his act amounts to an affirmation of the lease and a dispensation of the forfeiture. If money is paid and received as rent under a lease a protest by the lessor that it is accepted conditionally and without prejudice to the right to insist on the prior forfeiture cannot countervail the fact of the receipt. The intention of the lessor in accepting the rent is immaterial in considering the question of waiver.

Notes. Applied: *Hartnell* v. *Blackler*, [1920] 2 K.B. 161; *R.* v. *Paulson*, [1921] 1 A.C. 271. Considered: *Elliott* v. *Boynton*, [1923] All E.R. Rep. 174. Referred to: *Keith, Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147; *Davies* v. *Bristow*, [1920] All E.R. Rep. 509; *Quesnel Forks Gold Mining Co.* v. *Ward*, [1920] A.C. 222; *Jardine* v. *A.-G. for Newfoundland* (1932), 48 T.L.R. 199.

As to forfeiture and waiver of forfeiture, see 23 Halsbury's Laws (3rd Edn.) 665-674; and for cases see 31 Digest (Repl.) 512 et seq.

Cases referred to:

(1) *Doe d. Bryan* v. *Bancks* (1821), 4 B. & Ald. 401; 106 E.R. 984; 31 Digest (Repl.) 524, *6471*.

(2) *Roberts* v. *Davey* (1833), 4 B. & Ad. 664; 1 Nev. & M. K.B. 443; 2 L.J.K.B. 141; 110 E.R. 606; 31 Digest (Repl.) 524, *6475*.

(3) *Dumpor's Case* (1603), 4 Co. Rep. 119 b.; 76 E.R. 1110; sub nom. *Dumper* v. *Syms*, Cro. Eliz. 815; 31 Digest (Repl.) 436, *5639*.

(4) *Malins* v. *Freeman* (1838), 4 Bing. N.C. 395.

(5) *Croft* v. *Lumley* (1858), 6 H.L. Cas. 672; 27 L.J.Q.B. 321; 31 L.T.O.S. 382; 22 J.P. 639; 4 Jur.N.S. 903; 6 W.R. 523; 10 E.R. 1459, H.L.; 31 Digest (Repl.) 513, *6369*.

(6) *Pennant's Case* (1596), 3 Co. Rep. 64 a.; 76 E.R. 775; sub nom. *Harvy* v. *Oswold*, Moore, K.B. 456; Cro. Eliz. 553, 572; 31 Digest (Repl.) 565, *6854*.

Also referred to in argument:

Doe d. Christmas v. *Oliver* (1829), 10 B. & C. 181; 5 Man. & Ry.K.B. 202; 8 L.J.O.S.K.B. 137; 109 E.R. 418; 38 Digest (Repl.) 873, *862*.

Duchess of Kingston's Case (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C., 12th Edn., 754; 21 Digest (Repl.) 225, *225*.

Bridges v. *Longman* (1857), 24 Beav. 27; 53 E.R. 267; 31 Digest (Repl.) 559, *6797*.

A.-G. of Victoria v. *Ettershank*, *Ettershank* v. *A.-G. of Victoria* (1875), L.R. 6 P.C. 354; 44 L.J.P.C. 65, P.C.; 31 Digest (Repl.) 536, **2167*.

Appeal by the defendant, the Crown, from an order of the Supreme Court of Queensland, discharging a rule to set aside the verdict for the plaintiff, and to enter a nonsuit, or a verdict for the defendant, or order a new trial, in an action of ejectment brought by the Crown to recover 320 acres of land in the county of Aubigny, in the colony, under the provisions of the Audit Act (Queensland), s. 57.

The action was tried before Lutwyche, J., and a jury, and the learned judge directed a verdict for the plaintiff, reserving leave to move. A rule was obtained, but was discharged by the court (Cockle, C.J., Lilley and Lutwyche, J.J.). The Crown to her Majesty in Council.

Benjamin, Q.C., *J. D. Wood* and *Davenport* for the Crown.

The Solicitor-General (*Sir Hardinge Giffard, Q.C.*), *Kekewich, Q.C.*, and *Bowen* for the respondent.

Dec. 10, 1877. **SIR MONTAGUE SMITH.**—This was an action of ejectment in the Supreme Court of Queensland, brought by Her Majesty to recover an allotment, part of the Crown lands of the colony, which had been leased for eight years to one Meyer, on the ground that the lease was forfeited. The allotment consisted of 320 acres, numbered 196, in the Darling Downs district, and formed

part of what is called "agricultural reserves." The principal questions for consideration are, first, whether the lease was forfeited; and, secondly, if so, whether the forfeiture could be, and was, waived by the Crown.

Several statutes have been passed by the Colonial legislature regulating the sale and letting of the waste lands of the Crown. The principal enactments relating to the questions raised in this appeal are the following. The Agricultural Reserves Act, 1863, after empowering the Governor in Council to set apart lands for agricultural purposes, to be denominated agricultural reserves, and to offer them for sale in portions of not more than 320 acres, at a fixed price of 20s. an acre, enacts as follows: Section 4:

> "Any person desiring to purchase land in an agricultural reserve, after the same has been proclaimed open for sale, may apply to the land agent for the district in which the reserve is situated, and shall point out the particular portion of land, and shall at the same time pay to the land agent the sum of 20s. for every acre, together with the amount of deed fee, and he shall, subject to the provisions hereinafter contained, be deemed to be the purchaser of said land, and entitled to a grant in fee simple."

Section 7:

> "If within twelve months from the date of selection, the selector of land in an agricultural reserve shall make a declaration in the form contained in the schedule to this Act, that he has actually resided on the lands held by him in the said reserve for a period of not less than six months, and that he has cultivated not less than one-sixth of the land so selected, and shall have fenced in the said selection with a substantial fence of not less than two rails, then a deed of grant shall be issued to such selector; provided that the governor or other officer appointed in that behalf may require any reasonable evidence in support of the truth of such declaration."

Section 8:

> "If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required by s. 7 of this Act, then the right and interest of such selector to the land selected shall cease and determine, and the amount of the purchase money, less by one-fourth part, shall be refunded to him by the issue of a land order, entitling the holder to the remission of such three-fourths of the same in the purchase of other Crown lands."

The scheme of this Act, which provided only for the sale of agricultural reserves, was that the selector should pay at the time of selection the full purchase money of 20s. per acre, and should then, subject to the performance of certain conditions, be deemed to be the purchaser, and entitled to a grant in fee. No present term or estate was conferred upon the selector, but only an inchoate right to a grant, liable to be defeated on failure to perform the conditions, the selector in that case being entitled to have "the amount of his purchase money, less by one fourth," refunded to him in the manner described.

Three years later, the Leasing Act, 1866, was passed, under which the lease in question was granted. This Act made provision for leasing lands which had been put up for sale by auction and not sold. One year's rent was to be paid in advance by applicants for leases. It contained the following further enactments. Section 5:

> "The person declared lessee shall receive from the land agent a lease in such form as the Governor in Council shall appoint, and shall sign a duplicate lease, which shall be forwarded by the land agent to the office of the Surveyor-General."

Section 6:

"Every such lease shall be made subject to the following conditions: (i) The term thereof shall be for eight years inclusive, commencing from the first payment of rent. (ii) The yearly rent shall be at the rate of 2s. 6d. per acre when the upset price of the land or the sum for which it is open to purchase by selection is 20s. per acre; but if the upset price of such land or the price at which such land is open to purchase by selection be higher than 20s. per acre, then the rent shall be increased in proportion. (iii) The rent for the second and each succeeding year shall be paid in cash in advance to the Treasury at Brisbane on or before the 1st day of January, and in default of such payment in advance the lease shall be forfeited, and the land and all the improvements thereon shall revert to the Crown."

This subsection then provides that the lessee may defeat the forfeiture by paying the rent and a certain amount by way of penalty within ninety days. By sub-s. (4):

"So soon as the lessee shall have made the eighth payment of rent as aforesaid, he shall be entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable on the issue of deeds of grant."

Section 5:

"If at any time during the term of such lease the lessee shall pay in cash or land orders into the Treasury at Brisbane the rent for the unexpired portion of such term, he shall be forthwith entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable on the issue of deeds of grant."

The following section brought unselected allotments of the agricultural reserves within the operation of this Act. Section 12:

"All lands in agricultural reserves which shall have been or may hereafter be proclaimed as open for selection, and have remained so open and unselected for one calendar month, shall be open to lease by the first applicant under the terms and conditions specified in the seventh clause of this Act: provided only that if taken up on lease they shall be subject to the same condition and restriction as to cultivation and quantity as if they were selected by purchase."

By s. 17 so much of the seventh clause of the Agricultural Reserves Act, 1863, as required residence on and fencing of selections was repealed.

This was the state of legislation when Meyer became the applicant for a lease of the allotment in question; but before his lease was granted, an Act to consolidate and amend the laws relating to the alienation of Crown lands was passed, viz., the Crown Lands Alienation Act, 1868. It contains the following enactment. Section 68:

"Any selector who, before the passing of this Act, shall have selected land in any agricultural reserve under ss. 4 and 5 of the Agricultural Reserves Act of 1863, or Leasing Act of 1866, and who shall have proved by two credible witnesses to the satisfaction of the commissioner that he, his heirs, assigns, or lessees, is, or at the time of selection was, a resident within the district over which such commissioner may have jurisdiction, is hereby empowered at his option to substitute improvements in lieu of cultivation, the fencing of the said land to be deemed and taken to be part of the said improvements, provided that such improvements shall in the aggregate be

A equal to the sum of five shillings per acre on the total number of acres so selected by him as aforesaid. And upon the said selector proving by two credible witnesses to the satisfaction of the commissioner of the district that he has performed the conditions aforesaid, then the said commissioner shall issue a certificate accordingly, and the said selector shall thereupon be entitled to a deed of grant in fee simple, subject, however, to the payment of the fees chargeable in the issue of the said deed of grant and balance of rent due."

The terms and conditions of the leases to be issued under this Act are prescribed by s. 51.

The lease in the present case is from Her Majesty, and is dated on May 1, 1868. After reciting that Meyer, in pursuance of the Agricultural Reserves Act, C 1863, and Leasing Act, 1866, had applied to be declared lessee of the allotment, and paid £40 as the first year's rent in advance, Her Majesty, in consideration of the rent so paid in advance, and of the covenants by the lessee, demised the land to Meyer for the term of eight years from Sept. 23, 1867,

D "being the day upon which the first payment of rent was made, and thenceforth fully to be complete and ended, with all the rights of purchase and other rights, powers, and privileges, and subject to the terms, conditions, exceptions, reservations, provisoes, penalties, and forfeitures in the said Acts contained."

The reddendum is:

E "yielding and paying to us, our heirs and successors, yearly and every year in advance during the continuance of the said lease, the rent or sum named in the second schedule."

This schedule provides for the first payment on Sept. 23, 1867, and for subsequent payments on Jan. 1 in the years from 1869 to 1875 inclusive. The lease contains covenants by the lessee for payment of the rent, and also to F cultivate at least one-sixth part of the land within one year from the commencement of the term of the lease, and to observe, perform, and keep the clauses, conditions, and provisoes applicable to the lands demised in the Acts contained. It appears that two transfers of the lease have been made, viz., one from Meyer to Mr. Davenport (the appellant) and the other from him to Mr. D'Abedyll, and that both were registered by the Surveyor-General, the first on June 14, 1869, G and the last on June 28, 1870. The appellant was in possession as tenant to Mr. D'Abedyll when the ejectment was brought.

The forfeiture insisted upon by the Crown is the failure of Meyer to cultivate or improve the allotment within a year from Sept. 23, 1867, the date of his application to be declared lessee. In point of fact this failure happened, but the H appellant contends, on grounds to be presently adverted to, that a forfeiture was not thereby incurred, or, if it was, that it has been waived. He relies, moreover, on a certificate granted by the Commissioner of Crown Lands.

The principal facts are undisputed. The rent payable on Jan. 1, 1869, was duly paid into the Colonial Treasury, but, there being no evidence that the Crown was then made aware of the non-improvement, nothing turns upon this payment. I However, on Feb. 1 in that year the surveyor of the Darling Down district, who had been directed by the Surveyor-General to examine the allotments which had been leased, made a report in which he stated that no cultivation or improvement had been made, among others, in the allotment in question. A copy of this report was sent in the month of June following by the Surveyor-General to Mr. Taylor, the Minister for Lands of the colony. Mr. Taylor, who was examined at the trial, deposed that having made himself acquainted with the report he laid it before his colleagues in the Ministry, and that the result of their deliberations was a determination not to proceed for the forfeiture of the allotments, but to allow the future rents to be paid. Mr. Taylor says he thereupon told the

Surveyor-General to take no action on this report, adding: "We could not afford it." Accordingly, Mr. D'Abedyll paid the subsequent yearly rents in advance as they became due, viz., on Jan. 1 in the years 1870, 1871, and 1872, and on May 31, 1873, he paid in advance the whole of the remaining rent accruing under the lease. He paid at the same time fees chargeable on the issue of deeds of grant. It is not denied that the Minister for Lands was made acquainted with these payments, nor that they were paid "as rent"; and it cannot be doubted that the Minister knew they were so paid. Two receipts given by the local land agent were produced, in which the payments are described as "rents."

On Dec. 23, 1869, a notice, headed "Payment of Rents under the Leasing Act, 1866," was published in the "Gazette." After giving notice to lessees living at a distance from Brisbane that the local land agents had been instructed to receive the rents, it contains the following note:

> "The accompanying schedule contains all selections made under the Leasing Act of 1866, excepting those which have been forfeited for nonpayment of rent. Rents which may be received upon such of these selections as may have been forfeited by operation of law will be deemed to have been received conditionally, and without prejudice to the right of the government to deal with the same according to the provisions contained in the Act in that behalf."

The schedule contained the name of the appellant (who was then assignee of the lease), the allotment No. 196, and the amount due was described as "third year's rent, £40." Similar notices were published in the "Gazette" on Nov. 18, 1870, and Oct. 31, 1871.

After the rent for the whole term of eight years had been fully paid up, and before the term of the lease had expired, and without an offer to refund any part of the money, this ejectment was commenced. The writ bears date Sept. 16, 1874, and alleges the title of the Crown to have accrued on May 3, 1869, treating the lessee and his transferees as trespassers from that date. Upon the trial of the action, in which the above facts were admitted or proved, the judge directed the verdict to be entered for the Crown, one question only, which will be hereafter adverted to, having been left to the jury. The principal points were reserved for the consideration of the court, which, by the judgment under appeal, sustained the verdict.

It was contended on behalf of the appellant that there had been no failure to cultivate or improve the land at the time the ejectment was brought, because it was said the twelve months from the date of selection prescribed by s. 7 of the Agricultural Reserves Act, 1863, in the case of sales, was inapplicable to leases, and that lessees had the whole term of eight years to fulfil the condition. It was said that the reason for requiring the cultivation within a year in the case of sales was that, no estate being granted, nor any interest created beyond the right to have a grant in fee on the performance of the condition, it was essential that a definite time should be fixed for that performance, the scheme being, that in the event of non-fulfilment within that time, the inchoate purchase should be at an end, and the selector entitled to a return of three-fourths of the price he had paid. This reason, it was said, did not apply to the case of leases creating a legal interest for a definite term, with a right to a grant in fee on payment of the rent for the entire term; and, therefore, that the proviso in s. 12 in the Leasing Act, 1866, that lands in agricultural reserves, if taken up on lease, should be subject to the same condition as to cultivation as if they were selected by purchase, should be construed to apply to the obligation to cultivate only, and not to the limit of time. It was also pointed out that this limit in the first Act was only fixed by reference to the time within which a declaration was to be made by the selector in order to obtain a grant, and that a declaration was not necessary in the case of leases. It was further contended that s. 68 of the Alienation Act,

1868 (which came into operation on Mar. 1 of that year, during the currency of the first year of the lease in question), allowing selectors who held leases like the present to substitute improvements of the value of 5s. per acre in lieu of cultivation, gave the whole term of their leases for so improving their lands. If the above construction of the statutes be correct, this action, brought during the currency of the term, would, no doubt, have been prematurely commenced.

It was further insisted on behalf of the appellant that the proviso in s. 12 of the Leasing Act, 1866, did not make lessees subject to the forfeiture created by s. 8 of the Agricultural Reserves Act, 1863, but only to the obligation imposed by s. 7. It was urged that these sections were separable; that the condition for cesser of the interest, which was necessary to define and determine the position of a selector at the end of a year in the case of a purchase, was not necessary in the case of a lease creating a definite term, and it was pointed out that the condition for cesser was coupled with an equitable provision for the return (in the shape of land orders) of three-fourths of the purchase money, a provision inapplicable to the case of a lessee. It was said that a condition of forfeiture should be imposed in clear terms, and that the vague reference in the Leasing Act, 1866, to "the condition as to cultivation" in the Sale Act of 1863 did not subject lessees to the forfeiture prescribed in s. 8 of that Act, and would be satisfied by holding them liable to the obligation to cultivate imposed by s. 7.

The difficulties of construction, which these arguments undoubtedly present, arise from the inconvenient practice of legislating by means of vague and indistinct reference to the enactments of a former statute, a practice which in this case has been followed without due regard being had to the distinctions existing between the position of purchasers and that of lessees. Their Lordships, however, do not think it necessary to determine the questions raised by the arguments just referred to, for, assuming that these arguments ought not to prevail, their opinion is in the appellant's favour on the further question arising in the appeal.

In answer to the defence that if a forfeiture had accrued it had been waived by the receipt of rent, it was contended on the part of the Crown that the effect of the proviso in s. 8 of the Act of 1863 was to make the lease absolutely void, and not voidable only. The Supreme Court took this view, and further decided that, the legislature having imposed this condition, the Crown could not dispense with it. It is unnecessary to decide whether, in the event of a selector by purchase failing to perform the condition, a valid grant could be made to him. Such a selector has no estate vested in him, nor any right to a grant, until he has fulfilled the condition precedent as to cultivation. The distinction between the case of such a selector and that of a lessee to whom a lease has been granted, liable though it be to forfeiture, is obvious. The latter has a present estate for a definite term, an estate not created by the statute, but by a demise from the Crown. By s. 5 of the Leasing Act the form of lease is left to the discretion of the Governor in Council, and a duplicate of the lease is to be signed by the lessee. This provision shows that a lease by way of contract was contemplated, though based on the provisions of the statute. In the present case the demise is for a term of years, in the usual form of a lease. Besides being made subject to the terms, conditions, penalties, and forfeitures contained in the Acts, this lease includes covenants by the lessee for the payment of the rent and observance of the clauses, conditions, and provisoes in the Acts, with a distinct covenant to cultivate one-sixth of the land within a year. There seems to their Lordships to be nothing in the form of this lease inconsistent with the Acts. The covenants afford the means of conveniently enforcing the obligations of the lessee.

Does, then, the proviso of forfeiture in s. 8 of the Reserves Act, when read into such a lease as the present, make the term ipso facto void, or voidable only upon a breach of the condition? In a long series of decisions the courts have construed clauses of forfeiture in leases declaring, in terms however

clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe d. Bryan* v. *Bancks* (1); *Roberts* v. *Davey* (2); and other cases in the notes to *Dumpor's Case* (3), 1 SMITH'S LEADING CASES (7th Edn., p. 41). In *Roberts* v. *Davey* (2) the words were that the licence "should cease, determine, and be utterly void and of no effect to all intents and purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present. It is however contended that this rule of construction is inapplicable when the legislature has imposed the condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus in *Malins* v. *Freeman* (4), where the statute provided that if the purchaser at an auction refused to pay the auction duty his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case COLTMAN, J., said (4 Bing.N.C. at p. 399):

> "It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view."

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established. The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void would, of course, be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to re-possess the land, as indeed in the present case it was thought to be. Again, if the lessee could treat the lease as null on his own default, he would, while escaping from his contract and from liability to future rent, forfeit one year's rent only, or one-eighth of what in the end would be purchase-money, instead of the one-fourth of the purchase-money, which selectors by purchase would in the like case forfeit, the latter too being entitled to a return of the other three-fourths only in the shape of land orders. This difference establishes a further distinction between such selectors and lessees.

Having regard to these considerations, the intention of the legislature to the contrary does not, in their Lordships' view, so clearly appear as to exclude the usual and equitable rule of construction from applying to these leases. It may well have been meant to leave to the Crown, acting by its responsible Ministers, the option which other lessors in the case of similar conditions are entitled to exercise.

If, then, the Crown could treat the lease as voidable, the further question to be considered is: Has it elected so to treat it and waived the forfeiture? On this part of the case their Lordships have felt no difficulty. The evidence of waiver seems to them to be clear and overwhelming. Not only was the rent for three successive years accepted in advance, but in 1873 the whole of the remaining rent accruing under the lease was paid up in full. And these rents were received by the officers of the government, as appears by the evidence before set out, not only with full knowledge of the breach of the condition, but in consequence of the decision of the Ministers of the Crown

in the colony, come to after mature deliberation, that the government of the colony wanted the money and could not afford to insist upon the forfeiture. It was sought to obviate the effect of these receipts by referring to the passage contained in the "notification of rents due," set out above. This notification appeared in the "Gazette" in three successive years, the last year being, as far as appears, 1871. After that year the publication was apparently abandoned. It is, therefore, very doubtful whether this notification can in any way affect the acceptance in the year 1873 of all the rent then remaining due. But, supposing this notice is to be regarded as pointing to all future rents, their Lordships think it would not prevent the acceptance of these rents from operating as a waiver. The notification itself describes the payments as "rent," and their Lordships have no difficulty, upon the evidence before adverted to, in coming to the conclusion of fact, that the money was not only paid, but received as "rent."

A question of this kind received great consideration in the House of Lords in *Croft* v. *Lumley* (5). In that case the facts were much more favourable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the judges, except CROMPTON, J., was that the receipt of the money under these circumstances operated as a waiver. In the present case, the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. LORD WENSLEYDALE, who was disposed to agree with CROMPTON, J., in his conclusion of fact in the particular case, appeared to have no doubt that when money is in fact received as rent the waiver is complete. A very learned judge, WILLIAMS, J., gave his opinion in the following terms:

> "It was established as early as *Pennant's Case* (6), that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to the affirmance of the lease, and a dispensation of the forfeiture. In the present case, the facts, I think, amount to this—that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative—as he had no right at all to take the money unless he took it as rent. He cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them."

Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say that where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally, and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt. The finding of the jury that there was no waiver appears from the notes of the learned judge who tried the cause to have been founded on his direction "that the intention of the party receiving the rent, and not of the party paying it, must be looked at in considering the question of waiver, and that unless the jury were of opinion that the rents were received after May 23, 1869, unconditionally and unreservedly, they should find no waiver."

In their Lordships' view of the law, which has just been stated, this direction is erroneous. They do not however deem it necessary to send down the case for a new trial, because the question of waiver really depends on undisputed facts, from which the proper legal inference to be drawn is, in their opinion, clear. Even if the evidence of the receipt of the money as rent had been

less convincing than they have found it to be, they would have hesitated to come to the conclusion that the Ministers of the Crown took this money wrongfully, and without any colour of right, as they would have done if it had not been accepted as rent. Upon a review of the whole case, therefore, they are of opinion that the verdict ought to be entered for the defendant. Their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court, discharging the rule nisi of Dec. 11, 1874, and, instead thereof, to direct that such rule be made absolute to set aside the verdict found for the plaintiff, and to enter the verdict for the defendant, with costs. The defendant will also have the cost of this appeal.

Solicitors: *Cunliffe & Beaumont*, for *T. M. Davenport*, Oxford; *Freshfields & Williams*.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

PARKER *v.* SOUTH EASTERN RAIL. CO.

[Court of Appeal (Mellish, Baggallay and Bramwell, L.JJ.), February 6, 7, April 25, 1877]

[Reported 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 26 W.R. 564]

Bailee—Liability—Condition limiting liability—Notice of condition to bailor—Direction to jury—Deposit in railway cloak room.

The plaintiff handed in a parcel of a value exceeding £10 at a cloak room at a station of the defendant railway company, paid 2d., and received a ticket, on the face of which were the words: "See back." On the back was a condition that the defendants would not be responsible for any package exceeding the value of £10. The parcel having been lost, the plaintiff brought an action claiming damages for the loss.

Held: by Mellish and Baggallay, L.JJ.: the attention of the jury at the trial had not been directed to the question whether the defendants had done what was reasonably sufficient to give the plaintiff notice of the condition, and, therefore, there must be a new trial.

Per Mellish, L.J.: The proper direction to the jury in such a case is that, if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering of the ticket to him in such a manner that he could see there was writing on it was, in the opinion of the jury, reasonable notice that the writing contained conditions.

Notes. Considered: *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178. Distinguished: *Woodgate* v. *Great Western Rail. Co.* (1884), 51 L.T. 826. Approved: *Richardson, Spence & Co.* v. *Rowntree*, [1891-4] All E.R. Rep. 823. Considered: *Acton* v. *Castle Mail Packets Co.* (1895), 1 Com. Cas. 135; *Incandescent Gas Light Co.* v. *Cantelo* (1895), 12 R.P.C. 262. Followed: *Hooper* v. *Furness Rail. Co.* (1907), 23 T.L.R. 451; *Marriott* v. *Yeoward*, [1909] 2 K.B. 987. Considered: *Ryan* v. *Ocean Steam Navigation Co.*, [1914] 3 K.B. 731. Approved: *Hood* v. *Anchor Line (Henderson Bros.), Ltd.*, [1918-19] All E.R. Rep. 98. Considered: *Gibaud* v. *Great Eastern Rail.*

Co. (1921), 125 L.T. 76. Applied: *Ehinger* v. *South-Eastern and Chatham Rail. Co. and The Pullman Car Co.* (1922), 38 T.L.R. 678; *Hearn* v. *Southern Rail. Co.* (1925), 41 T.L.R. 305. Explained and Distinguished: *Thompson* v. *London, Midland and Scottish Rail. Co.*, [1929] All E.R. Rep. 474. Applied: *L'Estrange* v. *F. Grancob, Ltd.*, [1934] All E.R. Rep. 16. Considered: *Sugar* v. *London, Midland and Scottish Rail. Co.*, [1941] 1 All E.R. 172. Distinguished: *McCutcheon* v. *MacBrayne, Ltd.*, [1964] 1 All E.R. 430. Referred to: *Foreman* v. *Great Western Rail. Co.* (1878), 38 L.T. 851; *Burke* v. *South Eastern Rail. Co.* (1879), 5 C.P.D. 1; *Great Northern Rail. Co.* v. *Palmer* (1895), 72 L.T. 287; *Cooke* v. *Wilson* (1915), 85 L.J.K.B. 888; *Lyons* v. *Houghton*, [1915] 1 K.B. 489; *Roe* v. *Naylor* (1918), 87 L.J.K.B. 958; *Chapelton* v. *Barry U.D.C.*, [1940] 1 All E.R. 356; *Henson* v. *London and North Eastern Rail. Co.*, [1946] 1 All E.R. 653; *Hunt and Winterbotham (West of England), Ltd.* v. *B.R.S. (Parcels), Ltd.*, [1962] 1 All E.R. 111.

As to the liability of railway authorities receiving the property in the cloak rooms of railway stations, see 2 HALSBURY'S LAWS (3rd Edn.) 119, 120; and for cases see 3 DIGEST (Repl.) 91-94.

Cases referred to:

(1) *Harris* v. *Great Western Rail. Co.* (1876), 1 Q.B.D. 515; 45 L.J.Q.B. 729; 34 L.T. 647; 40 J.P. 628; 3 Digest (Repl.) 91, *216*.

(2) *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. & Div. 470; 32 L.T. 709; 39 J.P. 596, H.L.; 8 Digest (Repl.) 139, *898*.

(3) *Van Toll* v. *South Eastern Rail. Co.* (1862), 12 C.B.N.S. 76; 31 L.J.C.P. 241; 6 L.T. 244; 8 Jur.N.S. 1213; 10 W.R. 578; 142 E.R. 1071; 3 Digest (Repl.) 91, *214*.

(4) *Stewart* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 135; 4 New Rep. 64; 33 L.J.Ex. 199; 10 L.T. 302; 10 Jur.N.S. 805; 12 W.R. 689; 159 E.R. 478; 8 Digest (Repl.) 138, *896*.

(5) *Lewis* v. *McKee* (1868), L.R. 4 Exch. 58; 38 L.J.Ex. 62; 19 L.T. 522; 17 W.R. 325; 3 Mar.L.C. 174, Ex. Ch.; 41 Digest 399, *2449*.

Also referred to in argument:

Belfast and Ballymena Rail. Co. v. *Keys* (1861), 9 H.L.Cas. 556; 4 L.T. 841; 8 Jur.N.S. 367; 9 W.R. 793; 11 E.R. 846, H.L.; 8 Digest (Repl.) 129, *827*.

Cornish v. *Abington* (1859), 4 H. & N. 549; 28 L.J.Ex. 262; 7 W.R. 504; 157 E.R. 956; 1 Digest (Repl.) 402, *622*.

Appeal from a decision of the Common Pleas Division in an action brought by the plaintiff to recover damages for loss of luggage exceeding the value of £10, which had been deposited in the cloak room at the defendants' station. The defendants relied upon a condition printed on the back of the ticket, exempting them from liability.

On the back of the ticket the following words were printed.

"This company will not be responsible for articles left by passengers at the station, unless the same be duly registered, for which a charge of 2d. per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1d. per diem in addition will be made on all articles left in the cloak room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of £10."

The plaintiff at the trial swore that he did not know that what was printed on the ticket contained any conditions, but looked upon it merely as a receipt for the money which he had paid.

At the trial the following questions were left to the jury: (i) Did the plaintiff read, or was he aware of the special condition upon which the articles were deposited? (ii) Was the plaintiff, under the circumstances, under any obligation,

in the exercise of reasonable and proper caution, to read or make himself aware of the condition? The jury answered both questions in the negative, and the verdict was entered for the plaintiff for £24 12s. A rule was obtained to enter judgment for the defendants on the ground that upon the facts admitted at the trial and notwithstanding the findings of the jury the judge ought to have entered judgment for the defendants, or for a new trial on the ground of misdirection in telling the jury that they should find a verdict for the plaintiff if they thought that, considering the plaintiff's knowledge of the world and of life and the nature and character of the transaction, he had used proper caution in not having read the document given to him at the time of the deposit. The Common Pleas Division (Lord Coleridge, C.J., Brett and Lindley, JJ.) discharged the rule and the defendants appealed.

Benjamin, Q.C., and *Bremner* for the defendants.

Prentice, Q.C., and *F. Pollock* for the plaintiff.

Cur. adv. vult.

April 25, 1877. The following judgments were read.

MELLISH, L.J. (read by Bramwell, L.J.).—In this case we have to consider whether a person who deposits articles in the cloak room of a railway company, which are lost through the carelessness of the company's servants, is prevented from recovering by a condition on the back of the ticket that the company would not be liable for the loss of goods exceeding the value of £10.

It was argued on behalf of the railway company that the company's servants were only authorised to receive goods on behalf of the company upon the terms contained in the ticket; and a passage from the judgment of Blackburn, J., in *Harris* v. *Great Western Rail. Co.* (1) was relied on in support of their contention (1 Q.B.D. at pp. 533, 534):

> "I doubt much—inasmuch as the railway company did not authorise their servants to receive goods for deposit on any other terms, and as they had done nothing to lead the plaintiff to believe that they had given such authority to their servants so as to preclude them from asserting as against her that the authority was so limited—whether the true rule of law is not that the plaintiff must assent to the contract intended by the defendants to be authorised, or treat the case as one in which there was no contract at all, and consequently no liability for safe custody."

I am of opinion that this objection cannot prevail. It is clear that the company's servants did not exceed the authority given them by the company; they did the exact thing they were authorised to do. They were authorised to receive articles on deposit as bailees on behalf of the company, charging twopence for each article, and delivering a ticket properly filled up to the person leaving the articles. This is exactly what they did in the present case; and whatever may be the legal effect of what was done, the company must, in my opinion, be bound by it. The directors may have thought, and no doubt did think, that delivering the ticket to the person depositing the articles would be sufficient to make him bound by the conditions contained in the ticket, and if they were mistaken in that the company must bear the consequence. [Bramwell, L.J.—I entirely concur with this opinion of the lord justice.]

The question then is: Was the plaintiff bound by the conditions contained in the ticket? In an ordinary case where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud it is wholly immaterial that he has not read the agreement and does not know its contents. Parties may, however, reduce their agreement into writing, so that the writing constitues the sole evidence of the agreement, without signing it, but in that case there must be evidence independently of the agreement itself to prove that the defendant has

A assented to it. In that case also, however, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. If in the course of making a contract one party delivers a paper to another containing writing, and the party, receiving the paper, knows that the paper contains conditions which the party delivering B it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in the paper, although he does not read them, and does not know what they are, and, therefore, in my opinion *Harris* v. *Great Western Rail. Co.* (1) was rightly decided, because in that case the person who took the ticket for the plaintiff admitted on cross-examination that he believed there were some condi- C tions on the ticket. On the other hand *Henderson* v. *Stevenson* (2) is a conclusive authority that if the person receiving the ticket does not know there is any writing at all upon the back of the ticket he is not bound by a condition printed on the back.

The facts in the case before us differ both from those in *Henderson* v. *Stevenson* (2) and *Harris* v. *Great Western Rail. Co.* (1), because, though the D plaintiff admitted that he knew there was writing both on the front and back of the ticket, he swore, not only that he did not read it, but that he did not know or believe that the writing contained conditions. We are to consider whether under those circumstances we can lay down as a matter of law either that the plaintiff is bound or is not bound by the conditions contained in the ticket, or E whether his being bound depends on some question of fact to be determined by the jury, and, if so, whether the right question was left to the jury in the present case.

I am of opinion that we cannot lay down as a matter of law either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket from the mere fact that he knew there was writing on the ticket, F but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition and should put it in his pocket unread; as for instance, if a person driving through a turnpike gate receives a ticket upon paying the toll, he might reasonably G assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although in an action afterwards against the shipowner for the loss of the goods he might swear that he had never read the bill of lading, and H that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. The reason why the person receiving the bill of lading would be so bound seems to me to be because in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipbroker or the master delivering the bill of lading is entitled to assume I that the person shipping goods has that knowledge, although it is quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was. In my opinion, such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

The question we have to consider is whether the railway company, when a person deposited luggage and received a ticket in such a way that he could see

that some writing was printed on it, were entitled to assume that the person receiving it would understand that the writing contained the conditions of the contract, and this seems to me to depend upon whether people in general would in fact and naturally draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them. I think they are entitled to assume that he can read, that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak room. The railway company must, however, take mankind as they find them, if what they do is sufficient to inform people in general that the ticket contains conditions. I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, they have received goods on deposit without obtaining the consent of the persons depositing them to a condition limiting their liability.

I am of opinion, therefore, that the proper direction to the jury in these cases is that, if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions. I have, lastly, to consider whether the direction of the learned judge—namely, Was the plaintiff, under the circumstances, under any obligation in the exercise of reasonable and proper caution to read, or to make himself aware of the conditions?—was correct. I think that this direction was not strictly accurate, and was calculated to mislead the jury. The plaintiff was certainly under no obligation to read the ticket, but was entitled to leave it unread if he pleased; and the question does not appear to me to direct the attention of the jury to the real question, namely, whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition. On the whole, I am of opinion that there ought to be a new trial.

BAGGALLAY, L.J. (read by BRAMWELL, L.J.).—A railway company in the conduct of their cloak room business become bailees for reward of the articles deposited with them for safe custody; and as such, in the absence of any special contract, constituted by the delivery and acceptance of a ticket or otherwise, are responsible to the depositors for the full value of the deposited articles if unable to restore them when demanded. This clearly would be the nature of the contract if no tickets were delivered, as occasionally happens. In the case under consideration the question for consideration is whether the ordinary contract of bailment which would have resulted from the receipt by the company of the plaintiff's property, and the payment by the plaintiff of the prescribed charges, has been modified by the delivery of the ticket which was admittedly accepted by the plaintiff, though, as he alleges, in ignorance of the purport or effect of the printed statements indorsed upon it. If the practice of issuing cloak room tickets containing statements of conditions intended to be binding on depositors had become general, it might well be that a person depositing his property and accepting a ticket, even though himself ignorant of the practice, must be treated as aware of it and as bound to ascertain whether any such conditions were stated on the ticket delivered to him; but no such practice has been shown or even suggested in the present case, nor does

it, so far as I am aware, exist. The ticket does not ordinarily, if ever, contain any statement as to the date of the deposit or as to the payment of the charge; its primary purpose is to identify the articles deposited and the party entitled to reclaim them; practically, and by reason of the recognised practice of not delivering the ticket until the prescribed charge has been paid, it becomes a voucher for the payment. So far as these purposes are concerned the depositor has no occasion to look at the ticket until he desires to reclaim his property, and if the tickets were delivered for these purposes only, the ordinary contracts of bailment would be in no respect modified by the delivery of them.

In the absence of any such general practice as that to which I have alluded it appears to me that the depositor is prima facie entitled to regard the ticket as delivered to him for these purposes only, and that he is in no way put upon inquiry whether the company have any further or ulterior object. But it is, of course, open to the company to show not only that they intended that the ticket, which was delivered to the depositor primarily for his own convenience and protection, should also indicate to him certain terms and conditions in favour of the company, by which he was to be bound, but also that he was aware of such intention at the time when he accepted the ticket, and agreed to give effect to it in respect of these matters the onus of proof is upon the company. Of the intention of the company to modify the contract of bailment in the case under consideration by limiting their liability there can be no question. I think also that if the plaintiff was aware, or ought, for reasons which will be indicated presently, to be treated as being aware of the intentions of the company at the time when he received the ticket, and did not express his dissent, he must be regarded as having agreed to give effect to them.

The question remains: Was the plaintiff aware, or ought he to be treated as aware, of the intentions of the company thus to modify the effect of the ordinary contract? If at the time when he accepted the ticket he, either by actual examination of it or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the indorsed conditions, it can hardly be doubted but that he became bound by them. I think also that he would be equally bound if he was aware or had good reason to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such or from making himself acquainted with their purport. I do not think that in the absence of any such knowledge or information or good reason for belief he was under any obligation to examine the ticket with the view of ascertaining whether there were any such statements or conditions upon it. Whether the plaintiff had any such knowledge or information or good reason for belief, is a question of fact to be determined by the evidence.

Had the determination of these questions of fact in the case under consideration rested with myself, I should, upon the evidence, have decided in favour of the plaintiff, but, having had the opportunity of reading the proposed judgments of both my colleagues, I feel the force of the observations made by them as to the directions given to the juries by the judges who tried the actions. I do not think that the second question was quite right in form, though I think that, had it been put in the form suggested by MELLISH, L.J., which appears to me to be the more correct form, the same result would have followed. It is possible, however, though I think hardly probable, that the jury was misled by the form of the question, and under all the circumstances the best course to pursue would be, I think, to direct a new trial.

BRAMWELL, L.J.—It is clear that if the plaintiff had read the conditions on the ticket, and not objected, he would have been bound by them. No point was, or could be made, that the contract was complete before the ticket was

given. If, then, reading the conditions, he would have been bound, it follows that, had he been told that they were the conditions of the contract, and invited to read them, and had refused, saying he was content to take them whatever they might be, then also he would be bound by them. So also would he be if he was so told, and made no answer, and did nothing, for in that case he would have tacitly said the same thing, viz., that he was content to take them, whatever they might be. It follows further that, if he knew that what was on the ticket was the contract that the defendants were willing to enter into, he, the plaintiff, would be bound, though not told they were the conditions, for it cannot make a difference that he was not told what, by the hypothesis he knew already.

We have it, then, that if the plaintiff knew that what was printed was the contract the defendants were willing to enter into, the plaintiff not objecting, is bound by its terms, though he did not inform himself what they were. The plaintiff has sworn that he did not know that the printing was the contract, and we must act as though that was true, and we believed it, at least so far as entering the verdict for the defendants is concerned. Does this make any difference? The plaintiff knew of the printed matter. He admits that he knew it concerned him in some way. Though he said he did not know what it was, yet he does not pretend that he knew or believed it was not the contract. He does not pretend he thought it had nothing to do with the business in hand; that he thought it was an advertisement or other matter unconnected with his deposit of a parcel at the defendants' cloak room. He admits that for anything he knew or believed, it might be, only he did not know or believe it was, the contract. His evidence is very much that he did not think, or, thinking, did not care about it. He claims to charge the company, to have the benefit of his own indifference. Is it just? Is it reasonable? Is it the way in which any other business is allowed to be conducted? Is it ever allowed to a man to "think," "judge," "guess," "chance," a matter, without informing himself when he can; and, when his "thought," "judgment," "guess," or "chance," turns out wrong or unsuccessful, claim to impose a burden or duty on another which he could not have imposed had he informed himself, as he might. Suppose the clerk or porter at the cloak room had said to the plaintiff: "Read that, it concerns you," and he had not read it. Would he be at liberty to set up that, though told to read, he did not because he thought something or another?

What is the difference between that case and the present? Why is there printing on the paper except that it may be read; The putting of the ticket into the plaintiff's hands was equivalent to saying: "Read that." Could the defendants practically do more than they did? Had they not a right to suppose, either that the plaintiff knew the conditions, or that he was content to take on trust whatever was printed? Let us, for the moment, forget that the defendants are caput lupinum, a railway company. Take any other case—any case of money being paid, and a paper given by the receiver, or goods bought on credit, and a paper given with them. Take also the cases put by Byles, J., in *Van Toll* v. *South Eastern Rail. Co.* (3) (12 C.B.N.S. at p. 87). Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms in the paper? What more can be done? Must he say: "Read that?" As I have said, he does so in effect when he puts it into the other's hand. The truth is that people are content to take these things on trust. They know that there is a form which is always used, they are satisfied it is not unreasonable, because people do not put in unreasonable terms without being stopped; besides, unreasonable practices would be known. The very fact of not looking at the paper shows that this confidence exists. It is asked, whether, if there were some unreasonable condition, as to forfeit £1,000 if the goods were not removed in forty-eight hours, would the depositor be bound? I might content myself by

asking, would he be if he were told: "Our conditions are on this ticket," and he did not read them. In my judgment, he would not be in either case. I think there is an implied undertaking that there is no condition unreasonable to the knowledge of the party tendering the document, and not insisting on its being read—no condition not relevant to the matter in hand.

I am of opinion, therefore, that the plaintiff, having notice of the printing, was in the same situation as though the porter had said: "Read this, it concerns the matter in hand;" that if the plaintiff did not, he is as much bound as though he had and had not objected. The difficulty I feel as to what I have said is, that it is too demonstrative. But put in practical language it is this, the defendants put into the hands of the plaintiff a paper with printed matter on it, which in all good sense and reason must be supposed to relate or probably to relate to the matter in hand. This printed matter the plaintiff sees, and is either bound to read it, and object if he does not agree to it, or if he does read it and does not object, or does not read it, to be held to consent to its terms. Therefore, on the facts, the judges should have directed a verdict for the defendants. The second question left in my opinion should not have been left, and was calculated to mislead the jury. It might equally have been put if the plaintiff had been told that the conditions of the contract were on the for the defendants. The second question left in my opinion should not have been a question of law, and so it is now. Besides, by its terms it was calculated to mislead the jury. "Under any obligation in the exercise of reasonable and proper caution to read the ticket." Obligation to whom? Not to himself, as people sometimes say, for there is no such duty; or, if any, he may excuse himself from performing it. If it means, would a reasonable and properly cautious person omit to read it? I say: "Yes." Such a person might well take the matter on trust, but he ought to be content to take the consequences of so doing. He has no right, having omitted to inform himself, and having the means of doing so, to make a claim, which he might have fairly made had he had no such means of informing himself. The question possibly means "obligation to the defendants," that is, had the plaintiff a right to omit to do so, and then make his claim? I repeat that the same question might be put if he were told that the print contained the conditions of the contract, and then would obviously be a question of law as it is now. The question is imperfect. The question whether of law or fact, is: Can a man properly omit to inform himself, being able to do so, and then justly claim when he could not had he informed himself? The latter part of the question is left out. The authorities are in favour of this view: *Stewart* v. *London and North Western Rail. Co.* (4); *Van Toll* v. *South Eastern Rail. Co.* (3), the opinion of WILLES, J., in *Lewis* v. *McKee* (5), and, lastly, *Henderson* v. *Stevenson* (2). I need not say that if I thought that case supported the judgment I should defer to it. I cannot understand how that can be supposed. The plaintiff there said that "he had never looked at the ticket nor seen the notice on it, no one having directed his attention to either." On this the House proceeded. The Lord Chancellor says: "Your Lordships may take it as a matter of fact that the respondent was not aware of that which was printed on the back of the ticket." Here the plaintiff knew there was printed matter, and must have known it concerned him. The Lord Chancellor adds: "The passenger receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him."

I am of opinion, therefore, that the judgment should be reversed, and be given for the defendants. If not, though I think the question one of law, still, if it is one of fact, it has not been left to the jury, and there should be a new trial. The possible question of fact is that set forth in the judgment of MELLISH, L.J., with a perusal of which he has favoured me. But I repeat, I think it is a question of law. I also think the verdict against evidence, and on

that ground there should be a new trial. No one can read the evidence of the plaintiff in this case without seeing the mischief of encouraging claims so unconscientious as the present.

New trial ordered.

Solicitors: *G. W. Digby; W. R. Stevens.*

[*Reported by* P. B. Hutchins, Esq., *Barrister-at-Law.*]

BOWES & CO. *v.* SHAND & CO.

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan, Lord Blackburn and Lord Gordon), June 7, 8, 1877]

[Reported 2 App. Cas. 455; 46 L.J.Q.B. 561; 36 L.T. 857; 25 W.R. 730; 5 Asp.M.L.C. 461]

Sale of Goods—Rejection—Stipulation as to date of shipment—"March and/or April"—Shipment in February.

The appellants, by contracts dated London, Mar. 17 and 24, 1874, bought of the respondents about 600 tons of "Madras rice, to be shipped . . . during the months of March and/or April, per *Rajah of Cochin.*" About four tons only of the rice was shipped in March, the remainder having been shipped in February, and the appellants refused to accept it, on the ground that it did not comply with the contract.

Held: the stipulation as to the date of shipment must be (a) regarded as part of the description of the subject-matter to be sold, (b) the contracts must be strictly construed so as to render shipments in February a breach of the contract of sale which entitled the appellants to reject the rice and not merely gave them a right to claim from the respondents damages in respect of any damage they could prove they had suffered.

Alexander v. *Vanderzee* (1) (1872), L.R. 7 C.P. 530, distinguished.

Shipping—Carriage of goods by sea—Loading—"Shipped"—Interpretation as meaning "put on board."

Per Lord Hatherley: By "shipped" all the witnesses understood "put on board."

Shipping—Carriage of goods by sea—Loading—Completion—Evidence—Signing of bill of lading.

Per Lord Blackburn: I should regard the signing of a bill of lading as conclusive evidence that the portion of the shipment for which it is signed was then completed and at an end.

Notes. Considered: *Nelson* v. *Nelson Line (Liverpool) (No. 3)*, *Re Nelson and Nelson Line (Liverpool)* (1907), 77 L.J.K.B. 97. Applied: *Re General Trading Co. and Van Stolk's Commissiehandel* (1911), 16 Com. Cas. 95. Considered: *Sutro* v. *Heilbut, Symons & Co.* (1916), 86 L.J.K.B. 330; *Re L. Sutro & Co. and Heilbut, Symons & Co.*, [1917] 2 K.B. 348; *Manbre Saccharine Co.* v. *Corn Products Co.*, [1918-19] All E.R. Rep. 980; *Fisher, Reeves & Co.* v. *Armour*, [1920] 2 K.B. 329; *Avon* v. *Comptoir Wegimont*, [1921] 3 K.B. 435; *Taylor* v. *Bank of Athens*, *Pinnock* v. *Same* (1922), 91 L.J.K.B. 776; *Montague L. Meyer, Ltd.* v. *Osakeyhito Carelia Timber Co.* (1930), 36 Com. Cas. 17. Referred to: *Re Goodbody and Balfour and*

Williamson (1899), 5 Com. Cas. 59; *Hartley* v. *Hymans*, [1920] All E.R. Rep. 328; *Diamond Alkali Export Corpn.* v. *Bourgeois*, [1921] All E.R. Rep. 283; *The Annie Johnson*, *The Kronprinsessen Margareta*, [1918] P. 154; *James Finlay & Co., Ltd.* v. *N.V. Kwik Hoo Tong Handel Maatschappij*, [1928] All E.R. Rep. 110; *Wilson* v. *Wright*, [1937] 4 All E.R. 371.

As to stipulations as to time in a contract for the sale of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 45, 46; and for cases see 39 DIGEST 422-430.

Case referred to:

(1) *Alexander* v. *Vanderzee* (1872), L.R. 7 C.P. 530; 20 W.R. 871, Ex. Ch.; 39 Digest 425, *563*.

Also referred to in argument:

Graves v. *Legg* (1854), 9 Exch. 709; 2 C.L.R. 1266; 23 L.J.Ex. 228; 23 L.T.O.S. 254; 39 Digest 468, *927*.

Busk v. *Spence* (1815), 4 Camp. 329; 171 E.R. 105; 39 Digest 427, *570*.

Bettini v. *Gye* (1876), 1 Q.B.D. 183; 45 L.J.Q.B. 209; 34 L.T. 246; 40 J.P. 453; 24 W.R. 551; 12 Digest (Repl.) 482, *3590*.

Appeal by the defendants in the action, Bowes & Co., from a decision of the Court of Appeal (KELLY, C.B., MELLISH, BRETT, & AMPHLETT, L.JJ.), in an action brought by the plaintiffs, Shand & Co., against the defendants for damages for breach of a contract for the purchase by the defendants from the plaintiffs of a quantity of rice.

By two contracts, evidenced by sold notes, dated London, Mar. 17 & 24, 1874, the appellants bought of the respondents, about 600 tons of Madras rice—300 under each contract

> "to be shipped at Madras or coast for this port during the months of March and/or April, 1874, per *Rajah of Cochin*, at 11s. 10½d. per cwt. for fair pinky."

The rice was shipped in 8200 bags, in four parcels, a separate bill of lading being given for each parcel, as follows. For 1780 bags on Feb. 23; for 1780 bags on Feb. 24; for 3560 bags on Feb. 28; for 1080 bags on Mar. 3. Of this last parcel all but fifty bags were put on board before the end of February.

The action was tried before BRETT, J., and a special jury, at the Michaelmas sittings, 1875. Evidence was given that rice shipped in February would be of as good quality as rice shipped in March or April, and the learned judge left the question to the jury whether it was a shipment in March and/or April in the ordinary business sense of the words, the loading being completed in these months. The jury found a verdict for the plaintiffs for the agreed sum of £1636 18s. The defendants moved to enter judgment for them pursuant to leave reserved, and the court (BLACKBURN, MELLOR and LUSH, JJ.) acceded to the motion (1 Q.B.D. 470). The plaintiffs appealed, and the decision of the Queen's Bench Division was reversed by the Court of Appeal (2 Q.B.D. 112) on the authority of *Alexander* v. *Vanderzee* (1). The defendants appealed to the House of Lords.

Benjamin, Q.C., and *Gainsford Bruce* for the appellants.

Cohen, Q.C., and *J. C. Mathew* for the respondents.

LORD CAIRNS, L.C.—I have to propose to your Lordships to dissent from the unanimous decision of the Court of Appeal in this case. If I entertained any doubt, or if I had found that your Lordships entertained any doubt as to the conclusion at which we should arrive, I certainly should have suggested that time should be taken for further consideration of the case. But I think your Lordships have no hesitation in arriving at the conclusion which I shall ask you to arrive at.

The case appears to me, when properly considered, to be an extremely simple one. The action is brought upon two contracts for the sale of rice, which differ only in respect of the date, and, therefore, it will be sufficient that I should refer to one of them. The first of the two contracts is dated Mar. 17, 1874, and the sold note which is written to the respondents, Shand & Co., runs in these words:

> "We have this day sold for your account to Bowes, Martin, and Kent, the following Madras rice, to be shipped at Madras or coast, for this port during the months of March and/or April, 1874, about 300 (three hundred) tons per *Rajah of Cochin* at 11s. 10½d. per cwt., for fair pinky."

That sentence includes all that for the present purpose it is material that I should refer to.

So far as the construction of the contract expressed in these words is concerned, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the court. That has been said so often that I need not refer your Lordships to any authority upon the subject. I shall assume, in the first place, that there is no word in this contract which is proved by the custom of the trade to have any particular meaning. I shall afterwards consider whether it has been proved that there is any custom attaching a particular meaning to the words used.

Looking at the construction of these words, I put aside in the first place some which, to anyone unaccustomed to a contract of this kind might appear peculiar, the words "and/or", inasmuch as no question has been raised on those words, and it is agreed upon both sides that they simply are a mercantile way of expressing that something is to be done in the months of March and April, or either of them. Putting that aside, and looking still at what would be the ordinary and grammatical meaning of the words, it will, I think, occur to your Lordships that it is possible that the words which I have read may mean one of two things. It might be held that they mean that the rice which is spoken of is to be put on board the ship which is mentioned during some part of the two months specified, March and April, 1874, and that is the meaning of the words "to be shipped" during those months, or it might be held that they mean that the shipment is to be made continuously, and in such a way as that it is to come to a conclusion in one of the months in question, and that a bill of lading representing the shipment and the contract made on the shipment is to be given inside one of these months, for the whole of the rice in question.

If that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which has upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be made during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and some importance, and that alone might be a sufficient answer. But, if necessary, a further answer is obtained from some other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment. Therefore, it may well be that a merchant making a number of rice contracts ranging over several months of the year, will be desirous of expressing that the rice shall come forward at such times and at such intervals of time as that it will be convenient for him to make the payments, and it may well be that a

merchant will consider that he has attained that end if he provides for the shipment of the rice during a particular month, or during particular months, and that he will know that, provided he has made that stipulation, the rice will not be forthcoming at a time when it will be inconvenient for him to provide the money for the payment.

There is still another explanation. Sufficient appears upon the evidence to show that these contracts were made for the purpose of satisfying and fulfilling other contracts which the appellants had made with other persons; and it is at least doubtful whether, if they had made a contract in any other form than that which is before your Lordships, a contract made without this stipulation as to the shipment during these months, would have been a fulfilment of those other contracts which they desired to be in a position to fulfil.

Therefore, still dwelling merely upon the natural meaning of these words, and without any evidence as to their having any particular or customary meaning, I should say without hesitation, that the meaning of this contract must be one of two things. Prima facie I should say it meant that the shipment must be made, that the rice must be put on board, during the two specified months, and neither before nor after those months. But if the contract does not mean that, the only other meaning which it appears to me it could have is (and as to that, I think evidence would be required to show that by usage it had obtained that meaning) that the shipment should be made in a manner which would be described as continuous, and that it should come to a consummation or completion in one of those months which are here mentioned, and that the bill of lading should be given for the whole and complete shipment at that time.

If those two meanings be the only possible and natural meanings of the contract, then, according to neither meaning was the rice in this case put on board in such a way that it could be tendered in fulfilment of the contract, because the whole of the rice was actually on board, not merely at the time when the first contract was made, but during the month of February, with the exception of fifty bags which were put on board on Mar. 2, and bills of lading had been given during the month of February for all the parcel of rice with the exception of 1080 of the bags, in respect of which a bill of lading was given on Mar. 3. According, therefore, to neither of those constructions would the rice have been put on board in such a way as to make it a tender in fulfilment of the contract.

I now turn from this construction, which I submit to your Lordships is the natural and only possible construction literally of the words, to the construction which the contract has received in the Court of Appeal. MELLISH, L.J., speaks in this way:

> "The real question is whether in order to fulfil a contract that 600 tons of rice should be shipped in March or April, it is necessary that the whole 600 tons should have been put on board in March or April, or whether it is sufficient that the shipment should have been completed in March or April. . . . The word 'shipped' is, we think, capable of both constructions, and even if it be admitted that its literal meaning would imply that the whole quantity must be put on board during the specified time, that is a construction which seems to put a fresh additional burden on the seller, without any corresponding benefit to the purchaser, and the consequence of adopting it would, we think, be that purchasers would without any real reason, frequently obtain an excuse for rejecting contracts when prices had dropped."

I must submit to your Lordships that if it be admitted, as the lord justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning to say that it puts an additional burden on the seller without

a corresponding benefit to the purchaser. That is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real reason, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled. The lord justice continues:

> "The sole object of the purchaser of such produce as this in confining the seller to a particular time within which the goods must have been shipped is, as far as appears, that he may know when the goods are likely to arrive."

The lord justice takes no notice whatever of those other reasons to which I have referred, namely, that the merchant may not desire to be called upon before a certain time to pay the money, or that he may, in entering into a contract of this kind, have in view the fulfilment of some other contract with an analogous stipulation which a contract in any different form would not fulfil. The lord justice continues:

> "That object seems as effectually obtained by knowing when the shipment will be, or has been completed as by knowing when each part of the goods was put on board. We, therefore, should entirely agree with the decision in *Alexander* v. *Vanderzee* (1) even if that decision was not binding on us."

That makes it right that I should refer to the decision in *Alexander* v. *Vanderzee* (1). The Court of Appeal in the present case seem to have thought that there was some rule of general application laid down by the decision of that case in the Exchequer Chamber, and that that rule was binding, or ought to have been held binding, in the court below in the present case. I do not find that there was anything that could be called a rule laid down in *Alexander* v. *Vanderzee* (1). It was a case in which a contract somewhat similar to the present, but of Danubian maize, was made. The contract was that the maize was to be shipped in the month of June, and a great part of the maize was shipped in the month of May, that is to say, was put on board in the month of May. The remaining part was put on board in the month of June, and a bill of lading was given on the completion of the shipment for the whole parcel of maize. At the trial of the case the question was left to the jury: "Was a shipment of maize under those circumstances, commenced in May, concluded in June, and the bill of lading for the whole given in June, a June shipment according to the understanding of the trade?" The jury in that case found that it was a June shipment; the majority of the Court of Exchequer Chamber were of opinion that that question was properly left to the jury, and that, the jury having answered it as they did, that disposed of the case. Your Lordships have not now to decide, and cannot now decide whether what took place in *Alexander* v. *Vanderzee* (1) was the course which ought properly to have been taken with respect to the conduct of the case. We have not before us the evidence which was before the jury, or the form in which the question was left to the jury; but in that case the question which I have stated seems, in some form or other, to have been left to the jury, and they, as I have said, found that the shipment was a June shipment. I will assume that that decision was right, and that the mode in which that case was treated, was the correct mode. It has no application to the present case. Your Lordships have not here what occurred in *Alexander* v. *Vanderzee* (1)—a continuous shipment going on up to the period of completion, the completion being in the month specified, and a bill of lading given in that month. *Alexander* v. *Vanderzee* (1) laid down no general rule. It proceeded on the finding of the jury in that case, and, even if it

A did lay down a rule, the rule would not be applicable to a case like the present in which the facts are different from the facts which occurred there.

Before leaving that part of the case, I must advert to a suggestion which was made at the Bar on behalf of the respondents, although it does not appear to have been made in the court below. It was suggested that even if the construction of the contract be as I have stated, still, if the rice was not put on board in the B particular month, that would not be a reason which would justify the appellants in rejecting the rice altogether, but it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the month in question. I cannot think that there is any foundation whatever for that argument. If the construction of the contract be, as I have said, that it means that the rice is to be put on board in C the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross, or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The construction may be shown by evidence to be different from what I have supposed; but if the construction be that which I have supposed, the D plaintiff who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show this, he cannot claim any damages for the non-fulfilment of the contract.

Having submitted to your Lordships what I understand to be the natural and literal meaning of this contract, I ask how is that natural meaning to be got E rid of? I conceive in this way, and only in this way. It was, of course, competent for those who were resisting the application of this natural construction of the contract to have said: "We will prove by evidence that, according to the custom of the trade, these words, which have this natural signification, are used in a wider, or in a different sense. The natural meaning of the words, no doubt, is that the rice shall be shipped during these two particular months, F but we will show that, by the custom of the trade, a latitude is allowed, and that, provided the shipment has been conducted in such a way as that the ship will be able to sail during these two months, that means, by the custom of the trade, the shipping of rice on board during the months in question." That, of course, would—according to the well-known rule of law which admits parol evidence, not to contradict, but to explain, the words used in a document—to be G as it were the mercantile dictionary in which you are to find the mercantile meaning of the words which are used—be a legitimate and well-known mode of construing the document.

Has any evidence of that kind been adduced here? It is a case which is certainly one of the most singular I have ever observed in this respect. The appellants put upon the record pleas which repeated the stipulations in the con- H tract with regard to the shipment being made during the particular months, and the plea averred not only that the stipulation had that meaning, that the goods were to be put on board during those months, but that negatively they should not be put on board at any other time. The parties went to trial upon those issues among others. The respondents did not propose to adduce, and did not adduce, any evidence as to any custom which would put upon the words in I question any meaning different from whatever might be their ordinary or natural meaning. But the appellants not merely rested upon what they contended to be, and what as it seems to me was, the natural meaning of the words, but they proceeded to give evidence that that which was the natural meaning of the words was understood by the trade to be their real meaning, and to be the meaning which the trade was in the habit of acting upon. This appears to me to have been, on the part of the appellants, a taking upon themselves an onus, and an effort to discharge an onus, which, if it pointed to the producing of evidence at all, was an onus that lay on the other side. It was for the respondents, if they

had any evidence of a custom controlling or explaining the natural meaning of the words in the contract, to produce their evidence, and it was hardly necessary for the appellants to produce evidence which only professed to show that the words meant what naturally they would appear to mean. However, very strong evidence was produced by the appellants to that effect, and, what is still more remarkable, one of the very strongest pieces of evidence the appellants had on that point was the evidence of one of the respondents who upon cross-examination said, with at least as much distinctness and force as any of the other witnesses, that he would not consider rice put on board the ship during any months other than the two months specified to be a tender within the meaning of this contract.

In that state of things, so far from any evidence being produced by the plaintiffs to alter the natural meaning of the words, all the evidence was evidence going to show that the words ought to receive, and would in the trade receive, their natural and ordinary construction, and I think the counsel for the respondents at your Lordships' Bar admitted with great fairness, and they could not have done otherwise than admit, that, if the question were asked: Was there any evidence to go to the jury of a custom placing upon these words a meaning different from their natural and ordinary meaning? the answer must be that there was no evidence of that kind. Therefore, I submit to your Lordships that that which appears to me to have been the only mode of controlling the natural construction of this contract, was not a mode which was resorted to, or could be resorted to, in this case. There was nothing whatever in the evidence to go to the jury entitling the plaintiffs to say that a construction different from the ordinary meaning of the words should be put upon the contract.

That is the more important as bearing upon some other observations of MELLISH, L.J., in the Court of Appeal. Your Lordships will remember that there were in substance two applications to the Court of Appeal. One was with reference to whether the verdict should be entered for the appellants; the other was with reference to a motion for a new trial. With regard to the motion for a new trial on the ground that the verdict was against the weight of evidence, MELLISH, L.J., thus expressed himself:

> "Several witnesses, and amongst them the plaintiff himself, have deposed that they understood the word 'shipped' to mean 'put on board,' and that the whole quantity sold must be put on board within the specified time, and no witness says that the word in mercantile usage has any other meaning, and the jury appear to have based their verdict upon a distinction which, though made by one or two witnesses, we do not think satisfactory, between contracts in which the ship is named, and contracts which may be fulfilled by delivering goods out of any ship. On the other hand, we think it is obvious on reading through the evidence that each witness was not speaking of any real mercantile meaning which the word 'shipped' or 'shipment' bears, but was putting his own construction on the word, and, as persons who are not lawyers are apt to do, interpreted the word literally. No witness stated that he had known instances of goods rejected, and such rejection acquiesced in when the shipment had been completed within the appointed time, because the whole of the goods were not put on board during that time; and this is the sort of evidence which, in our opinion, ought to be given before the rule established by *Alexander* v. *Vanderzee* (1) is departed from."

I have already referred to that case, and to the supposition that it established any rule; but with reference to these observations of the lord justice I desire to point out to your Lordships that they appear to me to be based upon a degree of forgetfulness of what really was the state of things at the trial of

this case. The lord justice speaks as if witnesses had been brought forward to establish a custom controlling or altering the natural meaning of the words. Had that been the case I agree that it would have been extremely proper to have examined with minuteness and with criticism the evidence so given, to look upon it with suspicion, at all events with care, as you must always do upon evidence which proposes to fix upon words a non-natural meaning or an acquired meaning. But these witnesses were not brought forward to fix upon words a non-natural or an acquired meaning. They were brought forward for the very simple and innocent purpose of saying that they had always understood that the words bore their natural meaning, and had no acquired or secondary meaning in the trade. Under the circumstances I am at a loss to conceive how witnesses could have said anything else than that in general terms that was their opinion of the meaning of the words, and that was the way in which in the course of their trade they had always known them to be acted upon.

That really disposes of the whole of the case. If there had been any conflict of evidence, if there had been any evidence opposed to that given by the defendants, your Lordships might have had here to consider whether there ought not to have been a new trial; but it being the case, and it being in fact admitted, that there was no evidence the other way, and that there was no evidence to go to the jury of the words having any unnatural signification, the question resolves itself simply into the ordinary and natural construction of the contract as a document the construction of which must be placed upon it by the court. I repeat, *Alexander* v. *Vanderzee* (1) has not laid down any rule of construction applicable to the present case, and the documents lie before your Lordships for you to put the natural and ordinary construction on the words. That natural and ordinary construction appears to me to be free from doubt and ambiguity, and it will and must give to the contract a meaning showing that it has not been complied with in this case, and that the goods tendered are not goods which were shipped according to the contract. I, therefore, submit that the plaintiffs have failed in making out their case. In my opinion, the determination of the Court of Queen's Bench was correct, and the Court of Appeal ought to have dismissed the appeal which was made from that decision. Your Lordships, if you take that view, will now restore the judgment of the Court of Queen's Bench, with the costs of this appeal.

LORD HATHERLEY.—I entirely concur in the result at which my noble and learned friend has arrived. I pass altogether from *Alexander* v. *Vanderzee* (1), because, for the reasons which have been already assigned, it appears to me to be distinguishable from this case, and to have laid down no rule whatsoever which can be usefully applied here.

Looking at the case before us, the first observation which strikes one upon the aspect of the contract, I think, is that it is a carefully prepared contract. There are traces in the evidence before us of its being a contract of no unusual character, from which I infer that a course of dealing and practice has been established which we ought to be very careful in no way to interfere with. I apprehend that nothing can be more unbecoming in a court of justice than an endeavour in any way, by any strained rule of construction, to get rid of the plain and simple effect of the contracts which they have to construe. Our duty as judges in cases of this description, as contrasted with the duty of a jury, is this. If the contract bears a plain natural sense and meaning, nothing should make us deviate from that plain natural sense and meaning but the strongest evidence, not of the opinion of this or that witness, but of a custom of the trade or business which forms the subject-matter of the contract, which gives an unusual, and, as it has been called, a non-natural, meaning to the contract. No evidence of that description has been produced in this case. We have got,

as it appears to me, plainly and simply to construe this contract according to the words we there find.

The only word in the contract which would admit, as it appears to me, of any technical interpretation is the word "shipped." It may be well with regard to a word which was not sufficiently understood before, or with regard to words which have a special and technical force, to have established, if it can be established, upon evidence, any usage which has attributed to such words any special or peculiar force. It does not appear to me, however, that in the present case any such evidence is needed. I think the meaning of the word "shipped" is sufficiently understood by this time in commerce. But if it were needed, I think we have sufficient evidence before us that by "shipped," all the witnesses understood "put on board." I read the contract, therefore, as if it said, "put on board" at Madras or coast for this port during the months of March and/or April, 1874. Your Lordships will observe that it is not "*in*" the months of March and/or April; it is not that the goods are to find themselves on board, and to be there within that period, but it is that they are to be shipped, that is to say, to be put on board "*during*" those months, implying a continuous act of shipping, by which these goods are to be placed in the position in which they are to be placed according to the meaning of the contract.

It is not surprising that a state of things has arisen upon which there might be some controversy, for this reason. Owing to the distance of the district from which the goods were to come, the parties to the contract of Mar. 17 could not ascertain the exact state of things at the date of the contract, and in truth the goods which have been tendered to the defendants were all on board at the very date of the contract itself. They had, therefore, been put there with no reference whatever to the contract and its terms, and it is not surprising that this shipment of the goods, made before the contract was entered into, and without knowledge of the contract, should not be found to square with that instrument. The consequence is that we have here, as it seems to me, an engagement to supply to the appellants, rice the character of which was to be rice shipped during these two particular months, or either of them, and not otherwise.

Under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade to frame their contracts in the manner which pleases them best. We must assume that it is owing to the custom of the trade that they have determined to frame them in this fashion. They do not stipulate either that the goods shall be found on board at such a time, or that the goods shall be on board before the end of the month of April; that would have been a very simple mode of expressing it, if that was what they intended; but they do expressly say that the goods shall be shipped, that is to say, put on board, during these two particular months or one of them. The learned judge who tried the case and addressed the jury in the first instance appears to have reasoned upon the motives which might have induced such a contract to be entered into, and also MELLISH, L.J., in the Court of Appeal, did in some degree consider how far in his judgment a reason could be assigned for such a form of contract. BRETT, J., in addressing the jury, seemed to read the contract as I have just expressed, as if it had been that the ship should be loaded before the end of April; that is the construction which, expressed as he expressed it, it would convey.

The view that I take of the contract I confess is that it is not the article "rice" only that is sold, but the thing that is sold is the article "rice shipped in March or April," and the article "rice shipped in February" is not the article which has been purchased by the defendants. The lord justice says, in very much the same phraseology, that the word "shipped" is capable of the two

constructions, of meaning either "begun and finished to be put on board," or "the putting on board completed," in March or April. [HIS LORDSHIP read the passage from the judgment of MELLISH, L.J., quoted by the Lord Chancellor (p. 177 ante), and continued:] With the greatest possible respect, and I am sure no one judge ever entertained more respect, for another than I entertain for MELLISH, L.J., I do think that that is a very hazardous way of construing a contract, namely, to say in a class of contracts having a great range that the judge can see upon the face of the contract, relating to a class of business upon which he may or may not have been well informed, a sufficient reason to reject what may be the literal interpretation, if otherwise there would be an excuse afforded to parties for rejecting contracts. The danger of such a construction is extreme, because it is impossible to know all the causes which may have induced the persons to put the words into a contract. If the words have a certain definite meaning, it is dangerous to depart from that meaning until you can arrive at any sound ground upon which you should do so. It is dangerous to depart from it upon a conjecture that it can make no difference to the parties; and specially you cannot reject the literal construction, as it appears to me, because you think that unless you reject it you may be affording an opportunity for an evasive purchaser to escape from his bargain. Of course, as has been already observed in many cases, if a purchaser is desirous of escaping from his bargain, and if he finds that the bargain which it is attempted to enforce as against him is not only burdensome, but is against the letter of his contract, there is nothing in our law which prevents his availing himself of the answer to the case made against him, namely, that he has not entered into the engagement alleged, and if it is sought to fasten it upon him, he must first be brought within the four corners of the contract.

What MELLISH, L.J., says is very much like what BRETT, J., said. Assuming in the first place that the only object in view is to know when the ship may arrive, he further assumes that the object is to know the latest period at which it may arrive. I apprehend that it is important to persons entering into contracts of this description to arrange all their contracts for the whole course of the year after the calculations they may have made as to what particular times they will be in funds to meet their engagements, and it is just as important to them to know how long it will be before their ship arrives as to know how soon it will be that she will arrive. They do not wish the goods to arrive sooner than the time when they have made their arrangements for them, and they do not wish them to arrive later than the time respecting which they have made their arrangements. If they specifically name the months of March and April, they mean those two months. They do not mean to purchase goods placed on board in the previous month, February, which would, or might, arrive at a different season from that at which they specially engaged by the contract to accept the goods, which goods by the nature of the contract are to be paid for immediately on the ship's arrival. That seems to me to amount to the whole case, because as regards the evidence which has been produced, I entirely agree with what has been already said, that that evidence, if it was required at all, or if it is admissible at all, has, if anything, strengthened what appears to be the natural construction of the contract, that "March" does mean "March," and "April" does mean "April," and that the loading "during the months of March and April," does mean a loading during those months.

Without detaining your Lordships any longer upon the case, which has been so fully and amply gone into, I am content to say that I do not think this case is at all governed by *Alexander* v. *Vanderzee* (1), nor do I think it necessary to say anything whatever upon that case. I think it is plain upon the construction of the contract we have before us that that contract was not performed in such a manner as that the appellants were compelled to accept the

tender of goods which were shipped in February, instead of goods which were shipped in March and April, or one of them. The February shipment applied to the whole of the goods, with the exception simply of fifty bags, and we have it in evidence, that these fifty bags amounted to four tons out of 300 tons. It appears to me that the defendants could not be obliged to accept a tender of those bags separate and distinct from the complete contract they had entered into for the whole 300 tons almost the entirety of which was shipped in a different month from that which they had contracted for, and, therefore, was not of such a character as to be deliverable to them in fulfilment of the contract they had entered into.

LORD O'HAGAN.—I have reached the same conclusion, and substantially for the same reasons. I shall not repeat those reasons, nor go again through facts and documents that have been already abundantly discussed. The question is of public importance, and the conflict of judicial opinion upon it shows that it is not without serious difficulty, but the grounds of decision lie within a very narrow compass, and for myself I shall state them in a very few words.

As to the authority mainly vouched by the respondents (*Alexander* v. *Vanderzee* (1)), I concur with my noble and learned friends that it is distinguishable, and does not rule this case, which must be dealt with on its own special circumstances. We have to consider a written contract, carefully prepared, and deliberately acted upon, the terms of which are clear and intelligible, and convey very distinctly the purpose of the parties to it. Regarded in themselves, these terms are the proper subject of construction by a court and not by a jury, and they appear to me fully to sustain the contention of the appellants. Commercial usage, or the well established understanding among mercantile men, may sometimes be applied to put on words apparently distinct a sense other than that which reasonably and naturally belongs to them. But of such a usage or understanding the respondents have given no proof whatever, leaving the words employed to the interpretation of the court according to their ordinary import and effect. On the other hand the appellants have relied upon a considerable body of testimony to prove that the sense commonly attributed to the words is that which is put upon them by commercial people. This testimony, if it was needed, would be of much weight and persuasiveness. I do not think that it was. I think that if oral evidence was given at all it should have come from those who wish your Lordships to interpret plain phraseology against its common import. But it is striking and curious that all the witnesses are of one way of thinking, and all of them declare that the literal meaning is the true meaning, and recognised universally as such by those whose occupations and interests bring them continually into relation with agreements of the kind. I thought for a time that there must be a re-investigation of the case, and that the verdict of the jury should be set aside as against evidence, if not for misdirection. But having satisfied myself that the decision properly rested with the court, and that nothing had been offered on either side to raise a jury issue, and deeming the words of the contract plain and unequivocal, I feel bound to adopt the proposal of my noble and learned friend, and advise your Lordships to allow the appeal. I do not think that we are at liberty to speculate as to motives, or to consider what comparative benefit might have arisen from a shipment in February or a shipment in March. I can see good reason at least for the stipulation that it should definitely be in the one month or in the other. But the plain fact is that the appellants bargained for a shipment during March or April, and for nothing else; and as that which was offered to them was substantially a shipment in February they were not bound to accept it. The appeal must be allowed with costs and the judgment of the Queen's Bench affirmed.

LORD BLACKBURN.—I am entirely of the same opinion. The question arises upon a contract by which the one party bound himself to buy, and the

other party to sell, "Madras rice, to be shipped at Madras or coast for this port during the months of March and/or April, 1874, about 300 tons per *Rajah of Cochin.*"

The first question that arises is: What was it that, according to that contract the plaintiff was to supply, and the defendant was bound to take? It was argued that it was enough that it was rice, and that it was immaterial when it was shipped as far as the subject-matter of the contract went, its being shipped at another and a different time being only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by LORD ABINGER, C.B., and always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. The truth is, as he said, that if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras; probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April; and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin.* But the parties have chosen, for reasons best known to themselves, to say: "We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship"; and before the buyers can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for. Otherwise they are not bound to take it.

That being so, the question which arises in this case is whether the rice here tendered was shipped within the period stipulated for or not. That evidently involves in it two questions: First, what is meant by the word "shipped" as used in this contract? and, secondly, the question of fact whether the things which are proved to have taken place did amount to a shipping of the rice within the meaning which ought to be put upon the contract. Before saying a word about the evidence which was given with regard to usage and custom, I will proceed to consider what is the meaning which your Lordships should, in the absence of any evidence of mercantile usage, put upon the word "shipped" in a contract of this sort. Supposing we had no help from mercantile usage, and nothing to guide us but that general knowledge of dealing and of what takes place which judges judicially possess and take notice of, what would that contract mean? It seems to me that where a parcel of goods is begun to be put on board on or after Mar. 1, and they are all finally put on board, so that the shipping is entirely completed before Mar. 31, and nothing then remains but to take the bill of lading for them, there can be no doubt that that is a March shipment. The whole shipment is completed in that month. But there would be a great deal more difficulty in saying whether it was a March shipment or not if the case were this. Suppose the shipment of a large parcel of goods as one transaction, which occupies several days, has been begun before the end of February and been proceeded with continuously with reasonable despatch and in the ordinary way as a matter of fair dealing, and the completion of the shipment is in March, the bill of lading being taken in March, I think the materiality of the bill of lading would only be as evidence to show that the shipment was then completed. I do not think the delaying of the bill of lading for a fortnight would make the date of the shipment a fortnight later. I think the material thing is the completion of the putting the goods on board which would entitle you to

the bill of lading, but the bill of lading would be strong, and in most cases conclusive, evidence of the date when the shipment was completed. I think in a case of the sort I have supposed there is a serious and grave question whether or not the shipment may be considered as being made partly in one month and partly in the other, or whether it may not be considered as made at the time when the one indivisible transaction of putting those bags of rice on board was ended and completed, resulting in the whole parcel being on board, so that there is now a right to say: We have shipped this cargo, or portion of cargo, and we are now entitled to a bill of lading.

That was the case which arose in *Alexander* v. *Vanderzee* (1). The majority of the Court of Exchequer Chamber, KELLY, C.B., dissenting, said that that was a sufficiently ambiguous matter to make it a proper question to ask the jury whether this was a shipment in June or not, that being the month when it ended, having begun in May. The decision was that it was a proper case to take the opinion of the jury upon. I see that I am reported to have said (L.R. 7 C.P. at p. 534), standing, so far as I can perceive, alone in that respect, that without the aid of the finding of the jury I should have come to the same conclusion. I do not mean to say more about the case than that, without saying I was wrong upon that, I have very considerable hesitation and doubt in saying now that I was right. I pass by that case with merely that observation, and leave it as it stands. When the present case came before the Queen's Bench Division, and I had to give judgment, I could not consider whether the decision in *Alexander* v. *Vanderzee* (1) was right or wrong. Being a decision of the Court of Exchequer Chamber it bound me, and, consequently, it was absolutely necessary for the purpose of the decision there to distinguish this case, and show that it was not the same as *Alexander* v. *Vanderzee* (1). Now, when I am advising your Lordships in the House of Lords, that is no longer so. I am not bound to say that the decision in *Alexander* v. *Vanderzee* (1) is good, but it is quite enough for the purpose of advising your Lordships on what conclusion you should arrive at here to say that I do distinguish the present case from *Alexander* v. *Vanderzee* (1), and that I think it is distinguishable now for the same reasons as those for which I distinguished it in the Court of Queen's Bench below.

The facts here are that the great bulk of this rice was put on board during the month of February. For nine-tenths of it bills of lading were signed in February. With regard to the remaining tenth, a large part of that was put on board in February, but a small portion, amounting, I think, to four tons, was put on board in March, and the bill of lading for the last parcel was signed in March. Under these circumstances it seems to me that, putting aside the mercantile evidence altogether, it is quite clear that as far as regards those nine-tenths the shipment of which was completed in February, as was indicated by the taking of the bills of lading then, it was not part of a continuous operation eked out by putting on board four tons more in March. It seems to me that it was so completely a February shipment that, had this contract said "shipped in February" instead of saying "shipped in March and/or April," the buyers clearly could not have rejected it. Being a February shipment it cannot be a March shipment. I observe that in delivering the judgment of the Court of Appeal, MELLISH, L.J.,—and I suppose I need hardly say that every word which comes from him I consider with the greatest respect, and do not differ from without thinking over it very much—takes a different view. I quite agree with him that a bill of lading is no essential part of the shipping of a cargo or parcel of goods. A parcel of goods may be put on board a ship without a bill of lading at all; it is no necessary part, therefore, of the shipment. But when the question is whether there has been a shipment within a particular time or not, the fact that a bill of lading has been made out and signed is, to my mind, evidence, and until a mercantile man appears to tell me that it

A makes no difference I should regard it as conclusive evidence, that so far as regards that portion of the shipment for which it is signed, it is then completed and is at an end. It is in that way that I consider it as being a decisive and important question, and I must say that, to my mind, the reasoning of MELLISH, L.J., and of the other learned justices of appeal who agreed with him on that point is not sound.

B I think, therefore, that it comes to this, that prima facie in the absence of mercantile evidence or the like, the true construction of the contract is that "shipped in March" bears such a meaning that the portions or parcels of goods put on board in February, and so completely put on board and shipped that bills of lading were signed for them, were not March shipments, and, consequently, in the absence of mercantile usage, the defendants are entitled to judgment. As C to the mercantile usage, I will say scarcely anything upon that subject, for it really comes to this, that the respondents did not attempt to give any mercantile evidence. They said the construction of the contract without mercantile usage was in their favour. The appellants might have rested upon that; but, the jury having found in *Alexander* v. *Vanderzee* (1) that in that case there was a D different mercantile meaning, they were afraid of that and took upon themselves to prove the negative. They took upon themselves to prove that there was no custom. Nobody was trying to prove that there was a custom the other way, and I think your Lordships are bound to act without regard to the question which was asked, and to which no answer was given, whether or no there was any difference in the meaning of this contract established by mercantile usage, of E which certainly no evidence was given. Taking that view of the case it seems to me that the judgment should be for the appellants as it was originally given in the Queen's Bench Division, and I agree with what the noble and learned Lord on the Woolsack has proposed, that the costs should include the costs in this House as well as in the court below.

F **LORD GORDON** concurred.

Appeal allowed.

Solicitors: *Lattey & Hart; Stevens, Wilkinson & Harries.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

G

HUGHES *v.* METROPOLITAN RAIL. CO.

H

[HOUSE OF LORDS (Lord Cairns, L.C., Lord O'Hagan, Lord Selborne, Lord Blackburn and Lord Gordon), June 5, 1877]

[Reported 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 25 W.R. 680]

I *Landlord and Tenant—Lease—Forfeiture—Waiver—Notice to repair within period stipulated by covenant—Negotiations for sale to landlord of tenant's interest—Suspension of notice.*

By the lease of a house which the respondents, as tenants, held from the appellant, as landlord, the respondents covenanted to repair the premises within six months after notice in writing, the lease further containing a proviso for re-entry. In October, 1874, the appellant gave the respondents notice to repair. Negotiations were then entered into between the parties for the sale of the respondents' interest to the appellant, and those negotiations were not termin-

ated till Dec. 31, when they fell through. The respondents effected the repairs within six months from that date. In an action of ejectment brought by the appellant for a forfeiture for non-repair under the covenant,

Held: the entry by the appellant into the negotiations had the effect of leading the respondents to believe that for the time being the notice to repair was in abeyance and induced them not to proceed at once with the repairs, and in equity the appellant must be taken as having waived the notice as respected the period ended on Dec. 31; in view of the terms of the lease a period of six months must be taken to be a reasonable time within which to do the repairs and the repairs had been done within six months from Dec. 31; and, therefore, the respondents were not in breach of the covenant to repair and the appellant was not entitled to a forfeiture.

Notes. Applied: *Birmingham and District Land Co.* v. *London and North Western Rail. Co.*, [1886-90] All E.R. Rep. 620. Considered: *Bruner* v. *Moore*, [1904] 1 Ch. 305; *Modern Transport Co.* v. *Duneric Steamship Co.*, [1917] 1 K.B. 370; *Foot Clinics (1943), Ltd.* v. *Cooper's Gowns, Ltd.* (1946), 91 Sol. Jo. 309; *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.*, [1955] 2 All E.R. 657. Referred to: *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648; *Hartley* v. *Hymans*, [1920] All E.R. Rep. 328; *Salisbury* v. *Gilmore*, [1941] 2 All E.R. 817; *Lyle-Mellor* v. *A. Lewis & Co. (Westminster), Ltd.*, [1956] 1 All E.R. 247; *Central London Properties Trust, Ltd.* v. *High Trees House, Ltd.* (1946), [1956] 1 All E.R. 256, n.; *Beesly* v. *Hallwood Estate, Ltd.*, [1960] 2 All E.R. 657; *Société Franco Tunisiénne d'Armement* v. *Sidermar S.P.A.*, [1960] 2 All E.R. 529.

As to relief against breach of a covenant to repair, see 23 Halsbury's Laws (3rd Edn.) 585; and for cases see 31 Digest (Repl.) 555 et seq.

Cases referred to in argument:

Gregory v. *Wilson* (1852), 9 Hare, 638; 22 L.J.Ch. 159; 19 L.T.O.S. 102; 16 Jur. 304; 68 E.R. 687; 31 Digest (Repl.) 558, *6777*.

Hill v. *Barclay* (1811), 18 Ves. 56; 34 E.R. 238, L.C.; 20 Digest (Repl.) 550, *2577*.

Appeal from a decision of the Court of Appeal (James, Mellish and Baggallay, L.JJ., Mellor, J., and Cleasby, B.), reported 1 C.P.D. 120, reversing a decision of the Common Pleas Division (Lord Coleridge, C.J., Brett and Lindley, JJ.), in an action of ejectment brought by the appellant against the respondents for a forfeiture on breach of a covenant to repair premises of which they were the lessees within six months after the receipt of a notice in writing.

The facts appear in the opinion of Lord Cairns, L.C.

Southgate, Q.C., and *Bowen* for the appellant.

E. Kay, Q.C., and *W. G. Harrison, Q.C.*, for the respondents, were not called on to argue.

LORD CAIRNS, L.C.—The decree of the Court of Appeal which is brought before your Lordships in this case is one which has the support of all the five judges who constituted the Court of Appeal at the time. One of the learned judges, Cleasby B., no doubt assented to the decision with some hesitation, but it was a unanimous decision of the court. I own that the able argument which your Lordships have heard has raised no doubt whatever in my mind as to the propriety of that decision, although at the same time I am not able to take the view which one at least of the learned judges who concurred in the decision appears to have taken. James, L.J., in the observations which he made, is reported to have said this:

"I am of opinion from all this correspondence that the lessor [the present appellant] lulled the defendants to sleep until it was too late for them

to do the repairs, that be intentionally induced them to wait till the six months were nearly over, and then sought to enforce the forfeiture."

That not merely states a case which would entitle the court of equity to give relief, but states a case as against the appellant which imputes to him a serious offence in point of morals. I am bound to say, and I think the appellant is entitled that I should at once say, that I see no evidence whatever for fixing upon him the stain which these observations would fix upon him. I am unable to see that there is any evidence in this case that there was any intention on the part of the appellant to lull the defendants to sleep in order that he might wait until the six months were nearly over, and then take advantage of a forfeiture. For reasons which I am about to state, I am of opinion that the appellant cannot take advantage of a forfeiture, but, in my opinion, there was no intention whatever on the part of the appellant to practice any wrong upon the respondents.

The appellant was the landlord of premises in the Euston Road, London, the lease of which, an old and a long lease, was vested in the railway company. There were in the lease covenants to repair on a six months' notice. Notice had been given, and served upon the respondents by the appellant on Oct. 24, 1874. It was a notice to repair the premises within six months which would expire on April 24, 1875. Nothing was done by the railway company between Oct. 24 and Nov. 28. On Nov. 28 the agents of the railway company wrote to the solicitors of the appellant a letter stating that the notice to repair had been received, and that the repairs required by the covenant of the lease "shall be forthwith commenced." It added:

> "It occurs to us that the freeholder may be desirous of obtaining possession of the company's interest, which, as you know, is but a short one, and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest."

If the parties were really minded to treat for the purchase of the lease, of course it was for the interest of both of them that the doing of the repairs should be suspended, and that the property should be bought as it then stood, because it might be desired to apply it to purposes for which the repairs would be useless. I read this as a definite intimation on the part of the railway company that they would not proceed to execute the repairs, although they stated their readiness to commence them forthwith, if they found that there was a probability of an arrangement to purchase being come to. The appellant, when he received this letter, might have said: "I have no intention of becoming a purchaser," or: "I may become a purchaser, but if a negotiation is to be commenced, you must understand that it is to be without prejudice to my notice to repair. You must go on and make the repairs as if there was no negotiation"; or he might have said simply, "I will adopt what you propose," and enter upon a negotiation, saying nothing further. That third course is the course which he took, and it is a course which, it seems to me, when taken, carried with it the intimation that he was satisfied with the footing upon which the matter was put by the letter which he was answering.

By a letter dated Dec. 1, 1874, his solicitors said:

> "If the company are the owners of certain other houses, and are willing to sell them all, and give immediate possession, our client will, on learning the price, consider whether it is worth while to acquire the company's interest or not. In mentioning the price please to give us particulars of the tenancies and rents paid to the company."

That being a letter which, as it appears to me, acceded to the suggestion that the repairs were to be deferred until it was ascertained whether an agreement could be made for the purchase on Dec. 4, it was replied to in this way:

"We are in receipt of yours of the 1st inst. The particulars and terms asked for shall be sent in the course of a few days." A

On Dec. 30 the agents of the railway company write to the solicitors of the appellant:

"We send you herewith a statement of the company's receipts and payments in respect of the houses in Euston Road as requested by you. The company will agree to surrender the whole of the leases in consideration of a payment of £3,000. We shall be glad to hear from you at your early convenience." B

That is followed by the particulars of the railway company's interest in the houses in Euston Road, the property of Mr. Hughes. There is a somewhat lengthy schedule, and it is obvious that the preparation of that schedule was a work which would easily account for the lapse of time between Dec. 4 and Dec. 30. It was a schedule which was required by the appellant. Time was required to prepare it, and your Lordships come, therefore, to Dec. 30 with clear proof that no time had been lost between Nov. 28 and that day. C

The offer then standing upon the letter of Dec. 30, that letter is replied to by the solicitors of the appellant in these words: D

"We have duly received your letter of yesterday's date, enclosing a statement of the company's receipts and payments in respect of the houses in Euston Road, and at the same time intimating that the company will agree to surrender the whole of the leases in consideration of the payment of £3000. Having regard, however, to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company are liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must request you, therefore, to re-consider the question of price, having regard to the previous observations, and to the fact that the company have already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." E F

That is a letter which, a price of £3,000 having been proposed, repudiated that price, refuses to give it, and asks for a modified proposal. No modified proposal in point of fact was made.

But I will put the matter in the most favourable way for the appellant. I will assume that in place of asking for a modified proposal that had been a letter which had at once terminated the negotiation. No further proposal having been made the negotiation in substance then determined. I will assume that the letter upon the face of it had terminated the negotiation, and now I ask your Lordships to consider what would be the consequence. There had been a notice in October to repair in six months; the effect of the letter of November, as it seems to me, was to propose to the appellant, and the further letter of the appellant had the effect of an assent by him, to suspend the operation of that notice, in order to enter upon a negotiation for the purchase and sale of the lease. That negotiation was entered upon, and, as I have assumed, came to an end on Dec. 31. It appears to me that in the eye of any court proceeding on principles of equity it must be taken that all the time which had elapsed between the giving of the notice in October and the letter of Nov. 28 was waived as a part of the six months during which the repairs were to be executed, that all the time from Nov. 28 until the conclusion of the negotiations, which I have assumed to be on Dec. 31 was also waived, and that it was impossible that any part of the time should afterwards be counted as against the tenant as included in a six months' notice to repair. As a result it would be on Dec. 31 for the first time that time would begin to run for the purpose of repair as against the tenant. G H I

Then occurs the question: What time from Dec. 31 could be given? What a court of equity would have done if it had found that the tenant, after Dec. 31 had taken no step to make the repairs, and that a period of six months had run from Dec. 31 without any repairs having been made, it is not necessary here to consider. In point of fact the repairs were made within six months from Dec. 31, and I cannot but think that, the lease having prescribed a period of six months as that which in the eyes of the contracting parties was a reasonable period within which to make such repairs as those, a court of equity would be bound to hold that, the negotiation having been broken off on Dec. 31, the repairs were in this case executed within that which according to the view of the parties was a reasonable time for the execution of such repairs.

It is upon these grounds that I am of opinion that the decision of the court below is correct. It was not argued at your Lordships' Bar, and it could not be argued, that there was any right, or any practice, of a court of equity to give relief in cases of this kind by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all courts of equity proceed if parties, who have entered into definite and distinct terms involving certain legal results, certain penalties, or legal forfeiture, afterwards by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties. It appears to me that both parties here, by entering upon the negotiation which they entered upon, made it an inequitable thing that the exact period of six months, dating from October, should afterwards be measured out as against the respondents as the period during which the repairs must be executed. I, therefore, propose to your Lordships that the decree which is appealed against should be affirmed, and the present appeal dismissed with costs.

LORD O'HAGAN.—I am of the same opinion. Your Lordships have no power to relieve against the effect of a forfeiture, such as was legally established by the verdict of the jury in this case, merely on the ground that it has pressed hardly on the respondents. They entered into a covenant, and if they have failed to fulfil their undertaking they must abide the results, however onerous, unless the circumstances excuse their defaults in the view of a court of equity. But if they acted, or failed to act, through a mistake induced by the conduct of the appellant, if they were misled by it into the belief that his strict legal right was abandoned, or suspended for the time, he cannot be allowed to take advantage of the forfeiture which was so accomplished. I am bound to say that I see no evidence to impeach the appellant of mala fides, or misrepresentation, or wilful lulling the respondents into a disregard of their legal duty, or a compromise of their legal rights. But this does not affect the question. If there was real misleading and bona fide mistake, it does not matter that the appellant acted honestly, and without indirect purpose of any kind. The facts of this misleading and mistake are enough to prevent the forfeiture, although they have their origin in no corrupt intention.

We have it sworn on behalf of the respondents that they were put off their guard, and induced to postpone the making of the needful repairs within the appointed time by the negotiation which was pending. The letters and the oral proof put that negotiation beyond controversy. It continued at least from Nov. 28 to Dec. 31, and the learned counsel failed altogether in contending that during that period at all events the operation of the notice was not

suspended. Both parties contemplated as the issue of it a sale of the premises, and of necessity the question of repairs was put out of consideration. No doubt they might have agreed that the negotiation should be without prejudice to the notice, but they did nothing of the kind. It seems to me quite clear at that time that the forfeiture was not intended to take place during the negotiation, and I incline to agree that the period which had elapsed before the beginning of it, after the notice was given cannot be taken into account, and pieced on to that which elapsed after it had ended, to make up the six months, and complete the default. But it is not necessary to pronounce on this point with a view to our decision. The negotiation continued until Dec. 31, and did not then conclude. The appellant expressly dealt with it as still subsisting, and having refused the offer already made to him, invited another. To his invitation he got no reply, and he proceeded to act upon his notice. I concur with MELLISH, L.J., that the proper course would have been to inform the respondents within a reasonable time that, failing to make a new proposal, they should understand the negotiation to have been concluded, and the parties subjected to their legal rights. This would have been a reasonable and equitable course, but it was not taken, and the appellant must bear the consequences. I think that the judgment should be affirmed, and the appeal dismissed with costs.

LORD SELBORNE.—I am of the same opinion, and for the same reasons. I agree that there is nothing requiring your Lordships to throw any doubt upon the good faith of the plaintiff in this case.

I think that the difference between the Court of Common Pleas and the Court of Appeal comes to a short and a very simple point. LORD COLERIDGE, C.J., in delivering the judgment of the Court of Common Pleas, says this:

> "It appears to us that the effect of the correspondence was this, namely, first, to give to the company a reasonable time to make a fresh offer; and secondly, if the negotiations were not resumed, to give the company a reasonable time, but not necessarily six months, from Dec. 31, to do the repairs required."

The real point of difference is: What was a reasonable time under the circumstances of the case? As to the effect of the correspondence down to Dec. 31, and for some not definite time afterwards, there is an agreement of both courts that the first two and a half months of the notice, or thereabouts, were waived, and I must say that, looking at the terms of the correspondence, I can see no reasonable room for doubt about it, because the first letter of Nov. 28, 1874, says as clearly as possible these two things. If you require it the repairs which we have received notice to make shall be forthwith commenced, but we have an alternative proposition to make, and if you entertain that alternative proposition, we propose to defer the commencing of the repairs until we hear from you that we shall commence them. That is the effect of it, and the accession to that in the subsequent correspondence by the plaintiff is as plain as if he had said in terms: "I do not require you forthwith to commence the repairs; I am willing to enter into the treaty that you propose; it is not improbable that an arrangement may be made; and, therefore, I agree that the commencement of the repairs may be deferred as you suggest." That goes on until Dec. 31, and then, although the notice is referred to, it is manifestly not referred to as putting an end to that understanding at that exact point of time; it is referred to as an element of price to be considered in the new offer which is invited.

I do not think it necessary to inquire whether the company could reasonably be heard to say that they were at liberty to do nothing for four months afterwards, expecting some further notice from the appellant. I confess that

my impression is not so; but, taking it not to be so, what is the result? This. You have got the affidavit upon which the present application for the equitable jurisdiction of the Common Pleas Division is made. It positively states that

> "no objection having been raised by the plaintiff's solicitors to the repairs standing over during the negotiation, the company presumed the repairs need not be commenced until further notice from the plaintiff's solicitors."

I do not agree to that; at all events I think that is a ground which need not be taken as the foundation of the judgment, and could not safely be taken by the company. But the affidavit goes on:

> "and that the six months within which the repairs were to be done, would not include any time during which the negotiations were pending."

Then it says, in the next paragraph, that the repairs were actually

> "finished by the middle of June, 1875, being within six months from the earliest date at which the negotiations for a sale of the company's interest to the plaintiff might be taken to have been broken off,"

which manifestly must mean Dec. 31, or a few days afterwards.

The question is whether the conduct of the appellant in the correspondence justified and naturally led to that impression on the part of the company. In my opinion, it clearly did; and if it did, what is the consequence? I think the consequence is that which BAGGALLAY, L.J., derives from it. He says that the circumstances "were of a character to lead the company to consider that the notice to repair was at any rate suspended for some period of time," at least until Dec. 31. What is the meaning in the view of a court of equity of suspending a notice to repair? Manifestly that during that time the notice was not to be operative. What is the reasonable result of that in the circumstances of this case? Why, when the notice is to become operative, the same will be a reasonable time for the execution of the repairs which would have been a reasonable time if the notice had been given at that period, that is six months from at least Dec. 31, 1874. Therefore, on these grounds I entirely agree that the judgment of the Court of Appeal is right.

LORD BLACKBURN.—I also entirely agree in the judgment, and I think it right to say that I likewise agree that there is no ground for supposing that the appellant, or his advisers, in writing the letters of November and December, and acting as they did, intended to bring the respondents into a scrape, and to take advantage of it. But I quite agree that in spite of that there is equity to relieve the respondents, and, instead of putting it in my own words, I will read those of MELLISH, L.J., adopting them as my own, because I think that they exactly express what I believe to be the right law.

> "Notwithstanding that, although he did not himself intend to abandon his six months' notice, yet, in my judgment, if his conduct was such as to put the defendants off their guard, and to lead them reasonably to believe that the strict legal right of the six months' notice would not be insisted upon, that is enough to entitle them to relief upon equitable grounds. The result of that is quite different from a waiver by withdrawing the notice, because, if the notice was withdrawn, the action of ejectment brought for not repairing upon the notice would be gone too. A court of equity, however, would take care that the house was put in substantial repair; it would give the landlord all the relief he is entitled to, but the court would say that it was inequitable that he, having misled the defendants and allowed them to believe that he would not insist upon the strict

forfeiture on account of repairs not having been made within the actual six months, should now be allowed to insist upon it."

I apprehend that that correctly states the rule of equity and justice; and the only remaining question is whether in the present case there has been such a misleading as is there described. I think it not at all necessarily an intentional misleading, but such an inducing of the respondents to think that the actual six months would not be insisted upon. Further, there is the question what period that delay in insisting upon the actual six months would give them. I shall not repeat again what has been said as to the effect of the correspondence. I think it quite clear that there was an inducing the respondents to believe that they need not repair during the period up to Dec. 31 at all events, and that it was not until Dec. 31, or perhaps a short time afterwards, when the time for making a new offer had elapsed, whenever that might be, that it could be considered that they were not under an apprehension, induced by the appellant's conduct, that they need not make the repairs at that time.

Then comes the question which is that upon which the Court of Appeal have differed from the Court of Common Pleas—whether the period within which the repairs ought to have been executed after the negotiation went off, which I will assume to have been on Dec. 31, was a reasonable time, in the sense of such a time as a jury on the evidence might say was sufficient to do the repairs of the house, or the conventional time of six months provided for in the lease? If it were a reasonable time within which the repairs might have been made, then the fact that the repairs were commenced in April and were finished by the middle of June, that is to say in two months, would show that the time between Dec. 31 and April 24, when the notice had run out by efflux of time, which was three months, would have been sufficient. If in two months the repairs were actually done no one would dispute that three months would be a reasonable time to do them in. But is it correct to say that we are to take a reasonable time, in the sense of an uncertain time, according to the evidence, when we have a conventional time, namely six months, stipulated for? I think the very object for which the stipulated time of six months was named was to prevent that uncertainty in saying what would be a reasonable time, and to enable one of the parties to know that he had got six months to do the repairs in, even if that was more than was needed, and to enable the other to know that, whether it turned out to be either too much or too little, the repairs were to be done in that time. It seems to me, applying that to the present case, when it is once established that the respondents were entitled to say that out of the six months shall be taken the time till Dec. 31, because they were authorised by the appellant to hold their hand, and not begin till then, it follows that the time within which they were to do the repairs would be six months after Dec. 31, and that time would not expire till June 30. In fact the repairs were all done before that; they were done by the middle of June. That being so, it appears to me that the Court of Appeal was correct in the judgment that they gave and their decision ought to be affirmed, and this appeal dismissed with costs.

LORD GORDON concurred.

Appeal dismissed.

Solicitors: *Campbell, Reeve & Hooper; Burchells.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

BRADBURN *v.* GREAT WESTERN RAIL. CO.

[Exchequer Division (Bramwell, Pigott and Amphlett, BB.), November 6, 1874]

[Reported L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 23 W.R. 48]

Personal Injuries—Damages—Right of plaintiff to damages not reduced by amount payable under accident insurance policy.

Where a plaintiff suffers personal injuries through the negligence of the defendant, the damages awarded are not to be reduced because the plaintiff has insured himself against accidental injury. In such a case the plaintiff is entitled to receive the amount payable by the insurer in addition to the damages recoverable from the defendant.

Notes. Considered: *Jebson* v. *East and West India Dock Co.* (1875), L.R. 10 C.P. 300; *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, [1911-13] All E.R. Rep. 63; *Admiralty Comrs.* v. *Steamship Amerika (Owners)*, *The Amerika*, [1916-17] All E.R. Rep. 177; *Smith* v. *British European Airways Corpn.*, [1951] 2 All E.R. 737; *Payne* v. *Railway Executive*, [1951] 1 All E.R. 1034; *Judd* v. *Hammersmith, West London and St. Mark's Hospitals (Governors)*, [1960] 1 All E.R. 607. Referred to: *The Marpessa*, [1891-4] All E.R. Rep. 187; *The Mediana* (1899), 68 L.J.P. 26; *Jamal* v. *Moola Dawood Sons*, [1916] 1 A.C. 175; *Hill* v. *Showell* (1918), 87 L.J.K.B. 1106; *Baker* v. *Dalgleish Steam Shipping Co.* (1921), 126 L.T. 482; *Smiley* v. *Townsend*, [1950] 1 All E.R. 530; *Shearman* v. *Folland*, [1950] 1 All E.R. 976.

As to damages against carriers for personal injuries, see 4 Halsbury's Laws (3rd Edn.) 190-192; as to an insurer's right of subrogation, see 22 Halsbury's Laws (3rd Edn.) 260; as to personal accident insurance, see ibid. 292 et seq.; and for cases see 17 Digest (Repl.) 108 et seq.

Cases referred to:

(1) *Dalby* v. *India and London Life Assurance Co.* (1854), 15 C.B. 365; 3 C.L.R. 61; 24 L.J.C.P. 2; 24 L.T.O.S. 182; 18 Jur. 1024; 3 W.R. 116; 139 E.R. 465, Ex. Ch.; 29 Digest (Repl.) 367, *2807*.

(2) *Yates* v. *Whyte* (1838), 4 Bing. N.C. 272; 1 Arn. 85; 5 Scott 640; 7 L.J.C.P. 116; 132 E.R. 793; 17 Digest (Repl.) 108, *221*.

(3) *Hicks* v. *Newport, Abergavenny and Hereford Rail. Co.* (1857), 4 B. & S. 403, n.; 122 E.R. 510, N.P.; 36 Digest (Repl.) 221, *1178*.

(4) *Franklin* v. *South Eastern Rail. Co.* (1858), 3 H. & N. 211; 31 L.T.O.S. 154; 4 Jur.N.S. 565; 6 W.R. 573; 157 E.R. 448; 36 Digest (Repl.) 213, *1128*.

Also referred to in argument:

Pym v. *Great Northern Rail. Co.* (1863), 4 B. & S. 396; 2 New Rep. 455; 32 L.J.Q.B. 377; 8 L.T. 734; 10 Jur.N.S. 199; 11 W.R. 922; 122 E.R. 508, Ex. Ch.; 36 Digest (Repl.) 208, *1097*.

Motion by defendants to reduce the amount of an award of damages in an action brought by the plaintiff Bradburn, against the defendants, the Great Western Rail. Co., to recover compensation in damages for personal injuries sustained by the plaintiff in the course of a journey as a traveller upon the defendants' line of railway, by reason and in consequence of the negligence of the defendants' servants. At the trial before Pigott, B., and a special jury, at the assizes for Staffordshire, it was proved to the satisfaction of the jury, that the plaintiff received the injuries of which he complained in consequence of the train in which he was a passenger, on Oct. 3, 1873, being brought by the engine driver so suddenly to a dead stop that the plaintiff was thrown forwards from the

seat on which he was sitting to the opposite side of the carriage, and was thereby so seriously shaken and bruised that he became partially paralysed, and was for a considerable time afterwards confined to his bed and rendered quite unable to attend to his business, which was that of a manufacturer of artificial manures and a manufacturing chemist at Wednesfield. It appeared in the course of the case that the plaintiff was at and before the time of the happening of the accident in question, insured against accidents by railway in the Railway Accident Insurance Office, in the sum of £1000, and that he had received from that office under that insurance the sum of £31 as compensation for the five weeks during which he was laid up and confined to his bed by this accident. Thereupon the learned baron directed the jury to find the amount of damages which they considered the plaintiff to be entitled to at the hands of the defendants, either excluding from, or including in, their calculation the £31 which the plaintiff had received from the Accident Insurance Office, which latter amount might, if necessary, be thereafter made the subject of inquiry, upon the point of law, in the court above. The jury found a verdict for the plaintiff and assessed the total damage he had sustained by the accident at £217, or £186 exclusive of the £31; and thereupon PIGOTT, B., directed the verdict to be entered for £217 and reserved leave to the defendants' counsel to move to reduce that amount by the sum of £31, if the court should be of opinion that the defendants were entitled to have that deduction made in their favour.

Huddleston, *Q.C.*, for the defendants, moved for a rule to reduce the plaintiff's verdict by that amount accordingly, namely, from £217 to £186.

BRAMWELL, B.—We are quite ready to give a decision upon the point immediately. In my judgment there should clearly be no rule in this case. The damages which the plaintiff sustained at the hands of the defendants, as the jury found, amounted to the sum of £217. Because he had sustained these damages somebody else gave him £31, and, therefore, it is said he has not been damaged to the amount of £217. It is because he has been damaged to the amount of £217 that he got the £31; and really it would be the most unreasonable thing in the world if he were not to be allowed to get it, because a man pays his premiums on these insurances against accidents with the intention and object of getting them back again, if he should have the misfortune to meet with an accident and be injured.

It is not worth while to go into it, but the subject of insurances will be found to have been thoroughly discussed a few years ago in *Dalby* v. *India and London Life Assurance Co.* (1) in the Court of Common Pleas. A man pays the premiums upon these accident policies upon this kind of footing, namely, that his right to an indemnity in case of an accident shall be an equivalent for the mischief or injury that happens to him. He gets more, no doubt, if the mischief happens than all the premiums which he has paid would amount to; but he runs the chance that he will not get anything at all; and therefore it is, I say, that he ought to have this sum in addition to the damages that he may have sustained at the hands of the defendants by reason of the accident itself; for otherwise he would be a loser by insuring against accidents in a case where the railway company was in the wrong. I am, therefore, clearly of opinion that the verdict stands at present for the right amount.

Further than that, I think that there is authority for it, because the principle of *Yate* v. *Whyte* (2), to which counsel for the defendants has referred, is, in my opinion, directly and correctly in point. Then as to the decision of LORD CAMPBELL, C.J., in *Hicks* v. *Newport, Abergavenny and Hereford Rail. Co.* (3), I think that his ruling in that case was correct; and I may make this observation upon the matter: In the Fatal Accidents Act, 1846 (Lord Campbell's Act) no rule was laid down as to the principle upon which damages should be calculated, but a rule has been established by the courts, and, I think, was first pronounced

in this court [in *Franklin* v. *South Eastern Rail. Co.* (4)], that the compensation to be awarded to the family of the deceased person should be an equivalent for their loss, by reason of the death of their relative, of reasonably expected pecuniary benefit which would have accrued to them had he not been killed. If, for instance, we find that the father's death has put his son in possession of a large estate which the father had, it would be impossible to give the son any pecuniary compensation as damages resulting from his father's death, because he has, in fact, sustained no loss thereby, but rather, on the contrary, he is a gainer in a pecuniary point of view by his father's death. In like manner, we must look at whatever it may be that, upon and by reason of the death of a person, comes into the possession of his family, or surviving relatives, who allege that they have suffered a pecuniary loss by that person's death. I think that that case before LORD CAMPBELL is entirely distinguishable from the present case, and that my brother PIGOTT was quite right in directing the verdict to be entered for the larger amount, and therefore that there should be no rule.

PIGOTT, B.—I am of the same opinion. I think that the plaintiff is entitled to recover from the railway company the full amount of the damage which they have caused him to suffer by their negligence; and I think that there would be no justice or principle in setting off an amount which the plaintiff has entitled himself to under a contract of insurance, such as any prudent man would make on the principle of, as the expression is, "laying by for a rainy day." He pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company, for that express purpose, that he gets the money from them. It is true that there must be the element of accident in order to entitle him to the money; but it is under and by reason of his contract with the insurance company, that he gets the amount; and I think that it ought not, upon any principle of justice, to be deducted from the amount of the damages proved to have been sustained by him through the negligence of the defendants.

AMPHLETT, B.—I concur.

Rule refused.

Solicitors: *Young, Maples, Teesdale, Nelson & Co.*

ATTREE *v.* HAWE

[COURT OF APPEAL (Sir George Jessel, M.R., James, Baggallay and Bramwell, L.JJ.), June 5, 19, July 3, 1878]

[Reported 9 Ch.D. 337; 47 L.J.Ch. 863; 38 L.T. 733; 43 J.P. 124; 26 W.R. 871]

Company—Debenture—Statutory company—Right of stockholder to take possession of company's property in specie.

A debenture stockholder in a company incorporated by a special Act embodying Part III of the Companies Clauses Act, 1863, has no right, either at law or in equity, under any circumstances to take possession of a single item of the property of the company in specie, whether real or chattel. He has no power to take the land, or enter on the land, or interfere with the ownership, possession, or dominion of the statutory owners and managers. The debenture stock does

not constitute a charge on the land; it is a charge on the net profits and earnings of the trading corporation. There was, therefore, nothing in the Statute of Mortmain (9 Geo. 2, c. 36) (repealed) which prevented debenture stock in such a company from being given by will for charitable purposes.

Notes. The law of mortmain was abolished by the Charities Act, 1960, ss. 38, 48, Sched. 7, Pt. II. No right or title to any property shall be defeated or impugned, and no assurance or disposition of property shall be treated as void or voidable, by virtue of any of the enactments mentioned in s. 38 (1) or of any other enactment relating to mortmain if at the passing of the Act of 1960 the possession is in accordance with that right or title or with that assurance or disposition, and no step has been taken to assert a claim by virtue of any such enactment.

Explained: *Ashworth* v. *Munn* (1880), 15 Ch.D. 363. Applied: *Re Harris, Jacson* v. *Queen Anne's Bounty Governors* (1880), 15 Ch.D. 561; *Jervis* v. *Lawrence* (1882), 22 Ch.D. 202. Distinguished: *Cavendish* v. *Cavendish* (1883), 24 Ch.D. 685. Explained: *Re Christmas, Martin* v. *Lacon* (1885), 30 Ch.D. 544. Considered: *Re Watts, Cornford* v. *Elliott* (1885), 29 Ch.D. 947; *Re David, Buckley* v. *Royal National Lifeboat Institution* (1889), 41 Ch.D. 168. Applied: *Re Thompson, Bedford* v. *Teal* (1890), 45 Ch.D. 161; *Re Parker, Wignall* v. *Park*, [1891] 1 Ch. 682; *Re Hollen, Forbes* v. *Hardcastle* (1893), 69 L.T. 425. Considered: *Re Pickard, Elmsley* v. *Mitchell*, [1894] 3 Ch. 704; *Re Crossley, Birrell* v. *Greenhough*, [1897] 1 Ch. 928. Distinguished: *Re Dawson, Pattisson* v. *Bathurst*, [1915] 1 Ch. 626. Referred to: *Great Eastern Rail. Co.* v. *East London Rail. Co.* (1881), 44 L.T. 903; *Re Holmes, Holmes* v. *Holmes* (1890), 60 L.J.Ch. 267; *Re Bodman, Bodman* v. *Bodman*, [1891] 3 Ch. 135; *Re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422; *Lawrence* v. *West Somerset Mineral Rail. Co.*, [1918] 2 Ch. 250; *Cross* v. *Imperial Continental Gas Association*, [1923] All E.R. Rep. 628; *Fyfe* v. *Garden*, [1946] 1 All E.R. 366.

As to a debenture stockholder, see 6 HALSBURY'S LAWS (3rd Edn.) 50-51; as to appointment of a manager, see ibid. 514-515; and for cases see 10 DIGEST (Repl.) 1280-1285. For the Companies Clauses Act, 1863, ss. 22, 23, 24, 31, see 3 HALSBURY'S STATUTES (2nd Edn.) 341, 342, 343, 344; and for the Charities Act, 1960, ss. 38, 48, see 40 HALSBURY'S STATUTES (2nd Edn.) 168, 176.

Cases referred to:

(1) *Holdsworth* v. *Davenport* (1876), 3 Ch.D. 185; 46 L.J.Ch. 20; 35 L.T. 319; 25 W.R. 20; 8 Digest (Repl.) 367, *500*.

(2) *Walker* v. *Milne* (1849), 11 Beav. 507; 18 L.J.Ch. 288; 13 L.T.O.S. 542; 13 Jur. 933; 50 E.R. 913; 8 Digest (Repl.) 366, *476*.

(3) *Ashton* v. *Lord Langdale* (1851), 4 De G. & Sm. 402; 20 L.J.Ch. 234; 17 L.T.O.S. 175; 15 Jur. 868; 64 E.R. 888; 8 Digest (Repl.) 367, *496*.

(4) *Doe d. Myatt* v. *St. Helen's and Runcorn Gap Rail. Co.* (1841), 2 Q.B. 364; 2 Ry. & Can. Cas. 756; 1 Gal. & Dav. 663; 11 L.J.Q.B. 6; 6 Jur. 640; 114 E.R. 144; 10 Digest(Repl.) 1274, *8995*.

(5) *Hart* v. *Eastern Union Rail. Co.* (1852), 7 Exch. 246; 21 L.J.Ex. 97; affirmed sub nom. *Eastern Union Rail. Co.* v. *Hart*, 8 Exch. 116; 22 L.J.Ex. 20; 19 L.T.O.S. 314; 17 Jur. 89; 155 E.R. 1283; sub nom. *Hart* v. *Eastern Union Rail. Co.*, 6 Ry. & Can. Cas. 818, Ex. Ch.; 10 Digest (Repl.) 1280, *9044*.

(6) *Gardner* v. *London, Chatham and Dover Rail. Co.* (*No. 1*), *Drawbridge* v. *Same*, *Gardner* v. *Same* (*No. 2*), *Imperial Mercantile Credit Association* v. *Same* (1867), 2 Ch. App. 201; 36 L.J.Ch. 323; 15 L.T. 552; 31 J.P. 87; 15 W.R. 325, L.JJ.; 10 Digest (Repl.) 1273, *8993*.

Also referred to in argument:

Myers v. *Perigal* (1849), 16 Sim. 533; 18 L.J.Ch. 185; 13 Jur. 223; 60 E.R. 981; on appeal (1852), 2 De G.M. & G. 599; 22 L.J.Ch. 431; 20 L.T.O.S. 229; 17 Jur. 145; 1 W.R. 57; 42 E.R. 1006, L.C.; 8 Digest (Repl.) 366, *482*.

A *Wickham* v. *New Brunswick and Canada Rail. Co.* (1865), L.R. 1 P.C. 64; 3 Moo. P.C.C.N.S. 416; 35 L.J.P.C. 6; 14 L.T. 311; 12 Jur.N.S. 34; 14 W.R. 251; 16 E.R. 158, P.C.; 10 Digest (Repl.) 1273, *8992*.

Chandler v. *Howell* (1876), 4 Ch.D. 651; 46 L.J.Ch. 25; 35 L.T. 592; 25 W.R. 55; 8 Digest (Repl.) 363, *437*.

B *Thornton* v. *Kempson* (1854), Kay, 592; 2 Eq. Rep. 903; 23 L.J.Ch. 977; 23 L.T.O.S. 185; 18 J.P. 629; 2 W.R. 399; 69 E.R. 251; 8 Digest (Repl.) 363, *436*.

Alexander v. *Brame* (*No. 2*) (1861), 30 Beav. 153; 7 Jur.N.S. 889; 9 W.R. 719; 54 E.R. 847; 8 Digest (Repl.) 362, *422*.

Finch v. *Squire* (1804), 10 Ves. 41; 32 E.R. 758; 8 Digest (Repl.) 363, *435*.

C *Re Mitchell's Estate*, *Mitchell* v. *Moberly* (1877), 6 Ch.D. 655; 37 L.T. 145; 25 W.R. 903; 8 Digest (Repl.) 367, *497*.

Appeal by Brighton Corporation from a decision of HALL, V.-C., holding that a gift by will of debenture stock in the Midland Rail. Co. to them for charitable purposes was void. John Bates, by his will, bequeathed to Brighton Corporation £9000 debenture stock of the Midland Rail. Co. for charitable pur-
D poses, for the benefit of the poor of Brighton. The question raised was whether railway debenture stock was within the Mortmain and Charitable Uses Act, 1735, and whether, therefore, a valid bequest of such stock could be made to a charity. The point turned to a great extent on the effect of the provisions of the Companies Clauses Act, 1863, which are referred to in their Lordships' judgment. The Vice-Chancellor held that the gift of John Bates was void under the
E Mortmain Act, on the ground that the debenture stock was a charge upon, or an interest in, land; and that the stock in question belonged to the testator's next of kin. The corporation appealed.

Southgate, *Q.C.*, and *Millar* for the corporation.

Dickinson, *Q.C.*, and *Bunting* for the next of kin.

F *Eddis*, *Q.C.*, and *H. Greenwood* for the residuary legatee.

W. Pearson, *Q.C.*, *O. Morgan*, *Q.C.*, *W. Renshaw* and *Langley* for other parties.

Cur. adv. vult.

July 3, 1878. **JAMES, L.J.,** read the following judgment of the court.—
G This is an appeal from a decision of HALL, V.-C., that debenture stock of the Midland Rail. Co. is subject to the prohibitions of the Mortmain & Charitable Uses Act, 1735, restraining gifts of land to charitable uses. That decision is in direct conflict with a recent decision of MALINS, V.-C., in *Holdsworth* v. *Davenport* (1); and, assuming the case of debenture stock to be the same for this purpose with the debentures formerly given by railway companies and
H other public bodies (which will require to be considered), there are two conflicting decisions, one by LORD LANGDALE (*Walker* v. *Milne* (2)), holding that they were not, and one by KNIGHT BRUCE, V.-C., (*Ashton* v. *Lord Langdale* (3)), holding that they were within the prohibition.

HIS LORDSHIP referred to the Act [which provided that

I "... no ... lands ... shall be ... charged or encumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever,"]

save by deed as therein mentioned, and, after discussing the purpose of the Act, which he stated was to prevent the increase of inalienable land through the weakness of, or practices upon, dying persons, he continued: Accordingly, it has been held that a share or interest in a trading partnership or business, incorporated or unincorporated, is not within the prohibition, although it may have, as indeed almost every business has, some interest in land with which,

or on which, it is carried on; or although it may have among its assets any amount of mortgages, charges, or encumbrances on land; and shares in railways and shares in other public companies of a like nature, are now universally admitted not to be obnoxious to the prohibition of the Act. It was never supposed that a bond debt or other specialty binding the heir was within the Act, although its very object was to affect the real estate of the obligor. The personal estate of a testator is not for this purpose affected by the fact that an item in it is a share in the unascertained and unadministered assets real and personal of another testator.

How, dealing with the matter on principle, does the case of a railway debenture stand? Previously to the cases about to be mentioned it was very difficult to say that it was not a charge or encumbrance on land within the words of the statute. There are in this country a great many railways which are private and individual property. All, or almost all, the Canal Acts, passed about the end of the last century and the beginning of this contained powers enabling the proprietors of any mine or work within a certain distance of the canal to make a railway or tramway communication with the canal, the same to be open to the public on payment of the same tolls as were taken by the canal itself. It is clear that a mortgage or a debenture, in the very words of the ordinary railway debenture given by the owner of such a railway, would, in fact, be precisely similar to a mortgage on land. The mortgagee could, by himself, or at all events by a receiver, get into the actual possession of the line of railway, and, if the encumbrances were too heavy to be redeemed, that possession would be perpetual. KNIGHT BRUCE, V.-C., who was, as I happen to know, very familiar with that class of railway property to which I have referred, evidently, in *Ashton* v. *Lord Langdale* (3), considered that the debenture given by the corporate body of its undertaking and tolls was, in legal effect, an operation, the same as a similar charge on a private owner's railway would be, and on that assumption it was impossible for him to arrive at any other conclusion than the one he did. On the other hand, LORD LANGDALE must have thought that there was something essentially different between the charge created by a private owner of a railway and a charge made under statutory authority by a parliamentary body established and empowered to make, maintain, and manage for public convenience a great public highway, the maintenance and working of which may be of vital importance to the State itself; and he held, accordingly, in *Walker* v. *Milne* (2), that the holder of a railway debenture issued by such a body did not acquire a charge on land, any more than a shareholder in the company acquired an interest in the land.

The nature of such a debenture came under the consideration of the Court of Queen's Bench in *Doe d. Myatt* v. *St. Helen's and Runcorn Gap Rail. Co.* (4), and of the Court of Exchequer in *Hart* v. *Eastern Union Rail. Co.* (5), by which it was established that the debenture, wide as its words were, did not pass the soil, and did not pass the rolling stock of the company. On the same principle, it was held in *Gardner* v. *London, Chatham and Dover Rail. Co.* (6) that a debenture holder could not take or touch the soil of the lands required and used for the actual working of the railway, nor the soil of any surplus lands which had been acquired, but were not required for actual use, nor the rolling stock; nor could he, by himself or his receiver, get the management of the line, nor do anything in derogation of the authority of the statutory managers, who could not delegate to anyone else their powers, nor shift their responsibility. The words of the security were subordinated to the essential nature of the undertaking, and limited so as not to extend to the very destruction of the thing the maintenance of which in perpetuity was the intent and object of the legislature; and the result of that case was that the receiver, whose appointment the debenture holders were entitled to have made, was in truth nothing but a cashier or treasurer imposed on the company. He could not

appoint or discharge a ticket-taker or a railway porter, or an engine driver or platelayer. Every servant of the railway would still be under the directors, and their wages and salaries fixed by them. All purchases and contracts for the use of the railway would be made by them. The receiver, as treasurer, would take all the moneys received by every officer of the company, would thereout pay all the outgoings on the warrant of the directors, the statutory managers of the concern, and would then apply the net surplus, being the net earnings of the business, in discharge of his immediate principals, the debenture holders. His functions would be, except as to the net surplus, neither more nor less than those of a banker appointed to receive all the moneys of a large brewery, and to pay all cheques of the persons properly authorised to draw on the account. With the light thrown by these cases on the legal operation and effect of a railway debenture, it is impossible not to prefer the decision of LORD LANGDALE in *Walker* v. *Milne* (2) to the decision of KNIGHT BRUCE, V.-C., in *Ashton* v. *Lord Langdale* (3).

But the case before us is not that of a debenture, but of debenture stock. It seems to be called debenture stock lucus a non lucendo, because it is anything but a debenture. There is no debt except, indeed, as to the annual interest; the capital cannot be called in, and cannot be paid off. It is a right to a perpetual annuity, payable out of the concern. There is no conveyance or assignment of anything to the stockholder, or to any trustee for him. There is an entry in the books of the concern that there is so much debenture stock on which there is so much to be paid half-yearly to the holders, just like the entry of the National Debt in the great books at the Bank of England. The whole of the rights of a stockholder depend on the Act of Parliament authorising railways and other bodies to create such a stock.

Section 22 of the Companies Clauses Act, 1863, so far as material, is as follows. The company may, from time to time, raise money by the creation and issue, at such times and on such terms, subject to such conditions and with such rights and privileges as the company thinks fit, of stock, and may attach to the stock so created such fixed and perpetual preferential interest as it may think fit, not exceeding the prescribed limit. By s. 23 it is directed that the debenture stock, with the interest thereon, shall be a charge on the undertaking prior to all shares and stock of the company, and shall be transmissible and transferable like other stock of the company, and shall in all other respects have the incidents of personal estate.

By s. 24 it is provided that the interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, ordinary, preference, or guaranteed. So far it is quite clear that the debenture stock is of the same nature as other stock of the company, only with the important difference that it ranks in payment over all other stock, and that all arrears must be paid before a farthing is to reach the proprietors of the other stock. It is nothing but preference stock with a special preference. There is nothing to give to the stockholders any right, either at law or in equity, under any circumstances to take possession of a single item of the property of the company in specie, whether real or chattel.

Is any difference made in this respect by the provisions as to the appointment of a receiver? The receiver, when appointed, is to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, and after payment of interest on the mortgages and bonds of the company, to distribute the money rateably among the proprietors of debenture stock. In England the receiver is to be appointed by two justices of the peace, on the application of a prescribed proportion of stock proprietors. It is difficult to conceive how this could, directly or indirectly, tend to make any land inalienable or give to the stockholder, either immediately or as the ultimate result of any amount of insolvency, the possession or the right to the possession of any

portion of the property of the company which must remain legally and equitably in the possession of the company and under the absolute control and dominion of the statutory body of managers. The expression, no doubt, is "tolls or sums," but it is tolls or sums liable to the payment of the interest. It is possible to conceive the case of a company, the owner of a market, a port, or other franchise, with nothing to do but to receive tolls and pay its creditors, just as in the case of a turnpike or bridge the whole tolls may be taken by the creditors, leaving the road or bridge to be repaired by the parish or county. But with a railway company this is impossible. The actual tolls taken, whether from other carriers, or from freighters, or passengers, must, from the very nature of the case, remain under the dominion of the directors, to enable them to do what is required for the preservation of the road and the safety of life and property. The only thing chargeable is the net earnings of the company, the same fund out of which, if sufficient, the dividends and interest of the other stockholders are to be paid. Again, there is by the Act a special machinery for the summary appointment of a receiver; but, without that special machinery, a person having a charge on the net earnings of such a body could have got a receiver of those net earnings, if the managing body were to disregard its duty of applying them exclusively to the payment of the debenture stock interest. I apprehend that, even with regard to preference shares, properly so called, if the directors, acting in the interest of a majority of ordinary shareholders, were to misapply or not to apply such net earnings, the court would have no difficulty in appointing a receiver to receive and properly apply the same.

By s. 31 it is, no doubt, provided that, in all respects not otherwise by or under the Act or the special Act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special Act on the railway directors? They are not powers to take the land, or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers.

The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or a charge or encumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is.

Appeal allowed.

Solicitors: *Clark & Calkin*, for *Clarke & Howlett*, Brighton; *Singleton & Tattershall.*

[*Reported by* E. S. Roche, Esq., *Barrister-at-Law.*]

ATKINSON *v.* LITTLEWOOD

[Vice-Chancellor's Court (Sir Richard Malins, V.-C.), July 27, 28, 1874]

[Reported L.R. 18 Eq. 595; 31 L.T. 225]

Will—Debt owing by testator—Satisfaction by legacy—Annuity—Covenant to pay annuity—Bequest of annuity.

A., on separating from his wife, covenanted by the deed of separation to pay to a trustee for her an annuity of £52 per annum, payable on May 1, Aug. 1, Nov. 1, and Feb. 1 in every year, such annuity to be for her separate use. A. afterwards made his will, and thereby devised specific real estate to trustees, upon trust out of the rents to pay his wife £52 per annum by equal quarterly payments on Feb 1, May 1, Aug. 1, and Nov. 1 in each year. The will contained no direction for payment of debts.

Held: the annuity given by the will was a satisfaction of the debt created by the deed of separation.

Per Curiam: If the will had directed the debts to be paid and had then given the annuity, that would have been sufficient to warrant coming to a different conclusion.

Notes. Considered: *Re Manners, Public Trustees* v. *Manners*, [1949] 2 All E.R. 201. Referred to: *Re Horlock, Calham* v. *Smith*, [1895] 1 Ch. 516; *Re Rattenberry, Ray* v. *Grant*, [1906] 1 Ch. 667; *Kirk* v. *Eustace*, [1936] 3 All E.R. 520.

As to satisfaction generally, see 14 Halsbury's Laws (3rd Edn.) 598 et seq.; as to satisfaction of annuities, see 32 Halsbury's Laws (3rd Edn.) 535-536; as to satisfaction of a covenant to pay money, see 34 Halsbury's Laws (3rd Edn.) 445; and for cases see 20 Digest (Repl.) 472 et seq.

Cases referred to:

(1) *Talbott* v. *Duke of Shrewsbury* (1714), Prec. Ch. 394; Gilb. Ch. 89; 2 Eq. Cas. Abr. 352; 24 E.R. 177; 20 Digest (Repl.) 506, *2124*.

(2) *Fowler* v. *Fowler* (1735), 3 P. Wms. 353; 24 E.R. 1098; 20 Digest (Repl.) 507, *2142*.

(3) *Lord Chichester* v. *Coventry* (1864), 2 De G.J. & Sm. 336; 33 L.J.Ch. 676, L.JJ.; on appeal (1867), L.R. 2 H.L. 71; 36 L.J.Ch. 673; 17 L.T. 35; 15 W.R. 849, H.L.; 20 Digest (Repl.) 472, *1814*.

(4) *Wathen* v. *Smith* (1819), 4 Madd. 325; 56 E.R. 725; 20 Digest (Repl.) 510, *2183*.

(5) *Cole* v. *Willard* (1858), 25 Beav. 568; 4 Jur.N.S. 988; 6 W.R. 712; 53 E.R. 754; 20 Digest (Repl.) 512, *2205*.

(6) *Richardson* v. *Greese* (1743), 3 Atk. 65; 26 E.R. 840, L.C.; 20 Digest (Repl.) 511, *2193*.

(7) *Lady Thynne* v. *Earl of Glengall* (1848), 2 H.L.Cas. 131; 12 Jur. 805; 9 E.R. 1042, H.L.; 20 Digest (Repl.) 500, *2095*.

(8) *Bartlett* v. *Gillard* (1827), 3 Russ. 149; 6 L.J.O.S.Ch. 19; 38 E.R. 532, L.C.; 20 Digest (Repl.) 515, *2235*.

Also referred to in argument:

Edmunds v. *Low* (1857), 3 K. & J. 318; 26 L.J.Ch. 432; 30 L.T.O.S. 31; 3 Jur.N.S. 598; 5 W.R. 444; 69 E.R. 1130; 20 Digest (Repl.) 511, *2198*.

Smith v. *Smith* (1861), 3 Giff. 263; 31 L.J.Ch. 91; 5 L.T. 302; 7 Jur.N.S. 1140; 66 E.R. 408; 20 Digest (Repl.) 511, *2189*.

Weall v. *Rice* (1831), 2 Russ. & M. 251; 9 L.J.O.S.Ch. 116; 39 E.R. 390; 20 Digest (Repl.) 495, *2040*.

Earl of Durham v. *Wharton* (1836), 10 Bli. N.S. 526; 3 Cl. & Fin. 146; 6 E.R. 194; sub nom. *Wharton* v. *Earl of Durham*, 3 My. & K. 698; 6 L.J.Ch. 15, H.L.; 20 Digest (Repl.) 502, *2104*.

Dawson v. *Dawson* (1867), L.R. 4 Eq. 504; 20 Digest (Repl.) 498, *2077*.

Eastwood v. *Vinke* (1731), 2 P. Wms. 613; 24 E.R. 883; affirmed sub nom. *Eastgood* v. *Styles* (1732), Kel. W. 36, L.C.; 20 Digest (Repl.) 509, *2168*.

Bengough v. *Walker* (1808), 15 Ves. 507; 33 E.R. 847; 20 Digest (Repl.) 497, *2060*.

Lingen v. *Sowray* (1715), 1 P. Wms. 172; Prec. Ch. 400; 10 Mod. Rep. 38; Gilb. Ch. 91; 1 Eq. Cas. Abr. 175; 24 E.R. 343; sub nom. *Shorer* v. *Shorer*, 2 Eq. Cas. Abr. 327, L.C.; 20 Digest (Repl.) 392, *1133*.

Further Consideration of an administration suit in respect of the estate of Henry Atkinson, in which the plaintiffs were the infant sons of the said Henry Atkinson and the defendant was Mrs. Ann Atkinson, his widow; the question raised being whether an annuity given by the testator's will was given in satisfaction of an earlier covenant to pay an annuity.

By a deed of separation dated July 17, 1865, and made between Henry Atkinson of the first part, the defendant Ann Atkinson (then his wife) of the second part, and the defendant W. F. Singleton of the third part, Henry Atkinson covenanted to pay to W. F. Singleton, during the life of Ann Atkinson, an annuity or yearly sum of £52 sterling, commencing from Feb. 1 then last past, to be paid and payable during the continuance thereof, free and clear of and from all taxes and deductions, by four equal payments in each year, that is to say, on May 1, Aug. 1, Nov. 1 and Feb. 1 in every year. And it was thereby agreed and declared that W. F. Singleton should stand possessed of the said annuity of £52 upon trust from time to time, during the life of Ann Atkinson, as the said annuity should become due, to pay the same to Ann Atkinson for her separate use, or to such persons as she should in writing, but not by way of anticipation, appoint. The deed also contained a covenant on the part of W. F. Singleton, to indemnify Henry Atkinson against any debts which his wife, Ann Atkinson, might thereafter incur.

From the date of the deed of separation, Henry Atkinson and Ann Atkinson continued to live separate and apart from each other, up to the death of Henry Atkinson. Henry Atkinson made his will, dated Jan. 20, 1871, and thereby, after making certain specific bequests, devised unto the defendants, B. Littlewood, A. Noble, and Leah Atkinson, certain specific real estate therein mentioned,

> "upon trust to receive the rents and profits thereof, and, after payment of all ground rents and other outgoings, to pay to his wife Ann Atkinson thereout the sum of £52 per annum, by four equal quarterly payments, on Feb. 1, May 1, Aug. 1, and Nov. 1 in each year, the first payment to be made on such quarter-day as should happen next after his decease."

After payment of such annuity, the testator directed his trustees to accumulate the surplus rents and profits until the death of his wife, and after her death to divide the same between the plaintiffs (two of his natural children) as therein mentioned: And after the death of his wife, the trustees were to stand possessed of the above-mentioned specific real estate, upon trust for his natural children, as therein mentioned: And the testator devised and bequeathed all the residue of his real and personal estate to his said trustees, upon such trusts, in favour of his said two sons (the plaintiffs) as were thereinbefore declared concerning the fund to arise from the accumulation of surplus rents after payment of the amount of £52 to his said wife. The will contained no direction for payment of debts.

The testator died on Jan. 20, 1872, and in June, 1872, this suit was instituted for the administration of his real and personal estate. In March, 1873, the usual administration decree was made; and the question now arose, on further con-

sideration, whether Ann Atkinson, the widow of the testator, was entitled to the annuity of £52 given her by the will, in addition to the annuity of £52 secured to her by the deed of separation; or whether the annuity given by the will was in satisfaction of the annuity given by the deed.

Higgins, Q.C., and *Leigh Pemberton* for the plaintiffs.
J. Pearson, Q.C., and *Nalder* for the defendant.
Ince for the trustees of the will.
Druce for persons interested in remainder.

SIR RICHARD MALINS, V.-C.—The question is whether the widow of the testator is entitled under his will to an annuity of £52 a year, which he thereby gives to her, and also to an annuity of £52 a year secured to her by deed on the occasion of her separation from him. On July 17, 1865, he executed a separation deed in the ordinary form. The form of the separation deed is, that he covenants to pay to a trustee for the wife £52 per annum, payable on May 1, Aug. 1, Nov. 1, and Feb. 1 in every year; and in consideration of this, the trustee covenants to indemnify him against the debts of his wife.

[HIS HONOUR, after reading the clause in the will giving the annuity of £52 per annum to Mrs. Atkinson, continued:] If I were at liberty to conjecture upon the subject, and act upon what I believe to have been the testator's intention, I should certainly come to the conclusion that he intended by this bequest to give his wife, in addition to £52 a year, and not merely to satisfy the debt which he had contracted by the separation deed; because, if the bequest is in satisfaction of the debt contracted by the separation deed, then the wife gets nothing whatever by the will. That is the conclusion to which I should arrive if I were unfettered by authority; but the authorities are so clear that, whether it be portions or whether it be debts, the old rule laid down in *Talbott* v. *Duke of Shrewsbury* (1) applies, and has been so frequently followed, that I apprehend it is impossible for me to do otherwise than to follow it in the present case. My impression is, certainly, that when a man has contracted a debt, and then gives money to his creditor by will, he intends bounty, and not merely the payment of an obligation; that he does not merely intend to satisfy the debt.

Fowler v. *Fowler* (2) affords an apt illustration of what I mean. There the testator was under an obligation to pay pin money to his wife. The pin money became in arrear, and then the husband made his will, and gave his wife a legacy of £500. Upon the strength of this rule it was decided that, so far as the pin money was in arrear, the legacy was a satisfaction of the pin money. In that case TALBOT, L.C. (3 P. Wms. at p. 353),

> "admitted it to have been the general practice, where there is a debt due from the testator to a third person, and the legacy given to such person is as much or more than the debt, to hold such legacy a satisfaction of the debt; and this being established as a rule (notwithstanding, were it a new point, he should hardly have come into it and it had with great reason been urged in opposition to the maxim, that a man ought to be just before he is bountiful; that where there are assets, the testator may with as much reason be construed both just and bountiful), yet it must be of very ill consequence to unsettle or alter it; because at that rate no counsel would know how to advise his client."

The decision, therefore, was that the legacy was not merely bounty, but was in satisfaction of the debt. Therefore, to the extent of the arrears of the pin money, the legacy was extinguished.

Therefore, this being a settled rule, I am not at liberty to depart from it, unless I can satisfy myself that there was such a clear intention in the will as to warrant me in coming to a different conclusion. If the testator had directed his debts to be paid and then had given this annuity, I should have found

sufficient warrant; because that is the very point decided in *Lord Chichester* v. *Coventry* (3). There the testator, on the marriage of one of his daughters to Lord John Chichester, covenanted to pay to trustees £10,000, which was settled upon her and her family in the usual way; he afterwards made his will, and, after giving certain legacies, he directed the residue to be equally divided between his two daughters, but he directed his trustees in the first place "to satisfy all his just debts." The question was, whether Lady John Chichester was entitled to £10,000, and also to a moiety of the residue. Now, in that case, there was a great difference of opinion. At first WOOD, V.-C., decided that the £10,000 must be accounted for; that there were not to be double portions, and, therefore, that Lady John Chichester was only to get a moiety of the residue. The case went to the lords justices, and they differed. The case then went to the House of Lords. LORD CHELMSFORD, LORD CRANWORTH, LORD ROMILLY, and LORD COLONSAY were the judges who heard that appeal; and those four learned judges unanimously decided that she was entitled to the £10,000 and also to the moiety of the residue. But why? The reason they came to that conclusion was, that the testator had directed his debts to be paid, and the £10,000 was one of the debts directed to be paid. The debts having been paid, the residue was to be given equally between the two daughters. Therefore, notwithstanding the previous conflict of opinion, in the House of Lords there was unanimity, and their Lordships decided upon that ground, and upon that ground only, that she was entitled to the £10,000 as well as to the moiety of the residue.

The plaintiffs much relied upon *Wathen* v. *Smith* (4). In that case the testator, upon his marriage, covenanted to pay to his wife £1000 six months after his decease. By his will he gave his wife £1000, to be paid three months after his death; and it was held by SIR JOHN LEACH that the legacy of £1000 was in satisfaction of the debt; and, therefore, the widow got nothing by the will. I am satisfied that the conclusion SIR JOHN LEACH arrived at was contrary to the intention of the testator, for I am sure he intended to give his wife £1000 in addition to what he had contracted to give her. But there was another reason why she ought to have had it. There was a direction to pay all his debts, and the covenant in the marriage settlement to pay the £1000 created a debt. There was a direction to pay debts, and, upon the principle of *Lord Chichester* v. *Coventry* (3), this debt ought to have been paid; and the debt having been paid, she ought to have had the £1000 in addition. I therefore concur with the opinion LORD ROMILLY expressed in *Cole* v. *Willard* (5), that *Wathen* v. *Smith* (4) is a case of doubtful authority.

Counsel for the defendant cited cases to show that both LORD HARDWICKE (in *Richardson* v. *Greese* (6)) and LORD COTTENHAM (in *Lady Thynne* v. *Earl of Glengall* (7)) had expressed the opinion that the rule is much weaker where the legacy is in satisfaction of a debt, than where it is in satisfaction of a portion. I perfectly agree with those observations. But no case has been cited in which the court has decided in favour of the bounty and also of the debt, except *Bartlett* v. *Gillard* (8). That is a very peculiar case. There the testatrix, by her will, bequeathed certain leasehold property to her son Richard Gillard, subject to an annuity of £12 a year for the sole use of her daughter A. M. Bartlett. Therefore, the son took the property subject to the payment of this annuity. The son then made his will, and directed as follows:

> "Lastly, I do make, constitute, and appoint R. Gillard my whole and sole executor of all my land for ever, and leasehold property here or at Beeston, or money that shall become due for the same, paying Maria Bartlett £12 per annum by half-yearly payments, viz., Jan 27 and July 27."

Considering that the son held property liable to pay her £12 per annum, I certainly think that he merely meant to give the property, paying her that which

A he was bound to pay, not that he meant to give her anything in addition. I think that it so struck LORD ELDON, because he says:

> "If I were to indulge in conjecture, I might possibly come to the conclusion that the testator had no intention, by the words 'paying Maria Bartlett £12 per annum,' to create a new and additional payment. But the second annuity
> B is charged upon the freehold as well as the leasehold property, and, being payable to the wife generally, and not to her separate use, I think the case comes sufficiently within the authorities and doctrine applicable to this subject to repel the presumption that the second annuity was intended as a substitution and satisfaction for the first. The consequence is, that both annuities will be payable from the testator's death."

C Certainly that case has not been much relied upon as an authority upon this point, and I think the decision there must have turned very much upon the fact that the donor of the annuity by the second will was not the original testator. Therefore I am not able to regard it as an authority which can bind me upon the subject.

D Therefore, not finding any authorities against the general rule, and the general rule being so clear, unless the will from some circumstance or other shows a contrary intention—and here there is a complete absence of anything to show a contrary intention, beyond the fact that, having created a liability by the separation deed to pay an annuity of £52, he gives the same person an annuity of the same amount, payable on the same days, charged upon a particular portion
E of his property, and his object may have been to give her the security of his real estate, whereas previously to the will he had simply entered into a covenant—upon the authorities, I must regard the annuity given by the will as in satisfaction of the debt which had been created by the separation deed.

There will be a declaration that the widow is entitled to one annuity only; and she, by her counsel, electing to take as creditor under the separation deed, there
F will be a declaration that she is entitled to take accordingly.

Solicitors: *Edwards, Layton & Jacques; Shum, Crossman & Crossman.*

G

BLACK AND OTHERS *v.* HOMERSHAM

[EXCHEQUER DIVISION (Kelly, C.B., and Cleasby, B.), November 18, 1878]

H [Reported 4 Ex.D. 24; 48 L.J.Q.B. 79; 39 L.T. 671; 27 W.R. 171]

Company—Shares—Sale—Right to dividend—Dividend declared after contract, but before completion, of sale, in respect of period before contract.

Upon the sale of shares in a company under conditions of sale by which the purchase is to be completed on a future fixed day and no mention is made
I of dividends, dividends on the shares which are declared between the date of contract and the date of completion in respect of a period prior to the date of contract pass to the purchaser, whose right to the shares, with all accruing benefits and liabilities, becomes vested in him the moment the contract of purchase is effected.

Notes. Referred to: *Re Wimbush, Richards* v. *Wimbush*, [1940] 1 All E.R. 229; *Multipar Syndicate, Ltd.* v. *Devitt*, [1945] 1 All E.R. 298.

As to transfer of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 34-38; as to participation in dividend, see ibid. 405-406; and for cases see 9 DIGEST (Repl.) 362-364.

Cases referred to in argument:

Poole v. *Shergold* (1786), 2 Bro. C.C. 118; 1 Cox, Eq. Cas. 273; 29 E.R. 68; 42 Digest 495, *626*.

De Gendre v. *Kent* (1867), L.R. 4 Eq. 283; 16 L.T. 694; 40 Digest (Repl.) 716, *2091*.

Interpleader Issue stated in the form of a Special Case by direction of FIELD, J., to obtain the opinion of the court as to the right of the several claimants to a dividend which had been declared on certain gas shares purchased by them prior to the declaration of such dividend, under the following circumstances.

On June 30, 1877, the defendant, Edward Homersham, was the registered holder of 251 shares in the Mitcham and Wimbledon District Gas Light Co. The shares consisted of fifty-two £10 shares (fully paid), 100 £10 shares (£9 per share paid), and ninety-nine £10 shares (£2 per share paid). Some of the shares were sold by public auction on Aug. 1, 1877, and the residue thereof on subsequent days prior to Aug. 21, 1877, such sales respectively being made in accordance with printed particulars and conditions of sale published by the auctioneers and the defendant's solicitor, and as to the shares bought by the defendant Henry Edward Jones, a transfer thereof was executed by the defendant in favour of Henry Edward Jones on Aug. 24, 1877. Henry Edward Jones subsequently re-sold some of the shares bought by him to the defendant James Abbot. The third of the conditions of sale was as follows:

> "Each purchaser shall immediately pay into the auctioneer's hands a deposit of £20 per cent. in part of his or her purchase-money and sign an agreement for payment of the remainder on Aug. 29, 1877, at the offices of the vendors' solicitor, when and where the purchases are to be completed, and in this respect time shall be of the essence of the contract."

Another of the conditions of sale was as follows:

> "If either of the purchasers neglect or fail to complete his purchase on the said Aug. 29, 1877, the deposit money shall be absolutely forfeited to the vendor."

In pursuance of a notice dated Aug. 8, 1877, the ordinary half-yearly general meeting of the shareholders of the company was held on Aug. 28, 1877, when a dividend for the half-year ended June 30, 1877, was declared. In pursuance of the notice of Aug. 8, 1877, the transfer books of the company were closed from Aug. 13 to 28. No mention of any dividend was made either in the printed particulars and conditions of sale, or by the auctioneers, or by any other person on the defendant's behalf at the sale. The defendant executed a transfer of certain of the shares to a purchaser at the sale shortly after the sale, which transfer was duly registered in the books of the company (prior to Aug. 13) and the dividend on the shares was paid by the company to the purchaser, for which payment, however, the defendant seeks to have the company declared liable to him.

The claimants contended that in the foregoing circumstances the property in the dividend on the shares then accruing due passed at the time of the sale to the purchasers of the shares respectively at the auction or sale. The defendant contended that in the foregoing circumstances the property in the dividend on the shares for the half-year ended June 30, 1877, did not pass to the purchasers of the shares respectively at the auction or sale. The question for the opinion of the court was whether in the foregoing circumstances the claimants or the defendant were or was entitled to the dividend on the shares declared on Aug. 28, 1877.

Gore for the claimants.

Webster, Q.C. (with him *Candy*) for the defendant.

KELLY, C.B.—I am very clearly of opinion that the claimants are entitled to judgment in their favour. I have no doubt that the completion of the purchase in this case has relation back to the date of the contract, and that from the moment that that contract was effected at the sale, the right to the shares, with all accruing benefits and liabilities, became vested in the several purchasers. The purchase of the shares was made on Aug. 1, at a certain market value on that day, and when the balance of the purchase money was paid on Aug. 29, the time fixed for completion of the purchase, the title of the purchasers to the shares as they bought them on Aug. 1 was then perfect and complete. The present case is entirely different from that of the sale and purchase of real property. In the case of land the contract of purchase is in fieri, and in the meanwhile the profits go to the vendor. There is not, in my opinion, the analogy between the two cases that has been contended for by counsel for the defendant. Our judgment must be for the claimants.

CLEASBY, B.—I am of the same opinion; and I cannot see how we could possibly come to any other conclusion. It is common knowledge that the market value of property of this nature is lessened the moment after the declaration and payment of a dividend; and a purchaser, of course, pays more or less for this sort of property, according as he buys it just before or just after a dividend has been paid. Here the claimants bought these shares at the value put upon them before the dividend had been declared. They bought a property which had an accruing interest, and were they not to be held entitled to receive it, the result would be that they would have to pay more for the shares than they, in fact, bargained for, or intended or supposed they would have to pay.

Judgment for claimants.

Solicitors: *J. A. Girling & H. Kimber & Co.; W. Sturt.*

[*Reported by* H. LEIGH, ESQ., *Barrister-at-Law.*]

ROGERS *v.* INGHAM

[COURT OF APPEAL (James and Mellish, L.JJ., and Baggallay, J.A.), July 18, 1876]

[Reported 3 Ch.D. 351; 35 L.T. 677; 25 W.R. 338]

Administration of Estates—Legacy—Division—Division by consent with knowledge—Claim for repayment of one share—Competency.

An executor was advised by counsel that a fund should be divided between two legatees. One of the legatees being dissatisfied also took the opinion of counsel who confirmed that view. The executor subsequently divided the fund in accordance with counsel's opinion. Two years later the dissatisfied legatee filed a bill against the executor and the other legatee to have the will construed by the court, and the money received by the other legatee repaid.

Held: (i) as the fund had been divided by consent with a perfect knowledge of the facts on both sides, the mistake, if any, was a mistake of law; and (ii) although the court had power to grant relief where there had been a mistake of law this was not a proper case for the exercise of the power.

Notes. Considered: *Allcard* v. *Walker*, [1896] 2 Ch. 369; *Stanley* v. *Nuneaton Corpn.* (1913), 108 L.T. 986; *Carnell* v. *Harrison*, [1916-17] All E.R. Rep. 827. Distinguished: *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137. Referred

to: *Re Bowman, Whytehead* v. *Bolton* (1889), 37 W.R. 583; *Baylis* v. *Bishop of London*, [1911-13] All E.R. Rep. 273; *Sawyer* v. *Window Brace, Ltd.*, [1942] 2 All E.R. 669; *Kiriri Cotton Co., Ltd.* v. *Dewani*, [1960] 1 All E.R. 177.

As to refunding as between legatees, see 16 HALSBURY'S LAWS (3rd Edn.) 335; and for cases see 23 DIGEST (Repl.) 439. As to mistake of law, see 26 HALSBURY'S LAWS (3rd Edn.) 895 et seq.; and for cases see 35 DIGEST (Repl.) 95 et seq.

Cases referred to:

(1) *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126; 27 E.R. 934; 35 Digest (Repl.) 130, *253*.

(2) *Davis* v. *Morier* (1845), 2 Coll. 303; 63 E.R. 745; 35 Digest (Repl.) 177, *613*.

(3) *Stone* v. *Godfrey* (1854), 5 De G.M. & G. 76; 2 Eq. Rep. 866; 23 L.J.Ch. 769; 23 L.T.O.S. 289; 18 Jur. 524; 43 E.R. 798, L.JJ.; 35 Digest (Repl.) 97, *22*.

(4) *Clifton* v. *Cockburn* (1834), 3 My. & K. 76; 40 E.R. 30, L.C.; 35 Digest (Repl.) 95, *9*.

Also referred to in argument:

Naylor v. *Winch* (1824), 1 Sim. & St. 555; 57 E.R. 219; affirmed (1828), 7 L.J.O.S.Ch. 6, L.C.; 35 Digest (Repl.) 101, *54*.

Cooper v. *Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 35 Digest (Repl.) 98, *28*.

Bullock v. *Downes* (1860), 9 H.L.Cas. 1, H.L.; 23 Digest (Repl.) 438, *5081*.

Re Condon, Ex parte James (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 226, *2031*.

Brisbane v. *Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest (Repl.) 172, *571*.

Midland Great Western Rail. Co. of Ireland (Directors, etc.) v. *Johnson* (1858), 6 H.L.Cas. 798; 31 L.T.O.S. 240; 4 Jur.N.S. 643; 10 E.R. 1509; sub nom. *Midland Great Western Rail. Co. of Ireland* v. *Kinder*, 6 W.R. 510, H.L.; 35 Digest (Repl.) 97, *23*.

Stewart v. *Stewart* (1839), 6 Cl. & Fin. 911; Macl. & Rob. 401; 7 E.R. 940, H.L.; 24 Digest 1128, *105*.

R. v. *Lords Commissioners of the Treasury, Ex parte Lord Brougham and Vaux* (1851), 16 Q.B. 357; 20 L.J.Q.B. 305; 16 L.T.O.S. 484; 15 Jur. 767; 117 E.R. 916; 16 Digest (Repl.) 345, *1222*.

Appeal from a decision of HALL, V.-C., that a bill for the repayment of a legacy paid under a mistake of law could not be maintained.

Mary Rogers, the mother of the plaintiff, Martha Rogers, was entitled under the will of her deceased father to one-fourth part of his residuary estate for life with remainder to her children. In 1866 Mary Rogers died leaving two children surviving her, the plaintiff, and Robert Rogers. A third child, Hester, who married Thomas Wheatley, died in her mother's lifetime. The surviving executor of the will for some time divided the income of the one-fourth between the plaintiff and Robert Rogers equally, thinking that they were entitled to the whole of it as survivors of their sister Hester, and after the death of Robert Rogers he paid the whole of the income to the plaintiff. Subsequently the executor took counsel's opinion on the will, and was advised that the share of Hester Wheatley had become vested in her, and had passed to her husband as her legal representative, and the income of that share had consequently been wrongly paid to the plaintiff. The plaintiff, being dissatisfied, took the opinion of counsel, who confirmed that view of the case. Thereupon the executor divided the fund in accordance with the opinion of counsel, deducting from the share of the plaintiff the income paid to her in mistake, and adding the amount so deducted to the share of Hester Wheatley, which was paid to her husband, Thomas Wheatley. The share of the plaintiff was sent to her solicitors by cheque on July 2, 1873, and the receipt was acknowledged by her solicitors. On June 14, 1875, the plaintiff filed her bill against the executor and Thomas

Wheatley, submitting that on the true construction of the will the share of Hester Wheatley had passed to the plaintiff by survivorship, and praying that Thomas Wheatley might be ordered to repay the same with interest.

HALL, V.-C., held that the bill could not be maintained as the fund had been divided as a matter of arrangement between the parties two years before the bill was filed and was received by Thomas Wheatley in good faith and with the acquiescence of the plaintiff. The plaintiff appealed.

Dickinson, Q.C., and *Eyre Thompson* for the plaintiff.

Hastings, Q.C., and *Hanson* for the defendant.

JAMES, L.J.—I am of opinion that the decision of the Vice-Chancellor ought to be affirmed. In arriving at that conclusion I entirely put aside anything that has been said about any supposed or conditional consideration connected with the matter. The case must really be looked at as between the two persons who alone are now in litigation before us, that is, the plaintiff on the one part, and the defendant Wheatley on the other part; and the greater portion of the argument seems to me to be disposed of by this consideration, that there really is no question of trust, trust estate, or trust money, to be dealt with. When a trustee, by the direction or with the authority of his cestui que trust, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the cestui que trust had received the money from the trustee, and had herself paid it to that third person. It is simply a case of money paid by the lady, or by her direction, out of money of hers which the trustee had in hand to a person who said that he had a claim to the money.

That being so, the case is reduced, as it appears to me, to a mere action for money had and received, and it is the same as if A. through a third person had paid money to B., thinking that B. was entitled to it, B. thinking also that he was entitled to it; there having been, as it is now said, a mistake of law which was common to both parties. No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. Of course cases of that kind must have frequently occurred, and yet no case has been produced in which a suit of this kind has succeeded. And, even treating it as the common case of money paid to B. under a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one court than in the other court, for the action for money had and received proceeded upon equitable considerations. Here the money has got into the hands of one person, who received it honestly, with no mistake on his part, and no mistake on the part of the lady, or of the trustee, the intermediate hand through which the money passed, and by which it was actually paid.

No doubt there are some cases which have been relied on, in which this court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity supervening by reason of the conduct of either of the parties. It is said that there have been two cases of that kind. In *Bingham* v. *Bingham* (1) a man was held to be entitled to get his money back when he had paid it for a conveyance of his own land from another person. It was held in that case that he was entitled to recover back the money, because he had not the consideration for which he had bargained. The other case is *Davis* v. *Morier* (2), where the

relation of trustee and cestui que trust existed between the parties; but when the facts of that case come to be looked into, the person who received the whole income of the fund on trust to apply the same properly, and who was the trustee, retained to himself all except £500 a year, and it appeared that the £500 a year was not all that he ought to have paid to the cestui que trust; and that being so, KNIGHT BRUCE, V.-C., directed an inquiry, first, as to whether he had retained more than he ought to have retained, and, secondly, under what circumstances and whether the other cestui que trust had in any manner assented to such retainer, that is to say, had acquiesced in it so as to show whether they had given it up. Therefore, there was in that case a question between a cestui que trust and a trustee, which trustee, no doubt under mistake, had retained trust money in his own possession.

That is the nearest case that I have been able to find to the case now before us; but that case is far from establishing the proposition here contended for. If that proposition were true in respect of this case, it must be true in respect of every case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and evil in cases of the distribution of estates, and it would be difficult to say what limit could be placed on this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts and having given a release. The thing has never been done, and it is not a thing which, in my opinion, is to be encouraged. Where people have a knowledge of all the facts, and take advice, and, whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be re-opened by one of the parties saying, "You have received your money by mistake; I acquiesced in your receipt of it under that mistake, and, therefore, I ask you to give it back to me." I am of opinion, therefore, that the decision of the Vice-Chancellor is perfectly correct, and ought to be affirmed.

MELLISH, L.J.—I am entirely of the same opinion. There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the courts of equity did not, in such cases, interfere with the courts of law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might years afterwards be recovered, because perhaps some court of justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by courts of equity; but, on the other hand, I think that, no doubt, as was said by TURNER, L.J., in *Stone* v. *Godfrey* (3) (5 De G. M. & G. at p. 90):

> "This court has power (as I feel no doubt that it has), to relieve against mistakes in law as well as against mistakes in fact;"

that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.

Is there any such ground in this case? It appears that there was a trustee in possession of a fund which belonged either to the plaintiff or to the defendant. All the facts were perfectly well known; the trustee was in communication with both parties; both parties were well aware that the question was then to be decided. The plaintiff's attention and the attention of the plaintiff's

legal advisers was called to all the facts and circumstances; she took advice upon the point, she and her advisers being all of them aware that, if she had not assented to the view that the trustee took, the natural consequence would be that the money would have been paid into court under the Trustees Relief Act, 1847 (10 & 11 Vict., c. 96) [see now Trustee Act, 1925, s. 63], and that she would have been obliged to have the question then decided. Therefore, having all the facts before her, and before her solicitors, and being advised by them, she thinks it better for her not to contest the matter, but to allow it to be settled in that way; and there is no doubt that she was properly advised. Thereupon the money was divided, and of course would not be paid into court, and the matter would not be litigated.

Then the question is whether a person who has acted in this way is now entitled, because she has changed her mind, to litigate this question, which before she had been advised and had determined not to litigate. It seems to me that it would be contrary to the ordinary rule of law so to hold; and that the defendant is entitled to say, "I received this money believing it to be my own; the person by whose direction it was paid was the counter-claimant against me; she knew all the facts, and elected at the time not to litigate the question; and therefore I have received the money just as if the question had been determined in open court." In my opinion, it would be most unsafe to estates in general if we were to hold in a case of this kind that money paid under such circumstances could be recovered. I agree, therefore, with the lord justice in thinking that the judgment of the Vice-Chancellor ought to be affirmed.

BAGGALLAY, J.A.—I am of the same opinion, and I merely wish to add that, while I give a general assent to the passage in the judgment of LORD BROUGHAM in *Clifton* v. *Cockburn* (4) (3 My. & K. at p. 99), which has been referred to in the course of the argument, in which he expressed himself to the effect that cases might arise in which it would be the duty of the court to relieve against an error of law, I do not think that the present is a proper case for the application of such a principle.

Appeal dismissed.

Solicitors: *F. Last*, for *Barrell & Rodway*, Liverpool; *Paterson, Snow & Burney*, for *Dibb, Atkinson & Braithwaite*, Leeds.

[*Reported by* H. PEATE, ESQ., *Barrister-at-Law.*]

VAVASSEUR *v.* KRUPP

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), July 3, 1878]

[Reported 9 Ch.D. 351; 39 L.T. 437; 27 W.R. 176; 22 Sol. Jo. 702]

Patent—Infringement of patent—Right of property in articles made in violation of patent—Power of court to order destruction.

The right of property in articles made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer if he would otherwise have the right of property in them, but the court will prevent the use of those articles to the derogation of the patentee's right by ordering their destruction.

Constitutional Law—Foreign sovereign—Injunction—Right of sovereign to remove property made in violation of patent—Effect of submission to jurisdiction by sovereign for purpose of obtaining leave to remove property.

The plaintiff brought an action to restrain K. and his agent in England, and A. & Co., agents for the Japanese government, from infringing the plaintiff's patent for the manufacture of shells and projectiles. Shells, alleged to be infringements of the patent, had been made by K. in Prussia, and had been purchased there for the Japanese government and brought to this country in order to be put on board Japanese ships of war and taken to Japan. In December, 1877, an injunction was granted restraining A. & Co. from allowing the removal of the shells. In May the Mikado of Japan obtained leave to be added as defendant to the suit so far as it might be necessary for applying for leave to remove the shells. On the application of the Mikado an order was made giving leave to him to remove the shells notwithstanding the injunction.

Held: (i) the court had no jurisdiction to interfere with the property of a foreign sovereign in this country, and, therefore, the Mikado was at liberty to remove the shells; (ii) the Mikado, in submitting to be made a defendant in the action for the purpose of obtaining leave to remove his property, did not thereby lose his rights as a foreign sovereign.

Notes. Applied: *The Parlement Belge*, ante, page 104. Considered: *Re Miller's Patent* (1894), 63 L.J.Ch. 324; *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1949] 1 All E.R. 946. Referred to: *Moser* v. *Marsden*, [1891-4] All E.R. Rep. 458; *British Westinghouse Electrical and Manufacturing Co.* v. *Electrical Co.* (1911), 55 Sol. Jo. 689; *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagar & Co.*, [1921] All E.R. Rep. 138; *The Tervaete*, [1922] All E.R. Rep. 387; *Duff Development Co.* v. *Kelantan Government*, [1923] 1 Ch. 385; *The Jupiter*, [1927] All E.R. Rep. 237; *Amon* v. *Raphael Tuck & Sons, Ltd.*, [1956] 1 All E.R. 273; *Abbott* v. *Philbin*, [1960] 2 All E.R. 763.

As to foreign sovereigns and governments, see 7 HALSBURY'S LAWS (3rd Edn.) 265-267, 282; and for cases see 1 DIGEST (Repl.) 50 et seq. As to injunctions and sovereignty, see 21 HALSBURY'S LAWS (3rd Edn.) 350, 351; and for cases see 28 DIGEST (Repl.) 815. As to infringement of patents, see 29 HALSBURY'S LAWS (3rd Edn.) 90 et seq.; and for cases see 36 DIGEST (Repl.) 953 et seq.

Cases referred to in argument:

Gladstone v. *Musurus Bey* (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L.J.Ch. 155; 7 L.T. 477; 9 Jur.N.S. 71; 11 W.R. 180; 71 E.R. 216; 28 Digest (Repl.) 815, *620*.

Dixon v. *London Small Arms Co.* (1875), L.R. 10 Q.B. 130; 44 L.J.Q.B. 63; 33 L.T. 830; 23 W.R. 317; reversed (1876), 1 Q.B.D. 384; 46 L.J.Q.B. 617, n.; 35 L.T. 138; 24 W.R. 766, C.A.; reversed, 1 App. Cas. 632; 46 L.J.Q.B. 617; 35 L.T. 559; 25 W.R. 142, H.L.; 36 Digest (Repl.) 843, *1926*.

Hullet v. *King of Spain* (1828), 2 Bli. N.S. 31; 1 Dow. & Cl. 169; 6 E.R. 488; sub nom. *King of Spain* v. *Hullett and Widder*, 2 State Tr. N.S. 305, H.L.; 1 Digest (Repl.) 50, *369*.

Appeal from a decision of SIR GEORGE JESSEL, M.R. The plaintiff, Josiah Vavasseur, who was formerly in partnership with Captain Blakely, was the owner of certain English patents granted to him and Captain Blakely for the manufacture of projectiles. An action was brought against Messrs. Krupp, of Essen in Germany, Alfred Longsden, their agent in England, and Ahrens & Co., described as agents for the government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. The defendants, Messrs. Krupp, had sold some shells manufactured by them at Essen to the Japanese government. These shells were shipped to this country for the purpose of transhipment to three war vessels, which were being built here for the government of Japan, in which ships they were to be conveyed to Japan. The plaintiff alleged that the shells in question, if manufactured in this country, would have been an infringement of his patents, and that the bringing of them to an English port, though merely for the purpose of transhipment, amounted to an infringement of the patents. In December, 1877, an injunction was granted by the Master of the Rolls against Messrs. Krupp, and in January, 1878, another injunction was granted against Messrs. Ahrens, who had then lately been made parties to the action, restraining the defendants and the owners of the wharf where the shells lay from selling or delivering the shells to the government of Japan, or to any person on their behalf, or otherwise from parting with, selling, or disposing of the shells and projectiles. On May 11, 1878, an application was made to the court on behalf of the Mikado of Japan and his Envoy Extraordinary in this country, that, notwithstanding the injunction, the Mikado and his agents might be at liberty to remove the shells, and that, if, and so far as might be necessary, the Mikado and his envoy should, for the purposes of making and being heard upon such application, be added as defendants in the suit. Upon this application the Master of the Rolls made an order that on the Mikado, by his counsel, submitting to the jurisdiction of the court, and desiring to be made a defendant, and, on payment into court of £100 by the Mikado as security for costs, the name of the Mikado be added as a party defendant in the action. The Mikado then applied to the Master of the Rolls for an order that the injunction might be dissolved, and that the Mikado might be at liberty to take possession and remove out of the jurisdiction of the court the shells in question, they being the property of his Imperial Majesty.

Aston, *Q.C.*, *Davey*, *Q.C.*, and *Everitt* for the plaintiff.

Fooks, *Q.C.*, *Chitty*, *Q.C.*, *Cookson*, *Q.C.*, *Cozens-Hardy*, *Macrory* and *Medd* for the defendants, were not called on to argue.

JAMES, L.J.—I am of opinion that this attempt on the part of the plaintiff to interfere with the right of a foreign sovereign to deal with his public property is one of the boldest I ever heard of as made in any court in this country. It is an undoubted and admitted fact that the Mikado of Japan, who is a sovereign prince, bought in Germany a certain quantity of shells, which shells were lawfully made in Germany, although they were, as alleged, made upon the same principle as something which is the subject of a patent in this country. Those shells were bought by the Mikado for the purpose of his government. He brought them into this country on the way to Japan, and he asks to be allowed to remove them from this country; that is to say, he asks that he shall not, by reason of something which was done between the plaintiff and some other persons, be interfered with in his removal of them to his own country. It seems to me that to refuse him that leave would be a very dangerous proceeding. If a tribunal of any foreign

country were to deal with the ammunition of a British man-of-war under those circumstances, or refuse to permit the captain of a British man-of-war to remove his ammunition and shells, or anything else, I think that our country would consider it a very serious matter, and possibly demand reparation.

The objection made is this. The plaintiff says: "True it is that these shells were your property: you had brought them to this country in transitu to Japan, and you had no doubt a right so to bring them. But some persons in this country, either with or without your authority, with your authority it may be, but at all events having possession of these things as your agents, were minded to make, and did make, a use of these shells which was inconsistent with our patent; that is to say, they were making a profitable use of them." If they were doing so, then they are liable to an action for damages, and the plaintiff may recover any damages that he may be entitled to. But that does not interfere with the rights of the sovereign of Japan, who now asks to be allowed to take his property. It was his property. It is now in the shape in which it was when he lawfully bought it in Germany, where it was lawfully made, and he asks to be allowed to take it out of this country in that shape. I cannot conceive it possible how any doubt could arise or could be suggested as to the right of the Mikado to do this. I suppose that there is a notion that in some way these shells became tainted or affected through the breach or attempted breach of the patent; but even then a foreign sovereign cannot be deprived of his property because it has become tainted by the infringement of somebody's patent. He says, "It is my public property, and I ask you for it." That seems to me to be the whole of the case.

It is, however, said that the Mikado has submitted to the jurisdiction. No doubt he submitted to the jurisdiction, but in this way only, and for this purpose only. In certain circumstances, which it is not necessary for us now to inquire into, Mr. Ahrens and others were ordered by a court of municipal jurisdiction not to deliver certain shells and other things to the Mikado; that is to say, treating them as property, these persons were ordered not to deliver them to the Mikado, but entirely without prejudice. It could never be supposed that that order was to deprive him of any right or property which he had in them. Then when he himself applied to the persons and said, "Give me my property; let me take my property out of this country to my own country," they said: "We do not claim the property; we know it is yours, but there is an injunction of this court, and we may be liable to punishment by this court if we give you up your property." Upon this the Mikado, for the purpose of making an application to relieve his own property from a fetter which had been put upon it, I think inadvertently, if I may venture to say so, by the injunction of the court, does come and say, "I will submit to the jurisdiction of the court," which means, "I will submit to the jurisdiction of the court as to discovery, as to process, and as to costs." He never meant, "I shall submit my public property to be dealt with by a court of municipal jurisdiction in another country and in violation of my rights." The whole effect of that proceeding was that he made himself a suitor liable to the ordinary consequences, so far as they can be enforced against a sovereign, as to costs and otherwise, and in that character he made a deposit of £100 to provide for the costs of the proceedings. The order he obtained does not prevent his saying, as is the truth: "This is my property; it was lawfully bought by me and paid for by me, and it is public property. Whether anybody else has done anything right or wrong with it, is a question with which I have nothing to do. No court of municipal jurisdiction has any right to interfere with my property; and be good enough to remove your hands from it." Sir George Jessel, M.R., who granted the injunction, and heard the whole matter, as soon as he heard what was the state of things, said of course that he could not keep his hands on a property which he had no right to interfere with, and he made the order which is complained of.

BRETT, L.J.—It does not seem to me that in this case there is any fact whatever in dispute. These shells were made by Krupp at Essen. That was no infringement of the plaintiff's patent. In Germany they were sold to the Mikado and paid for by the agents of the Mikado. None of these facts are in dispute, and this purchase and sale was a perfectly lawful purchase and sale. The Mikado had three ships of war building in this country, and he desired that these shells should be sent to this country and put on board these ships. They were sent to this country by the order and by the authority of the Mikado, through Ahrens & Co. They were brought into this country, and they were deposited on a wharf. The plaintiff then, finding these shells in this country, and finding, as he alleges, that they were made according to the process of his patent, asserts that the bringing them into this country by Ahrens & Co. is an infringement of his patent by them; and thereupon he brings an action against Ahrens & Co. for the infringement. In that action he claims an injunction against Ahrens & Co., and it may be that he claims an order from the court to destroy those shells, because he says they are an infringement of his patent. In the course of that suit an injunction was obtained against Ahrens & Co., and against others, which injunction, in terms, forbids them from delivering these shells, which, with other things, are in their possession, to the ships of the Mikado, and, in fact, forbids them from sending the shells to Japan. To this action the Mikado was no party, but he or his agents here come forward and claim to have the delivery and the possession of these shells. The defendants in the action are not unwilling to give the shells to the Mikado, but they say, "If we do so it may be said that we have broken the injunction, and we may, therefore, be liable to certain penalties."

It seems to me, beyond dispute, that this was the purpose for which the Mikado came in and desired to be made a party to the suit, and the Master of the Rolls thus describes the purpose. [HIS LORDSHIP then read the judgment in question.] It is said that in the first place there is a dispute whether these shells are the property of the Mikado. It is argued that, if he were a private individual, then, although he has purchased these shells and paid for them, yet, inasmuch as there has been an infringement of the patent, the property is not in him, because the court may order the shells to be destroyed. Is that argument good or not? To my mind it is utterly fallacious. The patent law has nothing to do with the property. The facts here are undisputed, that Krupp made the shells with his own materials in Germany, where he had a right to make them, that he entered into a contract to sell specific shells to the Mikado, that that contract was performed, and that the shells were paid for, and that they were delivered in Germany to the Mikado's agent. Well, unless the patent law prevents the property from passing, nobody can doubt that the property passed to the Mikado. Therefore, the dispute is not upon facts, but upon a false theory of law, that the patent law prevented the property from passing. I am clearly of opinion that the patent law did not prevent the property from passing. The goods were the property of the Mikado. They were his property as a sovereign; they were the property of his country, and, therefore, he is in the position of a foreign sovereign having property here.

Whether the fact of Ahrens & Co. bringing these goods into England under these circumstances, and with this intention, was an infringement of the patent, I decline to consider. I shall assume for this purpose that it was an infringement, and that we have in this country property of the Mikado which infringes the patent. If it is an infringement of the patent by the Mikado, you cannot sue him for that infringement. If it is an infringement by the agents, you may sue the agents for that infringement, but then it is the agents whom you sue. The injunction is against the agents, the Mikado being then no party to the action, and not being forbidden to do anything. He then comes here as a sovereign, and requires the delivery of his own goods. His only difficulty is the injunction

against the agents, and for the purpose of enabling the court to make an order, he what is called "submits himself to the jurisdiction of the court." I think the interpretation put by SIR GEORGE JESSEL, M.R., upon the order then made is right, and that it was only an order that the Mikado might be made a defendant for the purpose of enabling the court to make the order which the court has made. He now says: "I know not, and I care not, whether my agents have infringed your patent law. I have property in this country, which property is my own. I demand that it shall be delivered to me, and I make myself a defendant in your court merely for the purpose of your modifying the order which you have made, so that my agents may not be injured in consequence of their delivering to me my own property."

The only order that SIR GEORGE JESSEL, M.R., has made is that these goods may be delivered up to the Mikado; the meaning of which is, that the mere fact of the Mikado taking these shells away shall not be considered, as against Ahrens & Co., an infringement of the injunction. That is the whole effect of the order. The Mikado has a perfect right to have these goods; no court in this country can properly prevent him from having goods which are the public property of his own country. Therefore, it seems to me that this order, which is really made for the benefit of Ahrens & Co., was an order rightly made, and that this appeal cannot be sustained.

COTTON, L.J.—We have not got the order appealed from, because it has not been drawn up, but in substance it is either that the Mikado should be at liberty, notwithstanding the injunction, to take away the shells in question, or that some defendants to the suit should, notwithstanding that injunction, be at liberty to deliver them to the Mikado, thus leaving the injunction against the defendants to stand as it was, though doing away with the effect of the injunction in so far that the particular goods in question are no longer stopped.

The point, therefore, which has been a great deal argued, does not arise, whether the defendants can justify an act which would otherwise be an infringement of the plaintiff's patent rights, on the ground that they were acting as agents for a foreign sovereign. That question does not arise; but, undoubtedly, if parties in England are doing that which is an infringement of a patent, they cannot justify it by saying that someone who has no power to authorise them to use the patent has authorised them to do so. Certainly, my judgment in this case in no way depends upon any such proposition. After that injunction had been granted, and assuming that the injunction was properly granted against the defendants in the suit, the Mikado came in and said: "These shells are public property of the country of which I am sovereign, and, therefore, I ought not to be prevented by that injunction from taking these shells. The injunction is not against me, but there may be a question whether the defendants could allow me to take these goods away without committing a breach of the injunction, therefore I come in and state that the shells are public property of the country of which I am sovereign, and I ask the court to give them over to me." In that proposition he is, I apprehend, clearly right. This court has no jurisdiction, and, in my opinion, none of the courts of this country have any jurisdiction to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign, as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented as all foreign countries having a sovereign are represented by the individual who is the sovereign.

Then, what besides was argued? I think one argument was very much this: That if the foreign sovereign had been a private individual he could have had no property in these goods, because they were violations of the plaintiff's patent, or

rather, I should say more correctly, because they were to violate the plaintiff's patent. There, I venture to say, is a fallacy. The property in articles which are made in violation of a patent is, notwithstanding the privilege of the patentee, in the infringer if he would otherwise have the property in them. The court, in a suit to restrain the infringement of a patent, does not proceed on the footing that the defendant proved to have infringed has no property in the articles; but, assuming the property to be in him, it prevents the use of those articles, either by removing that which constitutes the infringement, or by ordering, if necessary, a destruction of the articles so as to prevent them from being used in derogation of the plaintiff's rights, and does this in the most effectual mode of protecting the plaintiff's rights, not on the footing that there is no property in the defendant. The court cannot proceed to give that relief and interfere with the articles unless it has before it the person entitled to the articles in question, and has as against this person power to adjudicate that the articles are made or used in infringement of the plaintiff's rights. As against a foreign sovereign, how could that be done? If these things, as on the evidence we must take them to be, are the property of the state of which the Mikado is sovereign, I can see no possible ground for interfering on any such principle as that on which the court acts when a defendant, subject to its jurisdiction, having been shown to have infringed the plaintiff's rights, the plaintiff gets this relief, that either the articles are destroyed or the objectionable portion is removed.

The only other point which we really have to consider is this. It is said that, although under ordinary circumstances there is no jurisdiction as against a foreign sovereign, yet that in this particular case there is jurisdiction in consequence of the Mikado having come in and obtained the order of May 11, 1878. It is said that a sovereign suing submits himself to the court as an ordinary plaintiff, and that the Mikado, in consequence of having obtained this order and acted upon it, puts himself in the position of an ordinary plaintiff. In the first place there is this fallacy: the Mikado is not now in any way suing in the ordinary sense of the word, nor has he come to the court to establish as against an adverse claim his title to the property, which is really what is meant by a foreign sovereign coming here to sue to establish his rights. He is simply coming and saying: "The order of the court, possibly inadvertently, interferes with my sovereign rights. To prevent any question as to the defendants committing a breach of the injunction by allowing me to remove the property, make an order that they be at liberty, notwithstanding the injunction, to hand them over to me." So that, in my opinion, the very foundation for the suggestion fails. But again, even if the Mikado had brought himself into court as an ordinary defendant, that, in my opinion, would not give the court jurisdiction as against the subject-matter, namely, jurisdiction to interfere with the public property of Japan, which is represented here by the Mikado. But when one comes to look at the form of the order, the Mikado does not by it come in as an ordinary defendant. By it he simply says: "I wish to bring before the court the facts that these are my property, that the defendants were not constructing them under a contract for me, or using them under a contract with me. I wish to apply for liberty to remove them as the public property of the state of Japan, and for that purpose, if necessary, I ask to come in."

In my opinion the order taken fairly must be read with reference to the purpose for which the Mikado applied, and that being so, although possibly the form is not very happy, it is like a conditional appearance entered where a defendant who considers himself improperly served with any proceeding has entered a conditional appearance in order to contest the question, which he could not do without an appearance of some sort. It cannot, in my opinion, be said that the order puts the Mikado in the position of a plaintiff, or of a person who is made simpliciter a defendant. He came in for the particular purpose of raising this question,

and the form of the order, in my opinion, ought not in any way to prejudice the rights which he would have had independently of that order.

Appeal dismissed.

Solicitors: *Harrison, Beal & Harrison; Wilson, Bristows & Carpmael; Maples, Teesdale & Co.*

[*Reported by* E. S. Roche, Esq., *Barrister-at-Law.*]

CATTLE *v.* STOCKTON WATERWORKS CO.

[Queen's Bench Division (Blackburn, Mellor and Lush, JJ.), June 17, July 5, 1875]

[Reported L.R. 10 Q.B. 453; 44 L.J.Q.B. 139; 33 L.T. 475; 39 J.P. 791]

Negligence—Damage—Remoteness—Loss to contractor resulting from damage through negligence to third party's property.

Under the powers of their Act the defendants, a water supply company, laid down and maintained a pipe along and under a turnpike road the soil of which was, by statute, the property of the adjoining owners. K., the owner of land on both sides of the road, wanted to make a tunnel under the road where it crossed his land on an embankment, and he obtained the consent of the surveyor of highways and the road trustees for this project. The plaintiff contracted to do the work for K. for a lump sum, but, after beginning the work, he was obstructed by water flowing down on the work caused by a leak in the pipe in the road higher up. Notice was given to the defendants who for some time neglected to repair the pipe, but ultimately did so. The plaintiff completed his contract, but owing to the delay he was put to expense, for which pecuniary loss he brought an action against the defendants.

Held: no damage having been caused to any property of the plaintiff, the fact that the defendants were guilty of negligence which occasioned damage to K.'s property did not entitle the plaintiff to recover from them in respect of the injury he had suffered through his contract with K. becoming less profitable or resulting in a loss.

Notes. The power of a plaintiff to claim a nonsuit after trial no longer exists: R.S.C. (Revision) 1962, Ord. 21, see Annual Practice (1964) 471, 472.

Applied: *Societé Anonyme de Remorquage à Hélice* v. *Bennetts*, [1911] 1 K.B. 243. Distinguished: *The Zelo*, [1922] P. 9. Applied: *Federated Coal and Shipping Co.* v. *R.*, [1922] 2 K.B. 42. Considered: *McColl* v. *Canadian Rail. Co.*, [1923] A.C. 126. Referred to: *Elliott Steam Tug Co.* v. *Shipping Controller*, [1922] 1 K.B. 127; *Read* v. *Lyons & Co.*, [1946] 2 All E.R. 471; *Morrison Steamship Co.* v. *S.S. Greystoke Castle* (*Cargo Owners*), [1946] 2 All E.R. 696.

As to remoteness of damage in negligence cases, see 11 Halsbury's Laws (3rd Edn.) 278 et seq.; and as to liability for injury from hydrants, stopcocks or other apparatus in streets, see 39 Halsbury's Laws (3rd Edn.) 357; and for cases see 43 Digest 1096 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed

sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334.*

(2) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432; 118 E.R. 749; 34 Digest (Repl.) 210, *1474.*

(3) *Langridge* v. *Levy* (1837), 2 M. & W. 519; affirmed sub nom. *Levy* v. *Langridge* (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi* v. *Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest (Repl.) 53, *472.*

Also referred to in argument:

Mersey Docks and Harbour Board Trustees v. *Gibbs, Mersey Docks and Harbour Board Trustees* v. *Penshallow* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 358; 11 E.R. 1500, H.L.; 43 Digest 871, *3161.*

R. v. *Longton Gas Co.* (1860), 2 E. & E. 651; 29 L.J.M.C. 118; 2 L.T. 14; 24 J.P. 214; 6 Jur.N.S. 601; 8 Cox C.C. 317; 121 E.R. 244; sub nom. *R.* v. *Knight*, 8 W.R. 293; 26 Digest (Repl.) 533, *2081.*

Hammond v. *St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 38 Digest (Repl.) 15, *62.*

Blyth v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 38 Digest (Repl.) 13, *50.*

Dunn v. *Birmingham Canal Co.* (1872), L.R. 8 Q.B. 42; 42 L.J.Q.B. 34; 27 L.T. 683; 21 W.R. 266, Ex. Ch.; 38 Digest (Repl.) 40, *207.*

Vaughan v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 13, *54.*

Hammersmith and City Rail. Co. v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 14, *59.*

Jones v. *Festiniog Rail. Co.* (1868), L.R. 3 Q.B. 733; 9 B. & S. 835; 37 L.J.Q.B. 214; 18 L.T. 902; 32 J.P. 693; 17 W.R. 28; 38 Digest (Repl.) 400, *613.*

Rule Nisi obtained by the defendants for an order of nonsuit in an action in which the plaintiff alleged that the defendants, being a water company, so negligently laid down, under a turnpike road, pipes for supplying water to a district, and so negligently kept and maintained the pipes in such insufficient repair and in such imperfect and leaky condition, that, while the plaintiff was lawfully constructing, for reward, a tunnel across the turnpike road, and was lawfully using the road for such purpose, the pipes leaked, and large quantities of water flowed into the road upon the plaintiff's workings and flooded them, and the plaintiff was hindered and delayed in the work, and suffered great loss.

The defendants' pleas were first, Not Guilty; secondly, that the plaintiff was not lawfully constructing the tunnel; and, thirdly, that the grievances were caused by the act of the plaintiff.

At the trial before Amphlett, B., at the Leeds Spring Assizes, 1875, the damages, in the event of the plaintiff being held entitled to recover, were, agreed between the parties, at £26, and a verdict was found for the plaintiff for that amount, leave being reserved to the defendants to move to enter a nonsuit, the court to have power to draw inferences of fact.

The defendants obtained a rule nisi in Easter Term to enter a nonsuit, on the ground that there was no evidence of negligence to make the defendants liable, and that the plaintiff, as a trespasser, was not entitled to maintain an action for the damages resulting from his own act.

J. W. Mellor for the plaintiff.

Waddy, Q.C., and *Cave* for the defendants. *Cur. adv. vult.*

July 5, 1875. **BLACKBURN, J.,** read the following judgment of the court. —This was an action tried before AMPHLETT, B., at Leeds, when the plaintiff had a verdict for £26, subject to leave to move to enter a nonsuit. The facts proved, so far as material, were as follows. The defendants are a water-works company, incorporated under an Act of Parliament, and they had, under powers conferred on them by the Act, laid down and maintained one of their main pipes along and under a turnpike road. This road was formed under a Turnpike Act (19 & 20 Vict., c. xxxix, s. 17), by one of the clauses of which the soil of the road is declared to be the property of the owners of adjoining land, subject only to the right to use and maintain the turnpike road over it. One Knight was owner of the soil on both sides of the turnpike road, at a spot where the natural surface of the ground formed a valley, which the turnpike road crossed on an artificial embankment. This caused the surface of the road to be considerably above Knight's land on each side, but still left a descent on the road to that embankment. It was discovered afterwards, though at the time it was unknown to all parties, that one of the joints of the defendants' pipe, situate higher up the declivity, was from some cause or other defective, and left a considerable aperture through which water escaped. While the soil remained undisturbed it acted as a dam to keep in the water, and but little escaped; what did escape flowed down beside the pipe, or through the soil, and rendered the soil in and under the embankment full of water. From thence it no doubt oozed away through the subsoil, but in such a way that no one observed it.

Knight was desirous of making a tunnel through his soil, under the road, so as to procure for himself a passage from his premises on one side of the road to his premises on the other; and this as owner of the soil he had a perfect right to do, provided he did not interfere with the road above him, or the defendants' right, acquired under their Act, to keep their pipes there. He proposed to do this in a very usual way, called, "cut and cover." That is, he meant to make a cutting across part of the road, necessarily, of course, pro tanto interfering with the public right of way for the time, then to build his tunnel below, replace the soil, and make good the road above it, and then proceed to cut through the other parts of the road, and make the rest of the tunnel in the same manner. He applied for and obtained the consent of the surveyor of the highways, and of the road trustees, on the usual conditions that he should take proper precautions to prevent any danger to the public from this operation.

One point made on behalf of the defendants was that, notwithstanding this consent, the obstruction of the highway, though only partial and for a limited time, might have been made the subject of an indictment, though a very vexatious one, and consequently it was said no one could recover for any damage maintained in carrying out such an operation. We need not determine whether there would have been any defence to the supposed indictment, for, even if it might have been maintained, we think that the partial obstruction of the highway did not render the whole proceeding so illegal as to prevent those engaged in it from recovering damages for a wrong. This point was disposed of on the argument, and need not be further noticed.

Knight having made these arrangements, entered into a contract with Cattle, the plaintiff, that the plaintiff should do the whole work for a lump sum. The plaintiff, accordingly, began the work, and when he had cut in some little way he came on the water lodged in the soil, which, as is now known, came from the defective joint in the defendants' pipe. As he cut further in, and so removed the soil which dammed back the water, the flow of water increased, and his works were obstructed. Notice was given to the defendants, but the evidence leaves it in doubt at what time. It does, however, appear that the defendants for some time, whether long or short, after they had notice of the mischief, neglected to take any step to examine their pipe and repair it if it was

out of order. At last they did examine it and found the leak, as above stated, and repaired it. The plaintiff then completed his contract, but he was delayed and put to expense; and by agreement between the parties at the trial, the damages, if he was entitled to recover, were assessed at £26.

On the argument before my brothers MELLOR and LUSH and myself, the plaintiff's counsel contended that, according to the doctrine laid down in *Fletcher* v. *Rylands* (1) the defendants were under an obligation to keep in the water in their pipes, and therefore that it was not necessary to prove negligence in fact, in the defendants; but that, at all events, negligence was clearly shown from the time they had notice of the mischief in not taking immediate steps to repair it. The defendants' counsel contended that the doctrine of *Fletcher* v. *Rylands* (1) did not apply to a case like the present, where the defendants were authorised by statute to make and maintain the pipe; and that the damages were assessed on the supposition that the defendants were liable for the damage during the whole time, and consequently, if the plaintiff was entitled to recover only for a part, there should be a new trial to ascertain the quantum. If it were necessary to decide these questions, we should require further time to consider, as we are not as yet quite agreed on the principle of law applicable to such a case. But there is another point on which we are agreed that the rule must be absolute to enter a nonsuit.

Assuming for the present what we purposely leave undecided, that Knight, if himself doing the work, might have maintained an action in his own name for this damage and even assuming that he might, under the circumstances that exist, have maintained the action in his own name, and recovered the amount as trustee for the plaintiff, on the ground that he would have had to bear this loss if the plaintiff had not by his contract indemnified him against it, the question arises, can the plaintiff sue in his own name for the loss which he has sustained in consequence of the damage which the defendants have done to the property of Knight, causing the plaintiff to lose money under his contract? We think he cannot.

In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so we should establish an authority for saying that in such a case as that of *Fletcher* v. *Rylands* (1), the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. Many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that if the law does not give them redress it is imperfect. Perhaps it may be so. But, as was pointed out by COLERIDGE, J., in *Lumley* v. *Gye* (2) (2 E. & B. at p. 252), courts of justice should not

> "allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts."

In this we quite agree. No authority in favour of the plaintiff's right to sue was cited, and as far as our knowledge goes, there was none that could have been cited.

The two cases which go further in allowing a right of action to one injured in consequence of a breach of a contract with a third person, or of a breach of duty to a third person, are *Langridge* v. *Levy* (3) and *Lumley* v. *Gye* (2). In *Langridge* v. *Levy* (3) the plaintiff was a son whose hand was shattered by the bursting of a gun which had been sold to the father for his (the son's) use with a false and fraudulent representation that it was a safe one. But the

court below and the court in error both carefully point out (2 M. & W. at p. 532; 4 M. & W. at p. 338), as the ground of their judgment, that

> "as there was fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

In *Lumley* v. *Gye* (2) the majority of the court held that an action would lie for maliciously procuring a third person to break her contract with the plaintiff. But all three of the judges who gave judgment for the plaintiff relied upon malicious intention. It would be a waste of time to do more than refer to the elaborate judgments in that case for the law and authorities on this branch of the law.

In the present case there is no pretence for saying that the defendants were malicious or had any intention to injure anyone. They were at most guilty of a neglect of duty which occasioned injury to the property of Knight, but which did not injure any property of the plaintiff. The plaintiff's claim is to recover the damage which he has sustained by his contract with Knight becoming less profitable; or, it may be a losing contract, in consequence of this injury to Knight's property. We think this does not give him any right of action.

Rule absolute.

Solicitors: *Sharpe & Ullithorne*, for *Dodds & Co.*, Stockton; *Iliffe, Russell & Iliffe*, for *Dunn & Watson*, Darlington.

Re BIRKETT

[CHANCERY DIVISION (Sir George Jessel, M.R.), June 14, 1878]

[Reported 9 Ch.D. 576; 47 L.J.Ch. 846; 39 L.T. 418; 43 J.P. 111; 27 W.R. 164]

Charity—Grave, railing, tombstone—Bequest to keep in repair when necessary—Invalidity—Remainder for valid charitable object—Whole fund to valid object. Executor—Legacy—Doubt as to beneficiary—Practice—Costs.

Where there is a doubt to whom a legacy is payable the executor should take out an administration summons, waiving inquiries, and adjourn it into court, or agree on a statement of facts in the nature of a Special Case, rather than pay the amount of the legacy into court. But when the latter course has been adopted the costs will fall, not on the legacy, but on the residuary estate.

The testatrix gave a legacy of £500 to the incumbent of a parish on trust for the income to be applied when necessary for the repair of a tomb and the remainder for the sick poor of that parish.

Held: the purpose for the repair of the tomb, which was invalid, did not affect the gift of the remainder to the sick poor, which was a valid charitable purpose, and the whole of the income would be devoted to the valid charitable purpose.

Notes. The Trustees Relief Act, 1847 (10 & 11 Vict., c. 96) has been repealed. The Trustee Act, 1925, s. 63, now deals with payment into court by trustees: see 26 HALSBURY'S STATUTES (2nd Edn.) 145.

Considered: *Re Gibbon's Will* (1887), 36 Ch.D. 486. Not Followed: *Re Taylor, Martin* v. *Freeman* (1888), 58 L.T. 538. Followed: *Re Rogerson, Bird* v. *Lee*, [1901] 1 Ch. 715; *Re Porter, Porter* v. *Porter*, [1925] All E.R. Rep. 179. Referred to: *Re Vaughan, Vaughan* v. *Thomas* (1886), 33 Ch.D. 187; *Re Parker's Will Trusts* (1888), 58 L.J.Ch. 23; *Re Dalziel, Midland Bank Executor and Trustee Co.* v. *St. Bartholomew's Hospital*, [1943] 2 All E.R. 656; *Re Coxen, MacCallum* v. *Coxen*, [1948] 2 All E.R. 492.

As to gifts for maintenance of monuments and tombs, see 4 Halsbury's Laws (3rd Edn.) 234 et seq.; and for cases see 8 Digest (Repl.) 402. As to costs of inquiries to ascertain persons entitled to legacy, see 16 Halsbury's Laws (3rd Edn.) 453, 454; and as to costs where payment into court by trustee unjustifiable, see 38 Halsbury's Laws (3rd Edn.) 952; and for cases see 24 Digest (Repl.) 911 et seq.

Cases referred to:

(1) *Ewan* v. *Morgan* (1858), 32 L.T.O.S. 19; 22 J.P. 607; 6 W.R. 556; sub nom. *Dundee Magistrates* v. *Morris*, 3 Macq. 134, H.L.; 8 Digest (Repl.) 400, *915*.

(2) *Chapman* v. *Brown* (1801), 6 Ves. 404; 31 E.R. 1115; 8 Digest (Repl.) 400, *917*.

(3) *Fisk* v. *A.-G.* (1867), L.R. 4 Eq. 521; 17 L.T. 27; 32 J.P. 52; 15 W.R. 1200; 8 Digest (Repl.) 401, *924*.

(4) *Hunter* v. *Bullock* (1872), L.R. 14 Eq. 45; 41 L.J.Ch. 637; 26 L.T. 349; 20 W.R. 460; 8 Digest (Repl.) 402, *929*.

(5) *Dawson* v. *Small* (1874), L.R. 18 Eq. 114; 43 L.J.Ch. 406; 30 L.T. 252; 38 J.P. 646; 22 W.R. 514; 8 Digest (Repl.) 402, *930*.

(6) *Re Williams* (1877), 5 Ch.D. 735; 47 L.J.Ch. 92; 36 L.T. 939; 25 W.R. 689; 8 Digest (Repl.) 402, *931*.

Petition by the Rev. Benjamin Crompton, the perpetual curate of Unsworth, for payment out of the whole fund in court to himself to be applied for the poor of his parish. The fund consisted of £500, the amount of a legacy, which the executor had paid into court under the Trustees Relief Act, 1847.

By her will, dated Mar. 15, 1872, the testatrix, Margaret Birkett, who died in 1876, gave the following bequest:

> "To the incumbent for the time being of Unsworth, the sum of £500, the income to be applied, when necessary, in keeping in good repair the grave, and the railing, and tombstone of my late father, and the remainder of such income to be applied by such incumbent for the time being in providing wine and bread for the sick poor of Unsworth."

The testatrix then gave her residuary estate to William Rawlinson, her executor, upon trust for Thomas Butterworth on his attaining the age of twenty-one years.

Oswald for the petitioner.

Davey, Q.C., and *Warmington* for the residuary legatee, and for the executor and trustee.

SIR GEORGE JESSEL, M.R.—This is a singular illustration of the way in which our law gets altered. I have no hesitation in saying that, if there were no authorities, I should have no difficulty in deciding this case quite differently from the way in which I am about to decide it. I should hold that, where there is a gift of money upon trust to apply the income for a definite purpose, and then to apply the surplus for another purpose, if the first purpose was sufficiently defined to enable you to ascertain the amount required for it, and that purpose could not legally be carried out, the gift of the surplus beyond that amount would be unaffected. For instance, if a man was to give £10,000 a year upon trust in the first place to keep his father's tombstone in repair, which, under no conceivable estimate, could exceed £20 a year, and directed that the residue should go to a charity, I should assume it to be good law, which always means common sense that the £20 a year was void, and that the £9980 a year was well given to a charity.

I should have felt no difficulty in saying that was the law. I think, considering the decision of the House of Lords in *Dundee Magistrates* v. *Morris* (1), in which they seem to have held a gift of a sum of money to found a hospital, which was in fact a school for one hundred boys, was sufficiently definite and could be ascertained, that you might say in like manner that the sum required for the repair of a tomb, especially an existing tomb, was sufficiently definite and might readily be ascertained by any competent person. It appears to me, therefore, on principle that you might ascertain the amount required for the tombstone, and devote the rest to the charity.

I quite agree, however, that, if the first object is not so defined that you can reasonably ascertain the amount required, the whole gift must fail, since you might apply the whole to the first object, in which case there would be no residue. That seems to me to have been *Chapman* v. *Brown* (2) which, with all deference to several learned judges, does not seem to me to have been overruled by *Dundee Magistrates* v. *Morris* (1). In that case the House of Lords thought there was sufficient limitation pointed out by the will as to the charity, to enable them to ascertain the amount required for that object. But in *Chapman* v. *Brown* (2) SIR WILLIAM GRANT thought there was not enough for him to ascertain the amount required; and if it is not improper for me to express an opinion as between WOOD, V.-C., and SIR WILLIAM GRANT, I should say that SIR WILLIAM GRANT was clearly right that there was not enough. The purpose in *Chapman* v. *Brown* (2) was this. The testatrix gave the residue of her estate to executors "for the purpose of building or purchasing a chapel for the service of Almighty God." How could any human being say what would be reasonable for the purpose of building such a chapel? There is no possible limitation, there is nothing to guide the court in such a case as that, and there was nothing to prevent the whole of the residue being applied to the building of the chapel. It does not appear that there was more than sufficient, if the residue were so applied, to build a decent chapel. There is nothing, therefore, in my opinion, in *Dundee Magistrates* v. *Morris* (1) which at all interferes with the authority of *Chapman* v. *Brown* (2), the principle being that if you cannot ascertain the extreme sum required for the first purpose, and if that purpose is void, the contingent surplus cannot be ascertained, and the whole gift fails.

That would be my opinion if the question were untrammelled by authority. But what do I find as regards the authorities? It is of the utmost importance that judges of first instance should not disregard a series of decisions by other judges of first instance, none of which have been appealed from or otherwise interfered with. In *Fisk* v. *A.-G.* (3) there was a gift to an incumbent of a sum of stock upon trust out of the dividends to apply such part thereof as should be required to keep in repair a family grave, and to apply the surplus for charity. WOOD, V.-C., decided that though the gift for the grave failed, the gift of the corpus was not affected, and the whole of the income was applicable to the charity. It may be difficult to see how, on principle, he arrived at that decision; but he did arrive at it. The gift here is, to my mind, wholly undistinguishable from the gift in that case. That decision was followed twice by BACON, V.-C., in *Hunter* v. *Bullock* (4), and in *Dawson* v. *Small* (5). It was also very recently followed by MALINS, V.-C., in *Re Williams* (6), with these four decisions—the oldest ten years old, by judges of co-ordinate jurisdictions. I shall simply follow them and decide the case in the same way. The result will, therefore, be that the whole of the income of the fund in court will be applicable to the charitable purpose. And I shall make the order as suggested by the respondents, that the fund be paid over to the official charity trustee, and the income only given to the incumbent of Unsworth for the time being to be applied by him for the charitable purpose mentioned in the will.

On the question of the executor's costs, they ought to come out of the residuary estate. Under the present practice an executor ought not to pay a fund into

court, and so throw part of the costs upon the legacy. One course would be to take out an administration summons, waiving the accounts, which could be adjourned into court without affidavit or petition. And another course would be to take out an administration summons, and for both parties to agree upon a statement of facts in the nature of a Special Case, which could be adjourned into court if the parties wished.

Order accordingly.

Solicitors: *Johnson & Weatheralls; G. B. Wheeler.*

[*Reported by* J. E. Thompson, Esq., *Barrister-at-Law.*]

SMITH *v.* COOK

[Queen's Bench Division (Blackburn, Quain and Field, JJ.), December 14, 1875]

[Reported 1 Q.B.D. 79; 45 L.J.Q.B. 122; 33 L.T. 722; 40 J.P. 247; 24 W.R. 206]

Agistment—Duty of agister—Horse agisted in field with heifers gored by trespassing bull— Liability of owner of bull—Need to prove scienter.

The defendant undertook to agist a horse belonging to the plaintiff, and he put the animal into a large field with some heifers. The field was part of a marsh, and was separated from another field, in which a bull was kept, merely by a ditch, which the bull was known by the defendant frequently to cross in order to get to the heifers. The bull was exceptionally quiet, and had never been known to injure any animal, but the horse was found gored to death by him. In an action for damages for the value of the horse, the defendant contended that he could not be liable unless he knew that the bull had a mischievous propensity. The jury found that the defendant had not taken reasonable care of the horse and found for the plaintiff.

Held: the doctrine of scienter could not be imported into the contract to agist the horse; the only relevant question was whether the defendant had taken proper and reasonable care of the animal; and on the facts he had not and was liable in damages.

Notes. Referred to: *Searle* v. *Wallbank*, [1947] 1 All E.R. 12; *Brock* v. *Richards*, [1951] 1 All E.R. 261; *Wormald* v. *Cole*, [1954] 1 All E.R. 683.

As to liability of agister, see 1 Halsbury's Laws (3rd Edn.) 681; and for cases see 2 Digest (Repl.) 338 et seq.

Case referred to:

(1) *Lee* v. *Riley* (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 11 Jur.N.S. 527; 13 W.R. 751; 144 E.R. 629; sub nom. *Riley* v. *Lee*, 6 New Rep. 147; 2 Digest (Repl.) 312, *163.*

Also referred to in argument:

Madras Rail. Co. v. *Zemindar of Carvatenagarum* (1874), L.R. 1 Ind. App. 364; 30 L.T. 770; 38 J.P. 532; 22 W.R. 865, P.C.; 36 Digest (Repl.) 296, *415.*

May v. *Burdett* (1846), 9 Q.B. 101; 16 L.J.Q.B. 64; 7 L.T.O.S. 253; 10 Jur. 692; 115 E.R. 1213; 2 Digest (Repl.) 329, *216.*

Ellis v. *Loftus Iron Co.* (1874), L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246; 2 Digest (Repl.) 312, *158.*

Dolph v. *Ferris*, 7 Watts and Sergeant's Reports of the Supreme Court of Pennsylvania, 367.

Barnes v. *Chaplin*, 4 Allen (Massachusetts) 444.
Buxendin v. *Sharp* (1696), 2 Salk. 662; sub nom. *Buxentine* v. *Sharp*, 3 Salk. 12; 91 E.R. 661; sub nom. *Bayntine* v. *Sharp*, 1 Lut. 90; 2 Digest (Repl.) 333, *237*.
Cox v. *Burbridge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, *240*.
Corbett (*Corbet*) v. *Packington* (1827), 6 B. & C. 268; 9 Dow. & Ry. K.B. 258; 5 L.J.O.S.K.B. 142; 108 E.R. 451; 2 Digest (Repl.) 338, *270*.

Rule Nisi obtained by the defendant for an order of nonsuit in an action in which the plaintiff claimed damages in respect of the death of a horse which he had agisted with the defendant.

The plaintiff was the owner of three horses, which he entrusted to the defendant for agistment. The defendant placed the horses in a field belonging to him on Plumstead Marshes, where there were some cows and heifers. The fields there situated were divided only by ditches, which were kept in order by commissioners having charge of the marshes. In a neighbouring field, divided from the defendant's only by one of these ditches, another agister of cattle, named Russell, had placed a bull and some cows. This bull was frequently in the habit of wandering across the ditches, and into the neighbouring fields, and the defendant was aware of his keeping occasional company with the cows in his field. The bull's character, however, was exceptional for quietness, and he had never been known by his owner, or anyone who had the management of him, to show vice of any kind against men, horses, or other living creatures. One of the plaintiff's horses, however, was, after being about two months in the defendant's field, discovered to be dead.

In an action brought by the plaintiff for damages, the jury found that the horse had been gored to death by the bull. They also found that the defendant had not, under the circumstances proved, taken reasonable and proper care in agisting the plaintiff's horse, and estimated the plaintiff's damage at £50. The defendant obtained a rule nisi calling upon the plaintiff to show cause why this verdict should not be set aside, and a nonsuit entered instead thereof, pursuant to leave reserved by the learned judge, on the ground that there was no evidence of scienter, and that such evidence was necessary to maintain the action; and why a new trial should not be had between the parties on the ground that the verdict was against the weight of evidence.

Bray showed cause for the plaintiff.
Powell, Q.C., and *Shaw* supported the rule.

BLACKBURN, J.—I think in this case we must discharge the rule upon both grounds. The plaintiff brings a charge against an agister of horses of neglecting to take due and proper care of a horse whose custody the plaintiff entrusted to him, and in consequence the horse was killed. In point of fact the defendant, having charge of this horse, turned it into a marsh with heifers ready for bulling, being well aware that a bull was in the habit of straying from another part of the marsh, which was separated only by a ditch, which the bull could easily cross. The evidence was sufficient that the plaintiff's horse, whilst in the place where the defendant had put it, came by its death by being gored by this bull.

The first question is, was it negligence to put the horse into a field where it was known a bull was in the habit of going to visit heifers? There was evidence that it is dangerous to do so; and that whether mischief ensued or not it is negligent to do so. There was also contrary evidence. One man said he had thirty bulls in the same field with horses and heifers. The jury, however, found it was negligence, and I do not quarrel with the verdict. The point of law which arises has been settled from early times, more on authority than on

reason, that in the case of domesticated animals, such as horses, dogs, bulls, etc. which are not mischievous by nature, the owner is entitled to suppose they will not do mischief until he has express knowledge to the contrary; that is to say, he is not liable unless a scienter be proved. It is otherwise, of course, with respect to animals whose nature is admittedly well known to be injurious to men or other animals; but this doctrine is laid down as early as Henry VIII's time, in DYER'S REPORTS (Vol. 1, 25 b, pl. 122, Edn. 1794), where reference is made to authorities in the BOOK OF EXODUS and the YEAR BOOKS. It is clearly settled, at all events, that to show a man keeps a bull at his peril there must be proof that he had knowledge of the bull's specially mischievous nature. It is not enough to show that bulls sometimes gore other animals. There was no evidence here that this animal was mischievous, and therefore the owner, perhaps, could not be made liable, at all events without trespass.

But does it follow that the defendant could, without negligence, put a horse he was agisting where he knew a bull, however quiet, was in the habit of coming? Was such a proceeding consistent with the reasonable care which the plaintiff, the owner of the horse, had a right to expect of him? It seems to me that the doctrine of scienter does not govern this case at all. There is no authority for extending it to cases of contract, and I am not inclined to import a rule of this very artificial kind into matters not included by authority.

The cases do not throw much light upon the question. *Lee* v. *Riley* (1) is the strongest in favour of the plaintiff, but it appeared there that the defendant was negligent in not keeping up a fence. It may, however, be inferred that the same liability would have occurred if the two horses had been put in the same field. If so, a fortiori, should the defendant here be liable for putting the plaintiff's horse where a bull was known to have access? I think the rule should be discharged.

QUAIN, J.—I am of the same opinion. I agree that the action is founded on negligence. There was a bailment to agist the plaintiff's horse, and the only question for us is whether the defendant took proper and reasonable care of the animal. Counsel for the defendant says he could not be guilty of negligence unless he knew this bull was mischievous; but it is a mere question of fact whether there was negligence or not. Although the authorities are clear that scienter is necessary to establish an owner's responsibility, there are none for importing that doctrine into cases of contract. I think there was ample evidence to justify the verdict in this case.

FIELD, J.—I am of the same opinion. I think the evidence was sufficient, and the only other question is whether the defendant's ignorance of this bull's having gored horses before entitles him to a verdict. This is not a case which involves the doctrine of scienter; it is an action upon a bailment, and the only question is whether the defendant took reasonable and proper care of the plaintiff's horse. The facts were that he took the horse into a field where he knew this bull would probably come, and the result was what he ought to have expected. The jury have found that his proceeding in the matter was not reasonable, and that he ought to have known the risk to which he put the horse, even although the bull was particularly quiet.

Rule discharged.

Solicitors: *May, Sykes & Batten; S. W. Johnson.*

STRONG *v.* BIRD

[ROLLS COURT (Sir George Jessel, M.R.), June 12, 1874]

[Reported L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788]

Executor—Debtor of testatrix appointed executor—Release of debt—Forgiveness of debt in testatrix's lifetime, but no transfer.

Gift—Incomplete gift—Completion by appointment of donee as executor—Debt owing by donee to donor—Forgiveness in donor's lifetime, but no transfer.

The appointment of the donee of an uncompleted gift to be the donor's executor is sufficient to release the debt at law and no other transfer is necessary to complete the gift.

The testatrix, during her lifetime, lent a sum of money to the defendant, her stepson. She resided in his house and paid a quarterly rent and it was agreed that the loan should be repaid by deduction of a certain sum from each quarter's rent. Subsequently, the testatrix informed the defendant that she did not wish for the return of any more of the money and later made a will appointing him her executor.

Held: the appointment of the defendant as executor of the will was sufficient transfer at law to complete the gift.

Notes. Distinguished: *Bottle* v. *Knocker* (1876), 46 L.J.Ch. 159. Applied: *Re Applebee, Leveson* v. *Beales*, [1891] 3 Ch. 422. Distinguished: *Re Hyslop, Hyslop* v. *Chamberlain*, [1894] 3 Ch. 522. Considered: *Re Griffin, Griffin* v. *Griffin*, [1899] 1 Ch. 408. Applied: *Re Stewart, Stewart* v. *McLaughlin*, [1908-10] All E.R. Rep. 133. Considered: *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250; *Re Innes, Innes* v. *Innes*, [1908-10] All E.R. Rep. 270. Applied: *Re Pink, Pink* v. *Pink*, [1911-13] All E.R. Rep. 1037; *Re Goff, Featherstonehaugh* v. *Murphy* (1914), 111 L.T. 34. Considered: *Carter* v. *Hungerford*, [1917] 1 Ch. 260. Applied: *Re Comerbach, Saunderson* v. *Jackson* (1929), 73 Sol. Jo. 403. Explained: *Re Freeland, Jackson* v. *Rodgers*, [1952] Ch. 110. Considered: *Re Wale, Wale* v. *Harris*, [1956] 3 All E.R. 280. Referred to: *Re Flavell, Murray* v. *Flavell* (1883), 25 Ch.D. 89; *Re Stoneham, Stoneham* v. *Stoneham*, [1918-19] All E.R. Rep. 1051; *Re Westerton, Public Trustees* v. *Gray*, [1919] 1 Ch. 104; *Jenkins* v. *Jenkins*, [1928] All E.R. Rep. 546; *Cashin* v. *Cashin*, [1938] 1 All E.R. 536; *Holt* v. *Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1; *Re Nelson, Nelson* v. *Nelson* (1947), 91 Sol. Jo. 533.

As to appointment of debtor as executor, see 16 HALSBURY'S LAWS (3rd Edn.) 128, 129; and for cases see 23 DIGEST (Repl.) 32 et seq. As to completion of incomplete gift, see 18 HALSBURY'S LAWS (3rd Edn.) 399 et seq.; and for cases see 25 DIGEST (Repl.) 585 et seq.

Cases referred to in argument:

Flower v. *Marten* (1837), 2 My. & Cr. 459; 6 L.J.Ch. 167; 1 Jur. 233; 40 E.R. 714, L.C.; 20 Digest (Repl.) 306, *474*.

Taylor v. *Manners* (1865), 1 Ch. App. 48; 35 L.J.Ch. 128; 13 L.T. 388; 11 Jur.N.S. 986; 14 W.R. 154, L.JJ.; 12 Digest (Repl.) 566, *4311*.

Cross v. *Sprigg* (1849), 6 Hare, 552; 18 L.J.Ch. 204; 13 L.T.O.S. 505; 13 Jur. 785; 67 E.R. 1283; on appeal (1850), 2 Mac. & G. 113, L.C.; 20 Digest (Repl.) 257, *58*.

Toker v. *Toker* (1862), 31 Beav. 629; affirmed (1863), 3 De G. J. & Sm. 487; 32 L.J.Ch. 322; 8 L.T. 777; 46 E.R. 724, L.JJ.; 40 Digest (Repl.) 596, *1000*.

Yeomans v. *Williams* (1865), L.R. 1 Eq. 184; 35 Beav. 130; 35 L.J.Ch. 283; 55 E.R. 844; 12 Digest (Repl.) 566, *4310*.

Money v. *Jorden* (1852), 2 De G.M. & G. 318; 21 L.J.Ch. 893; 20 L.T.O.S. 56, C.A.; on appeal sub nom. *Jorden* v. *Money* (1854), 5 H.L.Cas. 185, H.L.; 12 Digest (Repl.) 223, *1656*.

Peace v. *Hains* (1853), 11 Hare, 151; 17 Jur. 1091; 68 E.R. 1226; 12 Digest (Repl.) 566, *4309*.

Ingle v. *Richards* (*No. 1*) (1860), 28 Beav. 361; 3 L.T. 46; 6 Jur.N.S. 1178; 8 W.R. 696; 54 E.R. 405; 40 Digest (Repl.) 221, *1793*.

Styles v. *Guy* (1849), 1 Mac. & G. 422; 14 Jur. 355; 41 E.R. 1328; sub nom. *Stiles* v. *Guy*, 1 H. & Tw. 523; 19 L.J.Ch. 185; 14 L.T.O.S. 305, L.C.; 23 Digest (Repl.) 324, *3924*.

Adjourned Summons arising in a suit instituted by one of the next of kin of the testatrix, to determine whether the defendant was to be charged with a debt of £900 alleged to be due from him to the estate of Frances Bird, deceased.

The testatrix, Frances Bird, died in December, 1870, having made a will containing the appointment of the defendant as executor, but which contained no disposition of her residuary personal estate. Frances Bird was the step-mother of the defendant, and resided at his house for several years before her death. She had an income of £2000, and paid the defendant for her board and lodging the sum of £212 10s. a quarter. In 1866 the defendant borrowed from her the sum of £1100, and it was agreed that this loan should be paid off by her deducting £100 each quarter from the sum of £212 10s. which she had to pay. These deductions were made from the quarterly payments made by the testatrix during the year 1866. About Christmas in that year a conversation took place between the testatrix and the defendant and his wife, in the course of which the testatrix said that she did not want to have any more of the lent money returned. From that time until her death the testatrix made the quarterly payment in full without any deductions. The Chief Clerk found by his certificate that the defendant remained liable for the debt, and the defendant now took out a summons to vary the certificate, which summons now came on to be heard.

Southgate, *Q.C.*, and *G. Miller* for the defendant.
Chitty, *Q.C.*, and *Jolliffe* for the plaintiff.
Mackeson, *Q.C.*, *Mander* and *A. Thomson* for other next of kin.

SIR GEORGE JESSEL, M.R.—The defendant borrowed the sum of £1,100 in three sums from the testatrix who was in the position of his mother. The loan was to be repaid by instalments of £100. At that time the lady was residing in her son's house and he maintained her. The arrangement was that she was to deduct the instalments of £100 from whatever she had to pay for her board and lodging. For the last four years the testatrix Mrs. Bird made her quarterly payments for board and lodging in full, without deducting the instalments of £100, and whether Mrs. Bird actually gave the amount of the debt in law or not, I think that at all events she intended to give it in law. The question is: Did the law allow her to give it as she did?

The mere saying "I forgive him the debt" is not enough. What the law requires is that there should be a transfer of the property at law, and until there is such a transfer the gift is not perfect. In the present case the testatrix appointed the defendant Bird as her executor, and the effect of such appointment is to release the debt at law. Therefore, it was not necessary that there should be any other transfer so as to complete the gift. Suppose a person was to write across the title deeds: "I have given Blackacre to A." and afterwards he was to convey Blackacre to A. without any consideration, would there be any resulting trust? It has been said that the defendant would be liable in this case, unless he can show some equitable defence. I am of opinion that he has done that.

There is a good defence to this claim on another ground. The testatrix lived with the defendant for years after she had a legal right to retain £100 a quarter. Therefore, at the end of the quarter she only owed him £112 10s., but after three quarters we find she in fact paid £212 10s. per quarter, that is, she paid him the instalments, due from him to her, which I believe she intended to give him. On both grounds I think he is entitled to be relieved from the debt. All parties must have their costs.

Solicitors: *Mason & Withall; Chapple & Welch; Farrar; C. Mander.*

ELLIS *v.* LOFTUS IRON CO.

[Common Pleas Division (Lord Coleridge, C.J., Keating, Brett and Denman, JJ.), November 19, 1874]

[Reported L.R. 10 C.P. 10; 44 L.J.C.P. 24; 31 L.T. 483; 39 J.P. 88; 23 W.R. 246]

Animal—Horse—Injury caused by stallion kicking and biting mare in adjacent field—Liability of owner of stallion.

While the plaintiff's mare and the defendants' stallion were in adjacent fields separated by a wire fence, the stallion kicked and bit the mare through the fence, causing injury. The plaintiff had warned the defendants to keep their stallion away from his mare, but on the occasion in question the stallion was turned out in the defendants' field with no supervision. In an action for damages for injury to the mare,

Held: there was evidence of a trespass on the plaintiff's land by the defendants' stallion; the damage caused was not too remote; and, therefore, the defendants were liable.

Notes. Distinguished: *Hadwell* v. *Righton*, [1907] 2 K.B. 345. Considered: *Bradley* v. *Wallaces, Ltd., and Thompson McKay & Co.*, [1913] 3 K.B. 629; *Manton* v. *Brocklebank*, [1923] All E.R. Rep. 416; *Gayler and Pope* v. *Davies*, [1924] All E.R. Rep. 94. Applied: *Wormald* v. *Cole*, [1954] 1 All E.R. 683. Referred to: *Wiseman* v. *Booker* (1878), 3 C.P.D. 184; *Wright* v. *Hetton Downs Co-operative Society* (1883), Cab. & El. 200; *Ponting* v. *Noakes*, [1891-4] All E.R. Rep. 404; *Theyer* v. *Purnell*, [1918] 2 K.B. 333; *Aldham* v. *United Dairies (London), Ltd.*, [1939] 3 All E.R. 478; *Read* v. *Lyons & Co.*, [1946] 2 All E.R. 471.

As to trespass by animals, see 1 Halsbury's Laws (3rd Edn.) 668 et seq.; and for cases see 2 Digest (Repl.) 309 et seq.

Cases referred to:

(1) *Vicars* v. *Wilcocks* (1806), 8 East, 1; 103 E.R. 244; 17 Digest (Repl.) 114, *270.*

(2) *Lee* v. *Riley* (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 11 Jur.N.S. 527; 13 W.R. 751; 144 E.R. 629; 2 Digest (Repl.) 312, *155.*

(3) *Star* v. *Rookesby* (1711), 1 Salk. 335; 91 E.R. 295; 2 Digest (Repl.) 311, *154.*

Also referred to in argument:

Jackson v. *Smithson* (1846), 15 M. & W. 563; 4 Dow. & L. 45; 15 L.J.Ex. 311; 7 L.T.O.S. 231; 153 E.R. 973; 2 Digest (Repl.) 333, *239.*

Hudson v. *Roberts* (1851), 6 Exch. 697; 20 L.J.Ex. 299; 17 L.T.O.S. 158; 155 E.R. 724; 2 Digest (Repl.) 334, *242.*

Cox v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 23 L.J.C.P. 89; 9 Jur.N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest (Repl.) 334, *240.*

Read v. *Edwards* (1864), 17 C.B.N.S. 245; 5 New Rep. 48; 34 L.J.C.P. 31; 11 L.T. 311; 144 E.R. 99; 2 Digest (Repl.) 377, *532.*

Jenkins v. *Turner* (1696), 1 Ld. Raym. 109; 2 Salk. 662; 91 E.R. 969; 2 Digest (Repl.) 334, *241.*

Blackman v. *Simmons* (1827), 3 C. & P. 138; 2 Digest (Repl.) 332, *230.*

Sneesby v. *Lancashire and Yorkshire Rail. Co.* (1874), L.R. 9 Q.B. 263; 43 L.J.Q.B. 69; 30 L.T. 492; affirmed (1875), 1 Q.B.D. 42; 45 L.J.Q.B. 1; 33 L.T. 372; 40 J.P. 36; 24 W.R. 99, C.A.; 2 Digest (Repl.) 304, *112.*

Case Stated by the judge of Pontypridd County Court for the opinion of the Court of Common Pleas in an action brought to recover damages for injuries to the plaintiff's mare caused by trespass of the defendants' stallion on his land.

The plaintiff was the occupier of a farm, and by arrangement between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the erection of certain works, and a plot was fenced in by the defendants by means of a wire fencing. The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle to the knowledge of the defendants. The defendants had a stallion, used by them as a draught cart horse, and in August this stallion was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. His mare grazed in the remaining portion of the field adjoining that portion occupied by defendants. The defendants' stallion had been turned out on former occasions into the same plot, and had always been watched, the plaintiff having warned the defendants to keep their stallion away from his mares. The stallion and one of the plaintiff's mares got close together on either side of the wire fence, and the stallion, by biting and kicking the mare through the fence, committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' stallion did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the stallion was of a vicious temper, or had bitten or kicked any animal before; on the contrary, it was stated that it had "as quiet a temper as you could ever wish a horse." The judge was of opinion that there was no trespass, and that the damages were too remote, and held that there was no case for the jury. The question for the opinion of the Court of Common Pleas was whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid, the horse being a stallion. If the judge was in error, the damages were to be entered for £15.

Field, Q.C. (*B. Francis Williams* with him), for the plaintiff.

Grantham, for the defendants.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the county court judge ought to be reversed, and that our judgment must be for the plaintiff.

There were two questions argued before us: First, was there evidence of a trespass? and, secondly, were the damages too remote? As to the first point, I speak with unfeigned diffidence, but I must say that I have never been able to bring my mind into an attitude of doubt upon it. It has been decided over and over again that a trespass cannot be measured; whether it be an inch or an ell, it is a trespass all the same. Similarly it has been decided over and over again that it is a man's duty to keep his cattle in, and that if his cattle get upon another man's land, the owner is liable to that other in trespass, independent of negligence, great or small. The law is that the man himself is liable in trespass if he go upon that which is his neighbour's; and that law equally applies to the case of cattle. In the present case it is found as a fact that there was a wire fence between the land of the plaintiff and the land of the defendants, and that the horse of the defendants kicked and bit the mare of the plaintiff through that

fence—which could not have happened unless some portion of the horse of the defendants had been protruding over the land of the plaintiff. There was, therefore, evidence of a trespass.

As to the second point, the damage was remote, no doubt, but it was not too remote in law. It was a natural consequence of the trespass, within the rule laid down in *Vicars* v. *Wilcocks* (1). I have said enough to dispose of the case, but I will add, that I do not think the merits of it are opposed to the law. The county court judge finds that for the convenience of the defendants the plaintiff had railed off part of his land. The plaintiff being in the habit of turning mares into his field, had given the defendants ample warning, and until the accident happened, the horse had been watched in compliance with this warning. The neglect to keep up the watching may have been a small one, and the consequences unforeseen, but it often happens that a heavy damage results from a trivial neglect.

It is not necessary to discuss the cases, but I may say that *Lee* v. *Riley* (2) is very strongly in point, and the law is well stated in *Star* v. *Rookesby* (3). The facts are stated so as to make the application of the law to them quite plain, so that our judgment must be for the plaintiff for the amount of £15, being the damages assessed.

KEATING, J.—I am of the same opinion. The county court judge appears to have held that there was no evidence of an actionable wrong by the defendants. I think that there was abundant evidence of a trespass rendering the defendants liable. I take the facts stated in the Case to signify that the head and leg of the stallion protruded over the land of the plaintiff; and this amounts to a trespass in law. But if negligence were necessary, there is ample evidence of negligence; it is quite clear that the defendants erected a fence which they were bound to erect, and that there was no negligence on the part of plaintiff: that the defendants turned the horse into the field for their own convenience, and though they were afterwards remonstrated with, neglected in the end to take proper precautions. I think that there was a case for the jury, and if I had been a juryman, I should have found for the plaintiff.

BRETT, J.—I at one time doubted whether a trespass could be committed by the owner of cattle straying entirely without any negligence on his part, although I never doubted that the ingredient of negligence would constitute a trespass. But inasmuch as a man himself going on the land of another without any evil intent, commits a trespass, therefore so also if a man's cattle stray upon another's land, the owner of the cattle commits a trespass, and that, too, however much care he may have personally taken to prevent the trespass being committed. In fact, I go the whole length, and say, that in whatever case the cattle of one man are found upon the land of another, in that case the owner of the straying cattle is liable in trespass.

This is the result of the authorities. Thus in COMYNS' DIGEST tit. "Trespass, C.," it is said that trespass lies "if a man's cattle escape into the land of another against his will." In CHITTY ON PLEADING (7th Ed.), vol. 1, p. 93, it is said that,

> "With respect to animals, mansuetæ naturæ, as their propensity to rove is notorious, the owner is bound at all events to confine them on his own land; and if they escape and commit a trespass on the land of another, unless through the defect of fences which the latter ought to repair, the owner is liable to an action of trespass."

And in STEPHEN'S COMMENTARIES (7th Edn.), vol. 3, p. 400, it is said that,

> "A man is answerable not only for his own trespass, but for that of his cattle also; for if by his negligent keeping they stray upon the land of another, this is a trespass for which the owner must answer in damages."

If it had been necessary that there should be evidence of negligence, I think there is here, I will not say abundant, but at any rate some evidence of negligence. The case of the plaintiff, therefore, might be supported on that ground, but that is not the ground of my judgment, which is, that there was evidence of a trespass.

DENMAN, J.—I agree with my brother BRETT, that it is by no means certain that the evidence of negligence was sufficient in this case, and if the case had turned upon negligence, I should have thought it not satisfactory to decide for the plaintiff on that ground.

As to the trespass, it struck me at first as far too large a proposition to say that where a man's animal strays ever so little over another man's land, the owner was liable in trespass; this appeared to me to be not only hard, but bad law. But after hearing the case discussed, after referring to *Lee* v. *Riley* (2), and taking into consideration the maxim, cujus est solum ejus est usque ad cœlum, I have come to think otherwise. My brother BRETT has cited great authorities on the point, and though it may seem hard to lay down that where a fence is agreed upon between two neighbouring owners, a quarrel between their animals will make one of them liable in trespass, I think there is no answer to those authorities. On the question of remoteness of damage, *Lee* v. *Riley* (2) is conclusive.

Appeal allowed.

Solicitors: *Ridsdale, Cradock & Ridsdale*, for *Grover & Grover*, Cardiff: *Renshaw & Rolph.*

R. *v.* RYMER

[COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED (Kelly, C.B., Denman, Field and Manisty, JJ., and Huddleston, B.), January 30, 1877]

[Reported 2 Q.B.D. 136; 46 L.J.M.C. 108; 35 L.T. 774; 41 J.P. 199; 25 W.R. 415; 13 Cox, C.C. 378]

Inn—Refreshment bar with separate entrance from hotel.

Inn—Innkeeper—Duty to provide refreshment to traveller—"Traveller"—Resident in neighbourhood.

Inn—Innkeeper—Duty to provide refreshment—Customer with savage dog—Right of innkeeper to refuse refreshment.

A refreshment bar attached to and under the same roof as an hotel, having a separate entrance from that of the hotel, the hotel being used for the accommodation of sojourners, and the refreshment bar for the refreshment of persons casually passing, is not a common law inn, and the proprietor is not liable to the common law regulations of an innkeeper.

If a customer enters upon an innkeeper's premises with a savage or large dog, which in the nature of things is calculated to frighten timid persons or children, the innkeeper has a right to protect himself and his customers against it and may refuse to serve the customer while accompanied by the dog.

A person living in the same town, 1200 yards from an inn, and walking about the town for his own recreation and amusement, is not a traveller so as to have a right at common law to be provided with refreshment and entertainment by the innkeeper.

Notes. Not Followed: *Williams* v. *Linnitt*, [1951] 1 All E.R. 278. Referred to: *Strauss* v. *County Hotel Co.* (1883), 12 Q.B.D. 27; *Lamond* v. *Richard*, [1897] 1 Q.B. 541; *Orchard* v. *Bush*, [1898] 2 Q.B. 284; *Sealey* v. *Tandy*, [1902] 1 K.B. 296; *Tinsley* v. *Dudley*, [1951] 1 All E.R. 252.

As to liabilities of innkeepers, see 21 HALSBURY'S LAWS (3rd Edn.) 441 et seq.; and for cases see 29 DIGEST (Repl.) 6 et seq.

Cases referred to:

(1) *R.* v. *Luellin* (1701), 12 Mod. Rep. 445; 88 E.R. 1441; 29 Digest (Repl.) 9, *110*.

(2) *Burgess* v. *Clements* (1815), 1 Stark. 249, n.; 4 M. & S. 306; 105 E.R. 848; 29 Digest (Repl.) 17, *197*.

Case Reserved for the opinion of Court for the Consideration of Crown Cases Reserved by the vice-chairman of quarter sessions for the western division of the county of Sussex.

The defendant was tried at the Michaelmas Sessions for the western division of the county of Sussex, for that he, being a licensed innkeeper, refused to supply the prosecutor with refreshments. There were several counts in the indictment varying the charge, some describing the prosecutor as a traveller, and others not; but otherwise nothing turned upon the form of the indictment. The defendant was the proprietor of the Sea House Hotel, at Worthing, attached to which, and under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about ten feet wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one being divided from the other by the counter in question, the attendants having access from the hotel, and serving from behind the counter. The prosecutor, who was a householder, lived in the same town within 1200 yards of the hotel and had been in the habit of coming to the premises of the defendant accompanied by two dogs. One of the two was a savage dog, and generally wore a muzzle. They were very large, of the St. Bernard mastiff breed. On Mar. 3, after a recent visit from the prosecutor, the defendant wrote to him as follows:

"Royal Sea House Hotel,
Mar. 3, 1876.

W. Cramer, Esq.

Dear Sir,—I regret to have to request you will be so good as not to bring your dog or dogs into the 'Carlton.' The slop and mess this evening has been much complained of, and the dogs are as objectionable in the 'Carlton' as in the hotel.—I am, yours truly,

JAMES RYMER."

And on Mar. 4, the prosecutor wrote in reply to the defendant as follows:

"Worthing, Mar. 4, 1876.

Dear Sir,—In reply to your note of yesterday I will so far comply with your request as not to bring my dogs into the refreshment bar, or as you facetiously call it, the 'Carlton,' when they are wet or dirty, but otherwise I must be allowed to follow my inclinations as heretofore. The consequence of refusing a person refreshment without reasonable cause I need not point out to you, believing you superior to the general run of publicans; but I may add that hostelries as well as public houses are placed under special laws, some of which tend to protect the public against the petty tyrannical, whimsical mad freaks or acts of individual landlords.—Yours respectfully,

W. CRAMER.

Mr. James Rymer."

On Mar. 6 the prosecutor went into the refreshment bar, leading the quiet dog by a chain, and demanded refreshment, asking for a glass of whisky, but

was refused by the person attending the bar, by order of the defendant; the same occurred on Mar. 7 and 8, when he again went to the refreshment bar leading the same dog in leash, and taking it into the passage above described, and demanded refreshment, tendering the money in payment, but was again refused by order of the defendant. On each occasion the bar was open, the hour was proper, and the order in itself reasonable. It was proved by other hotel keepers that complaints had been made of the prosecutor's dogs by their customers, and some of them had gone elsewhere in consequence, and that the prosecutor had been remonstrated with and himself admitted to one of the witnesses that "no doubt his dogs were a nuisance to the hotel keepers." It was also proved that other tradesmen in the town had complained of the dogs, and also that the dog in question had upon one occasion vomited on the door mat of a tradesman's shop in the town. It was not proved that the prosecutor was a traveller in any sense, otherwise than that he was walking about the town with his dog for his own recreation and amusement.

It was contended on the part of the prosecutor that by so refusing to provide him with refreshments the defendant committed an indictable offence. On the other hand, it was urged on the part of the defendant, first, that the prosecutor was a local resident and not a traveller, and, therefore, there was no obligation on the part of the defendant to serve him; and, secondly, that at all events the defendant was justified under the foregoing circumstances in refusing to do so. At the trial the vice-chairman of quarter sessions declined to stop the case, which ultimately went to the jury. He told them that prima facie the defendant was bound by law to supply the prosecutor, as one of the public, with refreshment upon his reasonable demand; that he could not select his customers or reject any from caprice or dislike, but that if the prosecutor insisted (as he did) upon being accompanied by his dog, which from its size, breed, nature or habits, was obnoxious to his customers and a nuisance in his business, he was justified (particularly after notice) in refusing to admit or serve the prosecutor. The jury found the defendant guilty, saying that they considered the defendant was bound to serve the prosecutor, though accompanied by a dog, even a savage one, but they found as a fact that the dog in question was not savage. The defendant was bound over in his own recognisance in £50 to appear to receive judgment when called upon.

No counsel appeared.

KELLY, C.B.—We regret that the case has not been argued by counsel, as the points raised are of very great public and general importance. However, they present no difficulty and no member of the court entertains any reasonable doubt upon any one of them. This was an indictment against the defendant alleging that he was an innkeeper and under a legal obligation to receive travellers and supply them with refreshments for their accommodation, and that he refused to receive the prosecutor into his house and provide him with refreshments, without any lawful and reasonable excuse.

The case presents three questions for our consideration: First, was the defendant's house, or that portion of the house into which the prosecutor desired to enter, an inn within the meaning of the old common law, which obliges an innkeeper to receive travellers and wayfarers, and provide them with food, sustenance and accommodation; secondly, was the prosecutor a traveller on the occasion in question; and, thirdly, assuming this part of the house to have been an inn, and the prosecutor a traveller or wayfarer on the occasion, was there any lawful and reasonable excuse for the defendant's refusing to receive him and supply him with the refreshment he asked for?

As to the first question, was this part of the house an inn within the meaning of the common law? The Case states "that the defendant was the proprietor of the Sea House Hotel at Worthing," and, if the statement had stopped there,

there could have been no doubt on this point; but it proceeds: A

"attached to which, and under the same roof and licence, and open to the street by a separate door, was a refreshment bar called the Carlton, along which ran a counter with an open space in front of about 10 ft. wide. The hotel was used for the accommodation of visitors desirous of sojourning there, and the bar for the refreshment of those casually passing by, the one B being divided from the other by the counter in question, the attendants having access from the hotel, and serving behind the counter."

[His Lordship also here read the letters set out in the Case in order to show that it was not the house or hotel to which the Case related, but a mere shop or bar in which spirits were sold.] Upon these facts, I am of opinion that a shop C or refreshment bar of the description like this one is not an inn within the meaning of the common law. An inn at common law is defined to be a place for the accommodation of travellers and wayfarers. A tavern or shop, or bar, where only liquors are sold by retail is not within the legal meaning of the word "inn," and the proprietor is not bound to comply with all the obligations of an innkeeper at common law. On this ground alone, viz., that the defendant D is not an innkeeper within the definition of the term innkeeper at common law, it would be enough for the purposes of the case to say that the conviction could not be sustained.

The second question is, Whether the prosecutor was a traveller or wayfarer on the occasion in question? The Case states that the prosecutor lived in the same town, within 1200 yards of the defendant, and had been in the E habit of coming to the premises of the defendant accompanied by two dogs. On Mar. 3 he went into the refreshment bar leading the quiet dog by a chain, and demanded refreshment, asking for a glass of whisky, but was refused by order of the defendant. The same thing occurred on Mar. 7 and 8. It thus appears that the prosecutor lived on the spot, no matter whether a quarter or a half mile off. Can anyone suppose for a moment that under the circumstances F the prosecutor was a traveller? He clearly was not a traveller or wayfarer, but a mere resident in the town taking a walk and calling at this bar for a glass of whisky. It is scarcely necessary to say that it is essential that the indictment should allege that the prosecutor was a traveller, but there is *R.* v. *Luellin* (1), where an indictment against an innkeeper for not receiving a guest was quashed for not alleging that he was a traveller. G

The third question is one which might be attended with some difficulty in certain cases, but upon the facts stated here there is none. Assuming for the purpose of this question that this refreshment bar was an inn and the prosecutor a traveller or wayfarer, was the refusal to serve the prosecutor made on a lawful and reasonable ground? It appears that the prosecutor had been in the H habit of going to the defendant's bar accompanied by two dogs, and had had three. One of the two was a savage dog, and generally wore a muzzle; the other dog was a quiet one; and they were very large dogs of the St. Bernard mastiff breed. On Mar. 3, after a recent visit from the prosecutor, the defendant wrote the letter set out, and on the 4th the prosecutor wrote the letter in reply, also set out in the Case; and then on Mar. 6 the prosecutor went I to the bar accompanied by a large dog of the St. Bernard breed, and though the jury have found that it was not a savage dog, still it was a very large dog. I do not wish to lay down any general rule upon this point, for there may be a case in which an innkeeper would be bound to supply a traveller or wayfarer with refreshment though he might be accompanied by a dog; but the innkeeper would have a right to say that he would put him in a safe place. I will reserve my opinion as to that till such a case arises. In this case, however, I think the defendant was not bound to admit the prosecutor as a guest. The innkeeper has a right to say that "the men, women, and children who are

likewise to be accommodated, and are within this house, are likely to be disturbed and alarmed by a large dog, and I do not think that I ought to subject my guests to such an annoyance." Taking all the facts stated in the Case together, I am of opinion that this was not such a dog as entitled the owner to require that the dog should be admitted into the inn as well as himself. I am, therefore, of opinion that the conviction should be quashed.

DENMAN, J.—I also think that the conviction should be quashed. It is desirable to call attention to the definition of an inn, laid down in 4 STEPHEN'S COMMENTARIES (7th Edn.) 271:

> "We may remark here an inn, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeeper fined if a traveller be refused entertainment by him without a very sufficient cause; for thus to frustrate the end of its institution is held to be disorderly behaviour, and therefore punishable as an offence, besides exposing the landlord to be sued for damages."

Three things are required to support the indictment by the common law: First, that the defendant be an innkeeper; secondly, that he refuse entertainment to a traveller; thirdly, that he have no sufficient cause for such refusal. This is an indictable offence, and must be clearly made out, and there must be evidence on which it can be reasonably found that the defendant comes within the three propositions to be established. Do these elements exist in this case?

First, whether this was an inn; it is clear to me upon the evidence that although the defendant was keeping an inn immediately adjoining the refreshment bar, still, in reference to the refreshment bar, he was not acting as an innkeeper. I think that the refreshment bar was in the nature of a shop and not an inn within the meaning of the innkeeper's liability, as to which the law requires that people when travelling should not be kept out at a time when they require food, lodging, and entertainment by a capricious choice of customers on the part of the innkeeper. There must be a liability to do the act qua innkeeper. On that ground I think the conviction ought to be quashed.

The second point is correlative to the first point, and flows from the law applicable to that. The prosecutor was not a traveller coming to an inn to obtain hospitality there. He simply came and asked for a glass of spirits at a place where there was no such accommodation as an inn affords. In *Burgess* v. *Clements* (2)—an action against an innkeeper for the loss of goods—LORD ELLENBOROUGH, C.J., says (4 M. & S. at p. 310):

> "Now the law obliges an innkeeper to keep the goods of persons coming to his inn, causa hospitandi, safely; so that, in the language of the writ, pro defectu hospitatoris damnum non eveniat ullo modo";

and in the course of his judgment he says: "Now let us consider whether the plaintiff came to this inn causa hospitandi." The facts there were that a traveller took goods to an inn, and had a private room to show his goods to customers, and one of his boxes was lost out of that room. LORD ELLENBOROUGH said:

> "An innkeeper is not bound by law to find show rooms for his guests, but only convenient lodging rooms and lodging. . . . The innkeeper not being bound to find any more than lodging and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room for the purpose of exposing in it his wares to view, and of introducing a number of persons over whom the innkeeper can have no check or control, and this, as it seems to me, for a purpose wholly alien from the ordinary purpose of an inn, which is ad hospitandos homines. I, therefore, think that the prosecutor in this case was not a traveller coming to an inn, causa hospitandi, but a mere customer."

Besides, the Case states that it was not proved that the prosecutor was a traveller in any sense otherwise than that he was walking about the town with his dog for his own recreation and amusement.

As to the third point. The finding of the jury that the defendant was bound to serve the prosecutor though accompanied by any dog, even a savage one, is a most unreasonable statement of the law, with which the jury had nothing to do. If a customer enters with a savage dog a landlord must have a right to protect himself and his customers against it. The jury, however, have found that this was not a savage dog, yet it was a large dog calculated to frighten small people, and we cannot leave out of sight what occurred on a former occasion with respect to this dog and its weakness on that occasion. I think, therefore, there was a sufficient legal excuse for refusing to serve the prosecutor.

FIELD, J., and **HUDDLESTON, B.**, concurred.

MANISTY, J.—I am of the same opinion. I only wish to guard against being supposed to admit that a traveller coming to an inn has a right to take his dog with him into a room occupied by several customers. If one may do it all may do it, and as at present advised I think a landlord is justified in refusing to admit a traveller bringing his dog into a room so occupied.

Conviction quashed.

[*Reported by* J. Thompson, Esq., *Barrister-at-Law.*]

IN THE GOODS OF WOTTON

[Court of Probate (Sir James Hannen), February 3, 10, 1874]

[Reported L.R. 3 P. & D. 159; 43 L.J.P. & M. 14; 30 L.T. 75; 38 J.P. 328; 22 W.R. 352]

Will—Execution—Signature—Position—Signatures on first side of will form—Disposing part of will on second and third sides—Signature of will after being written—Wills Act Amendment Act, 1852 (15 *&* 16 *Vict.*, *c.* 24), *s.* 1.

The testatrix wrote her will on a lithographed will form with four sides. On the first side, as well as the appointment of executors, were an attestation clause and the signatures of the testatrix and attesting witnesses. The disposing part of the will began on the second side and was continued on the third. The fourth side was left blank. An affidavit was made by one of the attesting witnesses to the effect that the whole of the will was written before it was signed by the testatrix and the witnesses.

Held: the will was duly executed and probate could be granted.

Notes. Explained: *Royle* v. *Harris*, [1895] P. 163. Applied: *In the Goods of Gilbert*, [1895-9] All E.R. Rep. 370. Distinguished: *Re Stalman*, *Stalman* v. *Jones*, [1931] All E.R. Rep. 193. Applied: *In the Goods of M. M. Smith*, [1931] P. 225. Considered: *In the Estate of Long*, [1936] 1 All E.R. 435.

As to requisite of signature for formal validity of a will, see 39 Halsbury's Laws (3rd Edn.) 875 et seq.; and for cases see 44 Digest 249 et seq. For The Wills Act Amendment Act, 1852, s. 1, see 26 Halsbury's Statutes (2nd Edn.) 1354.

Case referred to in argument:

Hunt v. *Hunt* (1866), L.R. 1 P. & D. 209; 35 L.J.P. & M. 135; 30 J.P. 679; sub nom. *In the Goods of Bell*, *Hunt* v. *Hunt*, 14 L.T. 859; 44 Digest 255, *816.*

Motion for probate of a will signed by the testatrix and attesting witnesses at the foot of the first page, the disposing part being on succeeding pages.

Elizabeth Wotton, late an inmate of the Friendly Female Asylum, Gloucester Place, Albany Road, Camberwell, deceased, died, leaving a will dated Dec. 26, 1866. It was written on the four sides of a lithographed form of will, where property is left to one or more persons. The disposing part of the will began on the second side, thus: "This is the last will and testament of me, Elizabeth Wotton. After the payment of all my just debts and testamentary expenses, I bequeath," etc. This was continued on the third page. On the fourth there was the endorsement, "Form of will where property is disposed of to one or more persons"; and on the first page there was the lithographed form, "I direct the payment of all my just debts and funeral expenses," etc.; then the appointment of executors, the attestation clause, and the signature of the testatrix and the attesting witnesses.

One of the attesting witnesses made an affidavit to the effect that the will was all written before it was signed by the testatrix and the attesting witnesses.

Inderwick now moved for probate.

Cur. adv. vult.

Feb. 10, 1874. **SIR JAMES HANNEN.**—In this case the testatrix made a will on a lithographed form, the lithographed form beginning on the first page of a sheet of foolscap, and the attestation clause appearing at the end of that first side. The will, however, is entirely contained in what, under ordinary circumstances, would be the second and third sides or pages of the foolscap form. It begins on the second side: "This is the last will and testament," etc. Then it is continued nearly to the end of the third side, and the fourth side is left in blank, having only on it the lithographed endorsement of a form of will where property is given to one or more persons. Then the attestation clause and the appointment of executors is inserted in the proper place in the lithographed form on the first page, and the will is duly attested by the signature of the testatrix at the bottom of the form, and duly attested by the signatures of the attesting witnesses. The question is whether or not this document is entitled to probate, as having been properly executed within the language of the Wills Act.

Nothing can be more general than the language used in that statute with a view to prevent the frequent miscarriage of justice which had occurred before it was passed. I will just call attention to the language of the Wills Act Amendment Act, 1852, s. 1, in order to see whether it is applicable:

> "No such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature."

And then follows these words, which may be called descriptive of the spirit of the Act:

"And the enumeration of the above circumstances shall not restrict the generality of the above enactment."

In this case, of course, if the will were to be treated as following the attestation clause, then it would be void. But because the substance of the will happens to be on the second and third sides of a sheet of foolscap, and the attestation clause on what is commonly called the first, am I bound to hold that the disposing parts of the will follow the attestation clause, and are therefore void? I am of opinion that I am not so bound to hold, because from the affidavit of the attesting witness it appears that the whole of this will was written in its present condition before the testatrix executed it, and before the attesting witnesses signed. That being so, the true way of looking at the will is to regard it as beginning on the second side of the sheet of foolscap, as being continued on the third, making those in fact the first and second sheets of the will, and that the last appears to be the first—in fact, reversing the order of the pages on which the will was written. The fourth page then becomes nothing but a blank between the body of the will and the attestation clause, which might have been filled up but was not. I, therefore, hold that the will was duly executed, and decree probate accordingly.

Solicitor: *J. Goldsmith.*

BETTINI *v.* GYE

[Queen's Bench Division (Blackburn, Quain and Archibald, JJ.), December 15, 1875, January 25, 1876]

[Reported 1 Q.B.D. 183; 45 L.J.Q.B. 209; 34 L.T. 246; 40 J.P. 453; 24 W.R. 551]

Contract—Condition—Condition precedent or independent agreement—Construction of condition in light of contract as a whole—Engagement of singer—Failure to attend for rehearsals on stipulated date.

The plaintiff agreed with the defendant, an operatic director, to sing for the defendant during the London season, the engagement of the plaintiff to begin on Mar. 30, 1875, and to end on July 13, 1875. The plaintiff also agreed to be in London without fail at least six days before the commencement of the engagement for the purpose of rehearsals, and not to sing anywhere out of the defendant's theatre without the leave of the defendant except at a distance of more than fifty miles from London and out of the season of the theatre. The plaintiff failing through illness to arrive in London until Mar. 28, the defendant refused to employ him.

Held: the question whether a clause in a contract was a condition precedent or an independent agreement depended on the true construction of the contract taken as a whole; in the present case, in the absence of an express declaration that the agreement would be terminated if the plaintiff failed to appear at the stipulated time, the stipulation was not intended to be a condition precedent and did not go to the root of the contract; and, therefore, the defendant was not justified in his refusal to employ the plaintiff.

Notes. Considered: *London Guarantee Co.* v. *Fearnley* (1880), 5 App. Cas. 911. Applied: *Hosking* v. *Pahang Corpn. (No. 1)* (1891), 36 Sol. Jo. 107. Considered: *Kidston* v. *Monceau Ironworks Co.* (1902), 86 L.T. 556; *Leiston Gas Co.* v. *Leiston-cum-Sizewell U.D.C.*, [1916-17] All E.R. Rep. 329; *Metropolitan Water Board* v.

Dick, Kerr & Co., [1917] 2 K.B. 1; *Huntoon Co.* v. *Kolynos (Inc.)*, [1930] 1 Ch. 528. Referred to: *Poussard* v. *Spiers and Pond* (1876), 24 W.R. 819; *Guy-Pell* v. *Foster*, [1930] All E.R. Rep. 790; *Kidner* v. *Stimpson* (1918), 34 T.L.R. 434; *Dawsons, Ltd.* v. *Bonnin*, [1922] All E.R. Rep. 88.

As to conditions and conditional promises in contract, see 8 HALSBURY'S LAWS (3rd Edn.) 194 et seq.; and for cases see 12 DIGEST (Repl.) 481 et seq.

Case referred to:

(1) *Graves* v. *Legg* (1854), 9 Exch. 709; 23 L.J.Ex. 228; 23 L.T.O.S. 254; 2 C.L.R. 1266; 156 E.R. 304; 12 Digest (Repl.) 473, *3531.*

Also referred to in argument:

Atkinson v. *Bell* (1828), 8 B. & C. 277; Dan. & Ll. 93; 2 Man. & Ry. K.B. 292; 6 L.J.O.S.K.B. 258; 108 E.R. 1046; 39 Digest 497, *1146.*

Graves v. *Legg* (1857), 2 H. & N. 210; 26 L.J.Ex. 316; 5 W.R. 597; 157 E.R. 88; sub nom. *Greaves* v. *Legg*, 29 L.T.O.S. 145; 3 Jur.N.S. 519, Ex. Ch.; 39 Digest 460, *869.*

Bradford v. *Williams* (1872), L.R. 7 Exch. 259; 41 L.J.Ex. 164; 26 L.T. 641; 20 W.R. 782; 1 Asp.M.L.C. 313; 12 Digest (Repl.) 383, *2995.*

Tilley v. *Thomas* (1867), 3 Ch. App. 61; 17 L.T. 422; 32 J.P. 180; 16 W.R. 166, L.JJ.; 12 Digest (Repl.) 347, *2685.*

MacAndrew v. *Chapple* (1866), L.R. 1 C.P. 643; Har. & Ruth. 745; 35 L.J.C.P. 281; 14 L.T. 556; 12 Jur.N.S. 567; 14 W.R. 891; 2 Mar.L.C. 339; 41 Digest 487, *3183.*

Jackson v. *United Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 12 Digest (Repl.) 438, *3339.*

Action for breach of an agreement, whereby Mr. Gye, director of the Royal Italian Opera in London, engaged Mr. Bettini to fill the part of primo tenor assoluto in the theatres, halls, and drawing rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr. Gye. This engagement was to begin on Mar. 30, 1875, and terminate on July 13, 1875.

It was a term of the agreement that Mr. Bettini should conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, etc., and he agreed "to be in London without fail at least six days before the commencement of this engagement for the purpose of rehearsals."

The plaintiff failed to arrive in London until two days before the commencement of his engagement. He averred that he was prevented by temporary illness from being in London on the specified date. The defendant refused to employ the plaintiff by reason of his failure to comply with the stipulation in the contract, and sought to put an end to the agreement.

He pleaded that the plaintiff was not in London six days before the commencement of the engagement for the purpose of rehearsals, nor had he been given notice before the said six days that the plaintiff would not be in London six days before the commencement of the engagement for the purpose of rehearsals. The plaintiff was not ready and willing to attend such rehearsals although it was necessary for him to do so, wherefore he had refused to employ the plaintiff.

Demurrer to the plea, and joinder in demurrer.

Murphy, Q.C., and *Lumley Smith* for the plaintiff.

Arthur Wilson (with him *Percy Gye*) for the defendant.

Cur. adv. vult.

Jan. 25, 1876. **BLACKBURN, J.,** read the following judgment of the court.—In this case the parties have entered into an agreement in writing, which is set out on the record. The court must ascertain the intention of the parties as is

said by PARKE, B., in delivering the judgment of the court in *Graves* v. *Legg* (1) (9 Exch. at p. 716), A

> "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed."

He adds: B

> "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract."

There was no averment of any special circumstances existing in this case with reference to which the agreement was made, but the court must look to the general nature of such an engagement. By para. 7 of the agreement, C

> "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals."

The engagement was to begin on Mar. 30, 1875. It is admitted on the record that the plaintiff did not arrive in London till Mar. 28, which is less than six days before the 30th, and, therefore, it is clear that he has not fulfilled this part of his contract. The question raised by the demurrer is not whether he has any excuse for failing to fulfil this part of his contract which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his (the defendant's) part. D E

The answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. This is a question which has very often been raised, and the numerous cases on the subject are collected in the first volume of SIR E. V. WILLIAMS'S NOTES TO SAUNDERS, p. 554, n., and in the 2nd vol., p. 750, n. We think the answer to this question depends on the true construction of the contract taken as a whole. Parties may think some matter apparently of very little importance essential, and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one, or they may think that the performance of some matter apparently of essential importance, and prima facie a condition, is not really vital, and may be compensated for in damages, and if they sufficiently express such an intention, it will not be a condition precedent. F G

In this case if to para. 7 of the agreement there had been added words to this effect: "And if Mr. Bettini is not there at the stipulated time, Mr. Gye may refuse to proceed further with the agreement"; or if on the other hand it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such express declaration of the intention of the parties either way. In the absence of such an express declaration we think that we are to look to the whole contract, and assuming the rule stated by PARKE, B., in *Graves* v. *Legg* (1), to be acknowledged, see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for, or whether it merely partially affects it and may be compensated for in damages. H I

Accordingly as it is one or the other, we think it must be taken to be or not to be a condition precedent. If the plaintiff's engagements had been only to sing in operas at the theatre it might very well be that previous

attendance at rehearsals with the actors in company with whom he was to perform was essential. If the engagement had only been for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find on looking to the agreement that the plaintiff was to sing in theatres, halls, and drawing-rooms, public and private, from Mar. 30 to July 13, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain and Ireland from Jan. 1 to Dec. 31, 1875, without the written permission of the defendant except at a distance of more than fifty miles from London.

The plaintiff, therefore, in consequence of this agreement had been deprived of the power of earning anything in London from Jan. 1 to Mar. 30, and though the defendant has, perhaps, not received any benefit from this so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent unless the nature of the thing strongly shows they must be so. As far as we can see the failure to attend at rehearsals during the six days immediately before Mar. 31, could only affect the theatrical performances, and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing rooms, and concerts for fifteen weeks. We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent. The defendant must, therefore, we think, seek redress by a cross claim for damages. Judgment must be given for the plaintiff.

Judgment for plaintiff.

Solicitors: *G. S. & H. Brandon; Sweetland.*

Re SNELL (A SOLICITOR)

[CHANCERY DIVISION (Sir George Jessel, M.R.), June 16, 1877]

[Reported 6 Ch.D. 105; 46 L.J.Ch. 627; 37 L.T. 350; 25 W.R. 823]

Solicitor—Lien—Mortgage—Solicitor acting for mortgagor and mortgagee—Costs owing by mortgagor—Validity of lien as against mortgagee.

A company, having issued debentures, executed an instrument whereby it vested its property in two of its directors as trustees by way of security for the debenture holders. The company's solicitor, S., who drafted the form of both debenture and trust instrument, acted throughout for both the company and the trustees. The company having passed a resolution for a voluntary winding-up, the trustees, acting under a power of sale contained in the trust instrument, contracted to sell the company's property to an intending purchaser and called upon S. for the title deeds. S. refused, claiming a lien upon the deeds for costs incurred by the company prior to the execution of the mortgage.

Held: a solicitor acting for both mortgagor and mortgagee lost his lien on the title deeds unless it was expressly reserved and held the deeds for his mortgagee client, and, therefore, S. must deliver the deeds to the trustees.

Notes. *Re Mason and Taylor* (1878), 10 Ch.D. 729. Distinguished: *Macfarlane* v. *Lister*, [1886-90] All E.R. Rep. 778; *Brunton* v. *Electrical Engineering Corpn.*,

[1892] 1 Ch. 434; *Re Dee Estates, Wright* v. *Dee Estates*, [1911] 2 Ch. 85. Referred to: *Re Walker, Meredith* v. *Walker*, [1891-4] All E.R. Rep. 324; *Re Lawrance, Bowker* v. *Austin*, [1894] 1 Ch. 556; *Barratt* v. *Gough-Thomas*, [1945] 2 All E.R. 414; *Barratt* v. *Gough-Thomas*, [1951] Ch. 242.

As to solicitor's lien, see 36 HALSBURY'S LAWS (3rd Edn.) 173-175; and for cases see 42 DIGEST 267-269.

Case referred to in argument:

Hicks v. *Keate* (1839), 3 Jur. 1024; 42 Digest 272, *3061*.

Petition for the delivery up of certain title deeds and for costs.

By a resolution dated Aug. 4, 1875, the directors of the West Esgair Lle Mining Co. Ltd., resolved to raise £2000 by an issue of debentures. Only £1120 was subscribed and debentures for that amount were duly issued. On Dec. 31, 1875, an indenture of trust was executed by the company of the one part and two of its directors, Smith and Webb, of the other part whereby the company's leasehold interest in the mines was vested in Smith and Webb (hereinafter called "the petitioners"), as trustees by way of mortgage for securing the repayment of principal and interest owing on the debentures. Both the form of mortgage and the trust instrument were drafted by Snell, the solicitor to the company, who had possession of the company's leases and other titled deeds and who was acting throughout as solicitor for both mortgagor and mortgagees. In May, 1876, the company passed a resolution for a voluntary winding-up and the petitioners, acting under a power of sale contained in the trust instrument, entered into a contract with an intending purchaser for the sale of the company's property. They thereupon applied to Snell for the title deeds but he refused to deliver them up on the ground that he had a lien upon them for certain costs due to him from the company incurred prior to the execution of the trust instrument. A petition was presented by the petitioners and one of the debenture holders for an order that Snell be ordered to deliver up the title deeds forthwith.

Chitty, Q.C., and *H. M. Williams* for the petitioners.

Davey, Q.C., and *Grosvenor Woods* for Snell.

SIR GEORGE JESSEL, M.R.—I have myself decided this point before. It has in fact been decided several times although the decisions do not appear to have been reported.

The point is this. Can a solicitor, who in the preparation of a mortgage acts both for mortgagor and mortgagee, claim a lien on the title deeds for costs due to him from the mortgagor, so as to be entitled to withold the deeds from his mortgagee client until payment of those costs?

If a solicitor prepares a mortgage on behalf of a mortgagee and acts for the mortgagee alone, he is of course bound to see that his client gets a proper security, an essential element of which is possession of the title deeds, and if he fails to see that his client has the deeds he has neglected his duty towards that client. If the solicitor chooses to act not only for the mortgagee but for the mortgagor also, he is still equally bound, as solicitor to the mortgagee, to see that his client obtains a good security, including possession of the deeds.

If he has a bill of costs against his mortgagor client he, by acting for both parties, loses his lien on the deeds and holds them for his mortgagee client unless his lien is expressly reserved. He cannot say to the mortgagee that he has been guilty of negligence and that he does not hold the deeds on his account. He must be taken to have performed his duty and to hold the deeds for his mortgagee client. That is his duty and the fact that such client knew that he acted as solicitor for the mortgagor and had a claim for costs against him is, therefore, wholly immaterial. Moreover, the mortgagor, having authorised his

solicitor to prepare the mortgage, has by so doing authorised him to act in a proper manner, that is, to do all necessary acts for the completion of the security which, of course, includes handing over the title deeds. The solicitor requires no further instructions for that; he holds them as agent for the mortgagee client and must give them up to him when required to do so.

It seems to me that Snell cannot be in a better position as regards these mortgagees than if he had acted as their solicitor alone. These deeds must, therefore, be delivered up to the petitioners, who must also have their costs if they press for them.

Solicitors: *A. C. Spaull; F. W. Snell.*

[*Reported by* J. E. Thompson, Esq., *Barrister-at-Law.*]

HILLIARD *v.* FULFORD

[Chancery Division (Sir George Jessel, M.R.), November 20, 1876]

[Reported 4 Ch.D. 389; 46 L.J.Ch. 43; 35 L.T. 750; 25 W.R. 161]

Executor—Liability—Costs—Incorrect partial distribution of estate—Costs as if no distribution made.

A testator by his will gave his residuary estate to his executors upon trust to divide the same equally among his grandchildren on their attaining twenty-one. There were six grandchildren, but the executors, mistakenly supposing one grandchild not to be entitled under the will, divided the residue into five shares, paid to four of the grandchildren their shares, and retained one share for the fifth grandchild, the plaintiff, who, on attaining twenty-one, filed a bill for the administration of the testator's estate. A declaration was made that the sixth grandchild was entitled to a share of the residue, and on taking the accounts it was found that the executors had wrongly applied part of the residue in the repair of houses specifically devised, that a larger sum was due from them than they had admitted, and that the four grandchildren who had received their shares had been overpaid.

Held: where executors have properly distributed the estate and are ready to show duly vouched accounts to the residuary legatees and the guardian of an infant and an administration suit is then instituted and it turns out that the accounts are substantially correct, the costs of that suit ought to be borne by the shares of the parties who institute and take the benefit of the litigation; but where, as in the present case, the accounts are substantially incorrect and the executors have made serious mistakes, the executors cannot be allowed to say that the distribution is a proper distribution, and that it ought to avail them when the accounts come to be taken; they must stand in the same position as if there had been no distribution at all, and it would be ordered that the whole costs of the administration suit should be taken out of the estate as if they had never divided it, so that the plaintiff and the sixth beneficiary would be entitled to the same shares out of the residuary estate as if no distribution had taken place and the other residuary legatees had been made defendants; the difference would have to be made good by the executors who had wrongly distributed the estate.

Notes. Followed: *Re Bell's Estate, Bath* v. *Bell* (1878), 39 L.T. 422. Referred to: *Re Giles* (1886), 55 L.J.Ch. 695; *Ministry of Health* v. *Simpson*, [1950] 2 All E.R. 1137.

As to proceedings by unpaid residuary legatees, see 16 HALSBURY'S LAWS (3rd Edn.) 453; and as to action for account or administration, see 38 HALSBURY'S LAWS (3rd Edn.) 948; and for cases see 23 DIGEST (Repl.) 439, 440, and 24 DIGEST (Repl.) 914.

Cases referred to:

(1) *Mackenzie* v. *Taylor* (1844), 7 Beav. 467; 49 E.R. 1146; 24 Digest (Repl.) 914, *9175.*

(2) *Thompson* v. *Clive* (1848), 11 Beav. 475; 50 E.R. 901; 24 Digest (Repl.) 900, *9001.*

Administration Action in the estate of Thomas Prewitt, who died on June 22, 1857. The cause now came on for further consideration.

The testator by his will, dated Dec. 11, 1855, gave his residuary real and personal estate to his executors upon trust to sell and convert the same, and to divide the proceeds equally among his grandchildren on their respectively attaining twenty-one. There were six grandchildren, but the executors mistakenly considering one of them, Harold Hilliard, a posthumous child, not to be entitled under the will, divided the net residue, amounting to £3750 into five shares, amounting to £750 each, paid the four adult legatees their shares, and retained the remaining £750 as the share of the infant grandchild, Clement Hilliard, which had since been paid into court. A bill to have accounts taken was filed by Clement Hilliard on his attaining twenty-one against the executors and Harold Hilliard, and at the hearing of the cause LORD SELBORNE held that Harold Hilliard was entitled equally with the other grandchildren, and directed the usual accounts and inquiries.

No order was made as to costs. On taking the accounts the executors were charged with £1095, which they had expended out of the general personal estate on the repair of real estate which had been specifically devised by the testator. The question arose whether the costs were to be thrown upon the two remaining shares, or whether they were to be paid as if no distribution had taken place.

Chitty, *Q.C.*, and *Nalder* for the plaintiff.

Waller, *Q.C.*, and *Dauney* for the executors.

Street for Harold Hilliard.

SIR GEORGE JESSEL, M.R.—The case is one of some novelty, and although the point must previously have occurred, I am not aware of it. The question is what is the proper rule as to costs where the executors have bona fide divided the residuary personal estate, but only partially—partially in this sense, that some of the legatees, having attained their specified ages, were entitled to call for their shares, and the executors, upon being asked for them, made up their accounts and paid them?

[HIS LORDSHIP stated the facts, and continued:] The cause came to a hearing before LORD SELBORNE and he decided that the executors were wrong in their construction of the will, and that all the six children were entitled to participate. So that that was error No. 1. They certainly divided the estate upon a wrong footing. No order was made as to costs. The accounts were taken in chambers, and it was found that the executors were also wrong in their discharge. They had claimed about £1000 in their discharge for money which had been laid out by them, through some mistake, in repairing houses forming real estate which belonged, not to the residuary legatees, but to specific devisees. The mistake was set right in chambers, and they were charged with the sum of £1000, so that on taking the accounts it was found that their accounts were substantially wrong, and they were also wrong as to figures. There was however, no imputation of dishonesty or intentional impropriety of conduct upon their part.

The suit now comes on for further consideration. It seems that after paying all the costs of the suit, the executors will probably have paid more than their shares to the adult residuary legatees so that if the estate were now to be distributed they would not get as much as £750. The question is: Who is to make good the difference? It appears to me that, in such circumstances, the right rule is that the executors who made this mistake in the distribution of the fund cannot be allowed to say that the accounts are substantially correct, that they have made a fair distribution, and that the plaintiff should pay the costs of the suit. The suit has been properly instituted. I agree that where executors have made up their accounts carefully and in a proper manner, have kept vouchers so as to have them always ready to be seen, and have divided the residue partially—that is, given the shares to those who are adult without suit—it would be unreasonable to make them pay a proportion of the costs of a suit subsequently instituted by other residuary legatees, for the result would be that no executor would ever divide an estate without instituting a suit. If there were ten residuary legatees, nine of whom were of age and one an infant (and it might be that one was a married woman, with a settlement or anything of that kind), and if at any subsequent period somebody instituted a suit, and said that all the costs were to be thrown on the estate in the same manner as if no distribution had taken place—the executors would have to make good out of their own pockets the share of costs attributable to each residuary legatee. It is obvious that such a rule would be in the highest degree inconvenient. It would throw every estate in the kingdom into Chancery, which no one would desire, least of all the judges of the Chancery Division.

The rule must, in such a case, be that where the executors have properly distributed the estate, and are ready to show duly vouched accounts to the remaining legatees and the guardian of an infant or infants, and an administration if a suit is then instituted, and it turns out that the accounts are substantially correct, the costs of that suit ought to be borne by the shares of the parties who institute and take the benefit of the litigation—that is, the remaining shares. As I read the authorities, namely, *Mackenzie* v. *Taylor* (1) and *Thompson* v. *Clive* (2) both of which were before Lord Langdale, that was the view he took of the law, although it is not so clearly stated as would be desirable in order to show what the rule is. Where, however, as in this case, the accounts are substantially incorrect, and the executors have made two most serious mistakes, one by choosing to take upon themselves the office of the court in construing an obscure will, and construing it wrongly, and another in laying out as much as £1,000 in repairing freehold houses which did not belong to their cestuis que trust, the executors cannot be allowed to say that the distribution is a proper distribution and that it ought to avail them when the accounts come to be taken. They must stand in the same position as if there had been no distribution at all. Therefore, the right order is that the whole costs of the administration suit should be taken out of the estate as if they had never divided it, so that the plaintiff and sixth beneficiary who have received nothing, will be entitled to exactly the same shares of the residuary estate as if no distribution had taken place, and the other residuary legatees had been made defendants. Of course the latter cannot be made to pay back anything. They cannot be compelled to come in and contribute. Therefore, the difference, which will not be large, will, in substance, have to be made good by the executors who wrongly distributed the estate. Those who have made the error will have to pay for it. In this way I think justice will be done. The simplest mode of carrying it out will be to order the defendants, the executors, to pay the costs of the plaintiff and the infant defendant, and to make good the amount which will be necessary, after allowing their own costs, charges, and expenses to be taxed in the usual way. The residue will then be ascertained, and they will make the amount of the

two-sixths good by payment into court of the balance found due. When that is ascertained it can be inserted in the order without going to chambers. The interest will be at the rate of £4 per cent. from the time of distribution, giving credit for any interest the executors have paid.

Order accordingly.

Solicitors: *E. Woodard; Austin De Gex & Harding.*

[*Reported by* G. W. KING, ESQ., *Barrister-at-Law.*]

Re SIBLEY'S TRUSTS

[CHANCERY DIVISION (Sir George Jessel, M.R.), February 17, 1877]

[Reported 5 Ch.D. 494; 46 L.J.Ch. 387; 37 L.T. 180]

Will—Substitution—Gift to "the children of R.F. or their issue in equal shares" —Children of R. F. dead at date of will leaving issue.

A testator, after giving his personal estate to "all and every the children of my uncle R. F. or their issue in equal shares," gave his real estate on trust for A. for life, and after her death to sell the same and hold the proceeds "upon trust for all and every the children of the said R. F., or their issue, in equal shares per capita." R. F. had had six children, four of whom died before the date of the will all leaving issue, and two of whom were living at the date of the will and at the date of these proceedings. The two surviving children claimed the whole trust fund on the ground that they were the only children of R. F. who survived the testator.

Held: the proceeds of sale of the real estate were divisible into six parts, two of which went to the surviving children of R. F.; as to the remaining four parts, the issue of the deceased children of R. F. living at the testator's death should take by substitution in the place of the deceased parent, as between themselves in equal shares.

Notes. Approved: *Re Jones' Estate, Hume* v. *Lloyd* (1878), 47 L.J.Ch. 775. Distinguished: *Re Barker, Asquith* v. *Saville* (1882), 51 L.J.Ch. 835; *Re Webster's Estate, Wigden* v. *Mello* (1883), 23 Ch.D. 737. Considered: *Re Roberts, Percival* v. *Roberts*, [1903] 2 Ch. 200. Distinguished: *Re Froy, Froy* v. *Froy*, [1938] 2 All E.R. 316. Referred to: *Re Lucas's Will* (1881), 17 Ch.D. 788; *Re Barker, Asquith* v. *Saville* (1882), 51 L.J.Ch. 835; *Miles* v. *Tudway* (1883), 49 L.T. 664; *Re Morgan, Morgan* v. *Morgan* (1893), 69 L.T. 407; *Re Walbran, Milner* v. *Walbran* (1905), 75 L.J.Ch. 105; *Re Hickey, Beddoes* v. *Hodgson*, [1917] 1 Ch. 601; *Re Brooke's Will Trusts, Jubber* v. *Brooke*, [1953] 1 All E.R. 668.

As to gifts expressed in the alternative, see 39 HALSBURY'S LAWS (3rd Edn.) 1048, and as to gifts to children, see ibid. 1052; and for cases see 44 DIGEST 796-799.

Cases referred to in argument:

Salisbury v. *Petty* (1843), 3 Hare, 86; 7 Jur. 1011; 67 E.R. 307; 44 Digest 791, *6477.*

Re Porter's Trust (1857), 4 K. & J. 188; 27 L.J.Ch. 196; 4 Jur.N.S. 20; 6 W.R. 187; 70 E.R. 79; 44 Digest 792, *6496.*

Congreve v. *Palmer* (1853), 16 Beav. 435; 23 L.J.Ch. 54; 1 W.R. 156; 51 E.R. 846; 44 Digest 793, *6505.*

Ive v. *King* (1852), 16 Beav. 46; 21 L.J.Ch. 560; 20 L.T.O.S. 5; 16 Jur. 489; 51 E.R. 693; 44 Digest 801, *6560.*

Re Philps' Will (1868), L.R. 7 Eq. 151; 19 L.T. 713; 44 Digest 804, *6583*.
Amson v. *Harris* (1854), 19 Beav. 210; 52 E.R. 330; 44 Digest 996, *8537*.
Finlason v. *Tatlock* (1870), L.R. 9 Eq. 258; 39 L.J.Ch. 422; 22 L.T. 3; 18 W.R. 332; 44 Digest 802, *6565*.
Bebb v. *Beckwith* (1839), 2 Beav. 308; 48 E.R. 1199; 44 Digest 800, *6549*.
Re Potter's Trust (1869), L.R. 8 Eq. 52; 39 L.J.Ch. 102; 20 L.T. 649; 44 Digest 794, *6509*.
Adams v. *Adams* (1872), L.R. 14 Eq. 246; 27 L.T. 505; 20 W.R. 88; 44 Digest 794, *6511*.

Petition for payment out.

By his will, dated May 7, 1867, the testator, Robert Sibley, gave to his trustees, J. A. Dimmock and Ann Topping, his residuary personal estate on trust to pay his debts, funeral and testamentary expenses and to pay the surplus to "all and every the children of my uncle, Robert Fuller, or their issue, in equal shares," and after giving certain pecuniary legacies the testator devised all his freehold and copyhold estate to his trustees upon trust for Ann Topping for life, and after her death to sell the same, and hold the proceeds "upon trust for all and every the children of the said Robert Fuller, or their issue, in equal shares per capita." The testator died on Mar. 19, 1870, Ann Topping died on Nov. 13, 1875, and J. A. Dimmock, the surviving trustee, paid into court, under the Trustees Relief Act, the proceeds of the sale of the real and copyhold estate. Robert Fuller had died in 1832, leaving six children, of whom four had died before the date of the will, each of them leaving issue, and two of whom, Martha, wife of Daniel Lawson, and Mary Lawson were living at the date of the will and at the date of these proceedings. Of Robert Fuller's children who died before the date of the testator's will, one, John Fuller, had eight children, of whom seven were still living; one of them, Mary, died in 1873, leaving five children. Of Robert Fuller's other children a considerable number of children and remoter issue were living at the date of the petition.

The petition for payment out of court of the trust fund was presented by Daniel Lawson, Martha his wife, and Mary Lawson who claimed the whole fund in equal moieties, on the ground that they were the only children of Robert Fuller living at the date of the will.

Owing to the large number of persons claiming under the will, viz., all the children and grandchildren of Robert Fuller's other children who died before the date of the will, a certain number of them were chosen to represent the whole.

Chitty, Q.C., and *Dundas Gardiner* for the petitioners.
Rigby for John Fuller.
Fischer, Q.C., *Marten, Q.C.*, *Oswald*, *Rodwell*, *Dryden*, *Woodhouse* and *Eaden* for the other respondents.

SIR GEORGE JESSEL, M.R.—I have to construe an obscure will, and although it is probable the testator had no particular meaning, that is no reason why the court should not assign a particular meaning to it. I think I have discovered what the meaning of the will is, but I am not disposed to find fault with anyone who differs from me. As I understand them the authorities on wills of personal estate all show that one is not to strain arbitrary rules of construction. There are, indeed, some fixed rules in the law, but one must not make new ones. It is also settled that, in the absence of definite arbitrary rules, the true guide is the meaning of the words which are to be read literally, subject, of course, to anything in the original gift or in the context which will control the words.

First, therefore, I must consider whether the authorities which have been cited from the textbooks have a bearing on this will. I do not say they have no

such bearing, but I do not think they help me much. It is, however, settled that when a legatee takes by substitution, he must be a substitute. When a person claims by substitution, it must be shown that the person in whose place he stands could take. There are, however, authorities which show that, when one finds a gift in a will to A. or B., that word "or" is to have some meaning, and a meaning depending upon what A. or B. really consists of. One cannot lay down à priori that the gift to A. or B. has any particular meaning until it is known what A. and B. are. Suppose, for example, a man says, "I give £1000 to the Bishop of Rochester, or his successor," there can be no doubt that he means the present Bishop of Rochester to take if he is alive, and if he dies then the bishop who next occupies the see is to take it. The description of the legatee shows what is meant. So in a gift to "John Jones or his next of kin," in order that the alternative gift may take effect, John Jones must be dead. It is plain in such cases as these.

There is another class of case in which it is not so plain. For example, if a testator makes a bequest to "John Jones or his children" it is not so plain in this case that the children are to take in place of John Jones who is dead. The authorities, however, show that they only take if John Jones is dead. Then there is still another class of gift in which instead of having a person "John Jones" as "A," there is a class "A," and a class "B." What is to be done then? The class may be "the children of my nephew," or "my nephews and nieces," or "my great nephews and nieces," followed by "or their children." The authorities show that the word "or" indicates in all cases an alternative gift, unless "or" be conjunctive. It is clear that the children to take are the children of the class in whose favour the previous gift is made; but that does not answer the questions: Who compose the first class; whether it includes people dead at the date of the will, people who die in the lifetime of the testator, or anybody who could not take at the testator's death? Upon that the authorities throw no light, and the answer must depend on the terms of the will. If a man gives a legacy to "the children of my nephew John," and it can be shown that he knew his nephew John was dead, it is plain he speaks of a man as his nephew whom he knows to be dead, and not as his "late" or "deceased" nephew. To find another class, therefore, one must depend on the will.

The point I have to determine here is: Who constitutes the first class. There is no doubt as to the second; it is the issue of the first, and the issue of the first, according to the decisions, only take in case of the death of the first. The state of the family, as known to the testator, was this: His uncle Robert Fuller died in 1832, the will was made in 1867. His uncle had had six children, two of whom were living, and four dead; and the four who had died had left a great number of descendants. Knowing the state of the family (which, I assume, he did, as no inquiry is asked), he first gives the residue of his personal estate "to all and every the children of my uncle, Robert Fuller, or their issue in equal shares;" then he gives his freeholds and copyholds upon trust for Ann Topping for her life, and after her death he directs his trustees to sell the same and hold the proceeds in "trust for all and every the children of the said Robert Fuller, or their issue in equal shares per capita." The distinction between the two gifts is—first, in the addition "per capita;" and secondly, in there being a prior life estate in the freeholds and copyholds, and none as regards the personal estate. Looking to the relationship of the testator —they were his first cousins—one may assume that the motive of the gift was relationship, and it would be singular if he intended to exclude from one class persons to whom he had given shares under the other class. It seems, therefore, reasonable to say in effect, "as I have given an immediate gift of my personal estate, I intend everybody living at the period of distribution, or who may be entitled at the period of distribution to take;" and to say the same thing as

regards the real estate. In the next place, I do not think that an ordinary man, knowing that he had but two surviving cousins, would describe them as "all and every the children," etc. To my mind this conveys the idea of more than two, and it weighs very much with me, especially seeing that he used twice over the words "all and every the children." In the next place they are collateral relatives, which explains the motive. It is not to be expected that he would particularly favour the issue of those two children of his uncle who happened to be living at the time, at the expense of the issue of those four children who were dead at the date of the will.

It appears to me, therefore, that there is nothing in the authorities to prevent my reading the words literally and interpreting "all and every the children" as meaning not all the children he had then living, but all his children in the literal sense. So I come to the conclusion that the issue of a child dead at the date of the will would take in the place of the parent, because that is what the testator intended by his description of the first class; in other words, he meant not only "all the children now living," but "all the children my late uncle had," and, consequently, he meant all the issue to take. The next question is how they take. Again, applying substitution, they are to take in the place of their dead parents or ancestors. As to those that are dead their issue are to stand in their place, but as between themselves they take in equal shares.

Solicitors: *Cole & Jackson*, for *E. Wayman*, Cambridge.

[*Reported by* J. E. Thompson, Esq. *Barrister-at-Law.*]

CLARK *v.* CHAMBERS

[Queen's Bench Division (Cockburn, C.J., and Manisty, J.), February 18, April 15, 1878]

[Reported 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613]

Highway—Negligence—Obstruction—Dangerous obstruction—Placed on highway by defendant—Removal by third person from usual position—Injury to plaintiff—Liability of defendant.

If a person unlawfully places an obstruction across a public or private way, he must be taken to have anticipated the removal of the obstruction by someone entitled to use the way as a thing likely to happen, and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. If the obstruction be a dangerous one, wherever it is placed, it may become a source of danger from which, should injury to an innocent party occur, the original author of the mischief should be held responsible.

The defendant unlawfully placed in a private road adjoining his property a hurdle with a chevaux de frise on the top in order to prevent the public from looking over into his property. An unknown person, without the defendants' knowledge or authority, removed the hurdle to another place, and the plaintiff, passing of right along the road in the dark, and knowing the original position of the hurdle, but not that it had been moved, struck against the chevaux de frise and was injured. In an action by the plaintiff to recover damages for the injury,

Held: it was the defendant's duty to take all precautions necessary to protect persons exercising their right of way; the plaintiff's injury was not an improbable consequence of the defendant's act; and, therefore, the action was maintainable.

Notes. Considered: *Bull* v. *Shoreditch Corpn.* (1902), 67 J.P. 37; *Ruoff* v. *Long*, [1916] 1 K.B. 148. Applied: *Glasgow Corpn.* v. *Taylor*, [1921] All E.R. Rep. 1. Considered: *Culkin* v. *McFie & Sons, Ltd.*, [1939] 3 All E.R. 613; *Buckner* v. *Ashby and Horner, Ltd.*, [1941] 1 K.B. 321. Referred to: *Tolhausen* v. *Davies* (1888), 59 L.T. 436; *A.-G.* v. *Tod Heatley*, [1895-9] All E.R. Rep. 636; *McDowall* v. *Great Western Rail. Co.*, [1902] 1 K.B. 618; *Cory* v. *France, Fenwick*, [1911] 1 K.B. 114; *Latham* v. *Richard Johnson and Nephew, Ltd.*, [1911-13] All E.R. Rep. 117; *Weld-Blundell* v. *Stephens*, [1920] All E.R. Rep. 32; *Barber* v. *Clarke & Co.* (1939), 83 Sol. Jo. 925; *Philco Radio and Television Corpn. of Great Britain* v. *J. Spurling, Ltd.*, [1949] 2 All E.R. 882; *Overseas Tankship (U.K.), Ltd.* v. *Morts Dock and Engineering Co., Ltd.*, [1961] 1 All E.R. 404.

As to nuisances on highways, see 19 HALSBURY'S LAWS (3rd Edn.) 270-283; and for cases see 26 DIGEST (Repl.) 466 et seq. As to negligence as the effective cause of injury, see 28 HALSBURY'S LAWS (3rd Edn.) 27-33; and for cases see 36 DIGEST (Repl.) 33 et seq.

Cases referred to:

(1) *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 15 Digest (Repl.) 987, *9656*.

(2) *Dixon* v. *Bell* (1816), 5 M. & S. 198; 1 Stark, 287; 105 E.R. 1023; 36 Digest (Repl.) 80, *431*.

(3) *Ilott* v. *Wilkes* (1820), 3 B. & Ald. 304; 106 E.R. 674; 36 Digest (Repl.) 153, *807*.

(4) *Jordin* v. *Crump* (1841), 8 M. & W. 782; 11 L.J.Ex. 74; 5 Jur. 1113; 151 E.R. 1256; 15 Digest (Repl.) 1008, *9933*.

(5) *Illidge* v. *Goodwin* (1831), 5 C. & P. 190, N.P.; 36 Digest (Repl.) 43, *224*.

(6) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(7) *Daniels* v. *Potter and Wing, etc.* (1830), 4 C. & P. 262; Mood. & M. 501, N.P.; 36 Digest (Repl.) 41, *206*.

(8) *Hughes* v. *Macfie*, *Abbott* v. *Macfie* (1863), 2 H. & C. 744; 3 New Rep. 394; 33 L.J.Ex. 177; 9 L.T. 513; 10 Jur.N.S. 682; 12 W.R. 315; 159 E.R. 308; 36 Digest (Repl.) 123, *627*.

(9) *Bird* v. *Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry. M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, *808*.

(10) *Jay* v. *Whitfield* (1817), cited in 3 B. & Ald. at p. 308; 106 E.R. 676; 43 Digest 436, *628*.

(11) *Hill* v. *New River Co.* (1868), 9 B. & S. 303; 18 L.T. 355; 26 Digest (Repl.) 476, *1635*.

(12) *Burrows* v. *March Gas and Coke Co.* (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; 18 W.R. 348; affirmed (1872), L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318; 36 J.P. 517; 20 W.R. 493, Ex. Ch.; 36 Digest (Repl.) 34, *156*.

(13) *Collins* v. *Middle Level Comrs.* (1869), L.R. 4 C.P. 279; 38 L.J.C.P. 236; 20 L.T. 442; 17 W.R. 929; 36 Digest (Repl.) 44, *237*.

(14) *Harrison* v. *Great Northern Rail. Co.* (1864), 3 H. & C. 231; 5 New Rep. 93; 33 L.J.Ex. 266; 10 L.T. 621; 10 Jur.N.S. 992; 12 W.R. 1081; 159 E.R. 518; 36 Digest (Repl.) 44, *236*.

(15) *Greenland* v. *Chaplin* (1850), 5 Exch. 243; 19 L.J.Ex. 293; 15 L.T.O.S. 185; 155 E.R. 104; 36 Digest (Repl.) 33, *155*.

(16) *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, *173*.

(17) *Mangan* v. *Atterton* (1866), L.R. 1 Exch. 239; 4 H. & C. 388; 35 L.J.Ex. 161; sub nom. *Atterton* v. *Mangan*, 14 L.T. 411; 30 J.P. 360; 14 W.R. 771; 36 Digest (Repl.) 123, *621*.

Rule Nisi, obtained by the defendant, for the new trial on the ground of misdirection of an action tried before COCKBURN, C.J., in which the plaintiff obtained a verdict for £200 damages in respect of personal injuries received by him in the circumstances described by COCKBURN, C.J., in the judgment of the court (infra).

Willis, Q.C., and *Glyn* for the plaintiff, showed cause.

Hannen (with *A. L. Smith*), for the defendant, supported the rule.

Cur. adv. vult.

April 15, 1878. **COCKBURN, C.J.,** read the following judgment of the court.—This was a case of considerable nicety, and which, so far as the precise facts are concerned, presents itself for the first time.

The defendant is in the occupation of premises which abut on a private road leading to other premises as well as to his. It consists of a carriage road and a footway. The soil of both is the property of a different owner; the defendant has no interest in it beyond the right of way to and from his premises. The defendant uses his premises as a place where athletic sports are carried on by persons resorting thereto for that purpose, for their own amusement. His customers, finding themselves annoyed by persons coming along the road in question in carts and vehicles, stationing themselves opposite to his grounds, and overlooking the sports, the height of the carts and vehicles enabling them to see over the fence, the defendant erected a barrier across the road for the purpose of preventing vehicles from getting as far as his grounds. This barrier consisted of a hurdle set up lengthways, next to the footpath; then two wooden barriers, armed with spikes, commonly called chevaux de frise; then there was left an open space through which a vehicle could pass; then came another large hurdle set up lengthways, which blocked up the rest of the road. At ordinary times the space between the two divisions of the barrier was left open for vehicles to pass which might be going to any of the other premises to which the road in question led. But at the times when the sports were going on, a pole attached by a suitable apparatus was carried across from the one part of the barrier to the other, and so the road was effectually blocked.

Among the houses and grounds to which this private road led was that of a Mr. Bruen. On the evening on which the accident which gave rise to the present action occurred the plaintiff, who occupied premises in the immediate neighbourhood, accompanied Mr. Bruen, by the invitation of the latter, to Bruen's house. It was extremely dark, but being aware of the barrier and the opening in it, they found the opening, the pole not being then set across it, and passed through it in safety. But on his return later in the evening, the plaintiff was not equally fortunate. It appears that in the course of that day or the day previous, someone had removed one of the chevaux de frise hurdles from the place where it had stood, and had placed it in an upright position across the footpath. Coming back along the middle of the road, the plaintiff, feeling his way, passed safely through the opening in the centre of the barrier. Having done which, being wholly unaware—it being much too dark to see—that there was any obstruction on the footpath, he turned on to the latter, intending to walk along it the rest of the way. He had advanced only two or three steps when his eye came into collision with one of the spikes, the effect of which was that the eye was forced out of its socket. It did not appear by whom the chevaux de frise hurdle had been thus removed; but it was expressly found by the jury that this was not done by the defendant or by his authority.

The question is whether the defendant can be held liable for the injury thus occasioned. It is admitted that what the defendant did in erecting this barrier

across the road was unauthorised and wrongful; and it is not disputed that the plaintiff was lawfully using the road. There is no ground for imputing to him any negligence contributing to the accident. The jury have expressly found, in answer to a question put to them by me, that the use of the chevaux de frise in the road was dangerous to the safety of persons using it. The ground of defence in point of law taken at the trial and on the argument on the rule was that, although, if the injury had resulted from the use of the chevaux de frise hurdle as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable, yet as the immediate cause of the accident was not the act of the defendant, but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it, and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another.

On the part of the plaintiff it was contended that, as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil by affording the occasion for its being removed and placed on the footpath, and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position. The first is *Scott* v. *Shepherd* (1). In that case the defendant threw a lighted squib into a market-house where several persons were assembled. It fell upon a standing, the owner of which in self-defence took it up and threw it across the market-house. It fell upon another standing, the owner of which in self-defence took it up and threw it to another part of the market-house, and in its course it struck the plaintiff, exploded, and put out his eye. The defendant was held liable, although without the intervention of a third person the squib would not have injured the plaintiff. In *Dixon* v. *Bell* (2) the defendant, having left a loaded gun with another man, sent a young girl to fetch it, with a message to the man in whose custody it was to remove the priming, which the latter as he thought did, but, as it turned out, did not do effectually. The girl brought it home, and thinking that the priming having been removed the gun could not go off, pointed it at the plaintiff's son, a child, and pulled the trigger. The gun went off, and injured the child. The defendant was held liable. Lord Ellenborough, C.J., said (5 M. & S. at p. 199):

> "As by this want of care [by leaving the gun without drawing the charge, or seeing the priming had been properly removed] the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case undoubtedly, but I think the action is maintainable."

In *Ilott* v. *Wilkes* (3), the well-known case as to spring-guns, it became unnecessary to determine how far a person setting spring-guns would be liable to a person injured by such a gun going off, even though such person were a trespasser, inasmuch as the plaintiff, having had notice that spring-guns were set in a particular wood, had voluntarily exposed himself to the danger. But both Bayley, J., and Holroyd, J., appear to have thought that without such notice the action would have lain, the use of such instruments being unreasonably disproportioned to the end to be attained, and dangerous to the lives of persons who might be innocently trespassing. Looking to their language, it can scarcely be doubted that, if, instead of injuring the plaintiff, the gun which he caused to go off had struck a person passing lawfully along a path leading through the wood, they would have held the defendant liable. In *Jordin* v. *Crump* (4), the use of dogspears was held not to be illegal, but there the injury done to the plaintiff's dog was alone in question. If the use of such an instrument had been productive of injury to a human being, the result might have been different. In *Illidge* v. *Goodwin* (5) the defendant's cart and horse were left standing in the street without anyone to attend to them. A person passing by whipped the horse which caused it to back the cart against the plaintiff's window. It was urged that the

man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But TINDAL, C.J., ruled that, even if this were believed, it would not avail as a defence. He said (5 C. & P. at p. 192):

> "If a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done."

Lynch v. *Nurdin* (6) is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age, playing in the street with other boys, was getting into the cart when another boy made the horse move on; the plaintiff was thrown down and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by LORD DENMAN, C.J. He said (1 Q.B. at p. 35):

> "It is urged that the mischief was not produced by the mere negligence of the servant as asserted in the declaration, but at most by that negligence in combination with two other active causes—the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length. For, if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

By way of illustration, the Chief Justice puts the case of a gamekeeper leaving a loaded gun against the wall of a playground where schoolboys were at play, and one of the boys in play letting it off and wounding another. LORD DENMAN, C.J., said:

> "I think it will not be doubted that the gamekeeper must answer in damages to the wounded party. This might possibly be assumed as clear in principle, but there is also the authority of the present Chief Justice of the Common Pleas in its support in *Illidge* v. *Goodwin* (5)."

It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here.

In *Daniels* v. *Potter and Wing, etc.* (7) the defendants had a cellar opening to the street. The flap of the cellar had been set back while the defendant's men were lowering coals into it, as the plaintiff contended, without proper care having been taken to secure it; the flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up a defence that its fall had been caused by some children playing with it. But the only question left to the jury by TINDAL, C.J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defence. *Hughes* v. *Macfie*, *Abbott* v. *Macfie* (8), two actions arising out of the same circumstances, and tried in the Passage Court at Liverpool, though at variance with some of the foregoing so far as relates to the effect of the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, are in accordance with them as respects the defendant's liability for his own act where that is the primary cause, though the act of another may have led to the immediate result. The defendants had a cellar opening to the

street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and, having reared it against the wall nearly upright with its lower face, on which there were cross-bars, towards the street, had gone away. The plaintiff in one of the actions, a child of five years old, got upon the cross-bars of the flap, and in jumping off them brought down the flap on himself and another child (the plaintiff in the other action), and both were injured. It was held that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so far as to be a joint actor with him.

Bird v. *Holbrook* (9) is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden, which was at some distance from his dwelling-house and was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden, in order to catch a pea-fowl the property of a neighbour which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off, and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it, rendered the latter liable for the consequences. In the course of the discussion a similar case of *Jay* v. *Whitfield* (10) was mentioned, tried before RICHARDS, C.B., in which a plaintiff who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict.

In *Hill* v. *New River Co.* (11) the defendants created a nuisance in a public highway by allowing a stream of water to spout up, open and unfenced in the road. The plaintiff's horses, passing along the road with his carriage, took fright at the water thus spouting up, and swerved to the other side of the road. It so happened that there was in the road an open ditch or cutting which had been made by contractors who were constructing a sewer and had been left unfenced and unguarded, which it ought not to have been. Into this ditch or cutting, owing to its being unfenced, the horses fell and injured themselves and damaged the carriage. It was contended that the remedy, if any, was against the contractors, but it was held that the plaintiff was entitled to recover against the company. In *Burrows* v. *March Gas and Coke Co.* (12) in the Exchequer Chamber, affirming a judgment of the Court of Exchequer, where, through a breach of contract by the defendants in not serving the plaintiff with a proper pipe to convey gas from their main into his premises, an escape of gas had taken place, whereupon the servant of a gasfitter, at work on the premises, having gone into the part of the premises where the escape had occurred with a lighted candle and examined the pipe with the candle in his hand, an explosion took place, by which the premises were injured, the defendants were held liable, though the explosion had been immediately caused by the imprudence of the gas-fitter's man in examining the pipe with a lighted candle in his hand. In *Collins* v. *Middle Level Comrs.* (13) the defendants were bound under an Act of Parliament to construct a cutting with proper walls, gates, and sluices to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage of the lands lying east of the cut, and to keep the same open at all times. In consequence of the defective construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other proprietors on the eastern side closed the culvert, and so protected their lands; but the proprietors on the western side, to lessen the evils to themselves, reopened the culvert, and so increased the overflow on the plaintiff's land, and caused injury to it. The defendant sought to ascribe the injury to the act of the western proprietors in removing the obstruction which those on the other side had placed at the culvert. But it was held that the negligence of the defendants was the

substantial cause of the mischief. Montague Smith, J., said (L.R. 4 C.P. at p. 287):

> "The defendants cannot excuse themselves from the natural consequences of their negligence by reason of the act, whether rightful or wrongful, of those who removed the obstruction placed in the culvert under the circumstances found in this case."

Brett, J., said (ibid. at p. 288):

> "The primary and substantial cause of the injury was the negligence of the defendants, and it is not competent to them to say that they are absolved from the consequence of their wrongful act by what the plaintiff or someone else did. I do not see how the defendants can excuse themselves by urging that the plaintiff was prevented by other wrongdoers from preventing part of the injury."

Harrison v. *Great Northern Rail. Co.* (14) belongs to the same class. The defendants were bound under an Act of Parliament to maintain a delph or drain with banks for carrying off water for the protection of the adjoining lands. At the same time certain commissioners appointed under an Act of Parliament were bound to maintain the navigation of the river Witham with which the delph communicated. There having been an extraordinary fall of rain, the water in the delph rose nearly to the height of its banks, when one of them gave way, and caused the damage of which the plaintiff complained. It was found that the bank of the delph was not in a proper condition; but it was also found, and it was on this that the defendants relied as a defence, that the breaking of the bank had been caused by the water in it having been penned back owing to the neglect of the commissioners to maintain in a proper state certain works which it was their duty to keep up under their Act. Nevertheless, the defendants were held liable.

These authorities would appear to be sufficient to maintain the plaintiffs' right of action under the circumstances of this case. It must, however, be admitted that in one or two recent cases the courts have shown a disposition to confine the liability arising from unlawful acts, negligence, or omissions of duty within narrower limits by holding a defendant liable for those consequences only which in the ordinary course of things were likely to arise, and which might, therefore, reasonably be expected to arise, or which it was contemplated by the parties might arise from such acts, negligence, or omissions. In *Greenland* v. *Chaplin* (15) Pollock, C.B., says (5 Exch. at p. 248):

> "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated."

Acting on this principle, the Court of Common Pleas in *Sharp* v. *Powell* (16) held that the action would not lie where the injury, though arising from the unlawful act of the defendant, could not have been reasonably expected to follow from it. The defendant had, contrary to the provisions of the Police Act, washed a van in the street, and suffered the water used for the purpose to flow down a gutter towards a sewer at some little distance. The weather being frosty, a grating through which water flowing down the gutter passed into the sewer had become frozen over, in consequence of which the water sent down by the defendant, instead of passing into the sewer, spread over the street and became frozen, rendering the street slippery. The plaintiff's horse coming along fell in consequence and was injured. It was held that, as there was nothing to show that the defendant was aware of the obstruction of the grating, and as the stoppage of the water was not the necessary or probable consequence of the defendant's act,

he was not responsible for what had happened. BOVILL, C.J., there says (L.R. 7 C.P. at pp. 258, 259):

> "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are by reason of some existing cause likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrong doer liable to an action."

GROVE, J., said (ibid. at pp. 259, 260):

> "I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression the 'natural consequence' which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted."

KEATING, J., said (ibid. at pp. 260, 261):

> "The damage did not immediately flow from the wrongful act of the defendant, nor was such a probable or likely result as to make him responsible for it. The natural consequence, if that be a correct expression, of the wrongful act of the defendant would have been that the water would under ordinary circumstances have flowed along the gutter or channel, and so down the grating to the sewer. The stoppage and accumulation of the water was caused by ice or other obstruction at the drain, not shown to have been known to the defendant, and for which he was in no degree responsible. That being so, it would obviously be unreasonable to trace the damage indirectly back to the defendant."

We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case; but we doubt its applicability to the present, which appears to us to come within the principle of *Scott* v. *Shepherd* (1), *Dixon* v. *Bell* (2), and other cases to which we have referred. At the same time it appears to us that the case before us will stand the test thus said to be the true one. For a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by someone entitled to use the way as a thing likely to happen, and, if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. Thus, if the obstruction be to the carriage way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was also the case here, become a source of danger from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover we are of opinion that if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all

A necessary precautions to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences.

It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. *Mangan* v. *Atterton* (17) was cited before us as a strong authority in favour of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil cake without its being thrown out of gear, B or the handle being fastened, or any person having the care of it. The plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not C liable: first, because there was no negligence on the part of the defendant, or, if there was negligence, it was too remote; secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do, otherwise we should have to consider whether it should prevail against the cases cited with which it is obviously in conflict. If the D decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it.

It appears to us that a man who leaves in a public place along which persons, and among them children, have to pass a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not E the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful. On the whole, we are of opinion, both on principle F and authority, that the plaintiff is entitled to our judgment.

Rule discharged.

Solicitors: *J. C. Button & Co.; S. H. Williams.*

[*Reported by* M. W. McKellar, Esq., *Barrister-at-Law.*]

WOODWARD *v.* SARSONS AND ANOTHER. BIRMINGHAM MUNICIPAL ELECTION PETITION

[COMMON PLEAS DIVISION (Brett, Archibald and Denman, JJ.), June 19, 21, July 9, 1875]

[Reported L.R. 10 C.P. 733; 44 L.J.C.P. 293; 32 L.T. 867; 39 J.P. 776]

Elections—Avoidance of election—Electors deprived of opportunity to elect candidate they prefer—Prevention of voting by corruption, intimidation, absence of voting facilities, and fraud.

For an election to be declared void by the common law applicable to Parliamentary elections it must be shown that it was so conducted that the tribunal which is asked to avoid it is satisfied (i) either that there was no real electing at all or (ii) that the election was not conducted under the election laws. As to (i) the tribunal should be satisfied that there was no real electing if it were proved that the electors had not had a fair and free opportunity of electing the candidate which the majority might prefer, e.g., if a majority of the electors had been prevented from recording their votes effectively by corruption, intimidation, or want of the premises or equipment necessary for voting, fraudulent counting of the votes, or a false declaration of numbers by the returning officer. An election could be avoided, not only if these matters were actually proved, but also if the tribunal were satisfied that there was reasonable ground to believe that a majority of the electors might have been prevented from electing the candidate they preferred.

At a municipal election (a) the presiding officer at one of the polling stations marked on the face of 294 ballot papers the numbers on the burgess roll of the voters using them. These numbers might have been, but were not in fact, seen by the agents of the candidates at the counting of the votes; (b) at another polling station twenty ballot papers, having been marked by the presiding officer by the direction of voters unable to read, were placed by him in the ballot box, wrapped up in the "declarations of inability to read," and were not made up into a separate packet; each of the votes so given could have been, but were not in fact, identified by the returning officer; (c) other ballot papers were objected to because they were marked (i) with two, and one with three, crosses instead of one, (ii) a straight line in addition to a cross, (iii) the letter "P" as well as a cross, (iv) a straight line instead of a cross, (v) a star instead of a cross, (vi) the name of a candidate struck out, and (vii) crosses placed to the left instead of to the right of the candidate's name; lastly (d) two ballot papers bore in the voter's writing the name of one of the candidates and another bore the voter's signature.

Held: the 294 ballot papers under (a) supra were bad; the 20 papers under (b) were good; the papers under (c) were good; and those under (d) were bad as they might disclose, or lead to the disclosure of, the voter's name.

Notes. For the present provisions regulating the conduct of elections see the Parliamentary Elections Rules and Local Elections Rules (Representation of the People Act, 1949, Sched. 2, 8 HALSBURY'S STATUTES (2nd Edn.) 733 et seq.), the Representation of the People Regulations, 1950, Urban District Council Election Rules, 1951, Rural District Council Election Rules, 1951, and Parish Council Election Rules, 1952 (7 HALSBURY'S STATUTORY INSTRUMENTS).

Followed: *Tower Hamlets, Stepney Division Case, Mitchett's Case* (1886), 4 O'M. & H. 34. Applied: *Phillips* v. *Goff* (1886), 17 Q.B.D. 805; *York (County) East Riding Buckrose Division Case* (1886), 4 O'M. & H. 110; *East Clare Case, Cox* v. *Redmond* (1892), Day, 161. Considered: *Exeter Case* (1911), 6 O'M. & H.

228, 229. Applied: *Re Barnes Corpn., Ex parte Hutter* (1932), 97 J.P. 76; *Re South Newington (Kingston-upon-Hull) Municipal Election Petition, Lewis* v. *Shepperdson*, [1948] 2 All E.R. 503; *Pope* v. *Clarke*, [1953] 2 All E.R. 704. Referred to: *Gloucestershire, Thornbury Division Case, Ackers* v. *Howard* (1886), 16 Q.B.D. 739; *Islington Western Division Case* (1901), 5 O'M. & H. 120; *Brodie* v. *Bevan, Dunn* v. *Bevan* (1921), 38 T.L.R. 172; *Young* v. *Darvel* (1922), 87 J.P. 8; *Re Derbyshire, North Eastern Case, Holmes* v. *Lee and Cleaver* (1923), 39 T.L.R. 423.

As to the conduct of elections, see 14 HALSBURY'S LAWS (3rd Edn.) 67 et seq.; and for cases see 20 DIGEST (Repl.) 104, 133.

Cases referred to:

(1) *Hackney Case, Gill* v. *Reed and Holms* (1874), 31 L.T. 69; 39 J.P. 151; 2 O'M. & H. 77; 20 Digest (Repl.) 104, *859*.

(2) *Salford Case, Anderson, Bryant and Harding* v. *Cawley and Charley* (1869), 20 L.T. 120; 1 O'M. & H. 133; 20 Digest (Repl.) 157, *1320*.

(3) *Bolton Case, Ormerod* v. *Cross* (1874), 31 L.T. 194; 2 O'M. & H. 138; 20 Digest (Repl.) 61, *412*.

(4) *Norfolk Case* (1679), 9 Commons Journals, 631; 20 Digest (Repl.) 69, *498*.

(5) *Morpeth (Borough) Case* (1774), 1 Doug. El. Cas. 147.

(6) *Pontefract Case* (1775), 1 Doug. El. Cas. 379.

(7) *Coventry Case* (1706), 15 Commons Journals, 276; 20 Digest (Repl.) 69, *499*.

(8) *New Ross Case* (1853), 2 Pow. R. & D. 188; 36 Digest (Repl.) 379, **7*.

(9) *Drogheda (Borough) Case* (1857), Wolf. & D. 206; 20 Digest (Repl.) 65, **260*.

(10) *Drogheda (Borough) Case* (1869), 1 O'M. & H. 252; 21 L.T. 402; 20 Digest (Repl.) 70, **309*.

(11) *Drogheda (Borough) Case* (1874), 2 O'M. & H. 201; 20 Digest (Repl.) 104, **560*.

(12) *Wigtown District Burgh Case* (1874), 2 O'M. & H. 215.

(13) *Haswell* v. *Stewart* (1874), 1 R. (Ct. of Sess.) 925; 11 Sc.L.R. 533; 20 Digest (Repl.) 114, **621*.

Also referred to in argument:

Barnstable Case, Northcote v. *Pulsford* (1875), L.R. 10 C.P. 476; 44 L.J.C.P. 217; 32 L.T. 602; 39 J.P. 487; 23 W.R. 700; 20 Digest (Repl.) 127, *1035*.

Harwich Case (2nd Case) (1851), 1 Pow. R. & D. 314; 20 Digest (Repl.) 105, *871*.

Belfast Case, 7 I.R.C.L. 30.

Warrington Case, Crozier v. *Rylands* (1869), 19 L.T. 812; 1 O'M. & H. 42; 20 Digest (Repl.) 107, *885*.

Petersfield Case, Stowe v. *Jolliffe* (1874), L.R. 9 C.P. 734; 43 L.J.C.P. 265; 30 L.T. 795; 38 J.P. 617; 22 W.R. 911; 20 Digest (Repl.) 41, *252*.

Re Haverfordwest Case, Davies v. *Lord Kensington* (1874), L.R. 9 C.P. 720; 43 L.J.C.P. 370; 30 L.T. 610; 38 J.P. 376; 22 W.R. 707; 20 Digest (Repl.) 68, *494*.

Special Case stated under the Corrupt Practices (Municipal Elections) Act, 1872, s. 15 (6).

An election for the office of town councillor for the Nechell's ward of the borough of Birmingham was held on Nov. 2, 1874. The ward was divided into nine polling districts (numbered 123, 124, 125, 126, 127, 128, 129, 130, and 131), in each of which there was a polling station, where the votes of the burgesses appearing on the ward list rated in that district were taken. The petitioner, Woodward, and the respondent, Sarsons, were candidates, and the respondent, Sadler (being the alderman of the ward), was returning officer. A poll became necessary and was held, and the number of votes given was declared by the respondent Sadler to be, for Sarsons, 965 votes; for Woodward, 775 votes, whereupon the respondent Sarsons was declared elected.

The respondent Sadler appointed certain persons to act as presiding officers at each of the said polling stations. At station No. 130, he appointed one Smith, a solicitor, presiding officer. Upon an elector attending to vote, and applying for a ballot paper at polling station No. 130, Smith first marked upon the face of the ballot paper the number of such voter appearing on the burgess roll, and then delivered the same out so marked to the voter as and being a ballot paper to be used by him, and the same was accordingly used by him for the purpose of voting. This course John Smith followed in the case of every ballot paper used or attempted to be used at polling station No. 130 at the election. The returning officer was not aware of this being done, or having been done, until after the polling was closed. The number of ballot papers so marked by Smith was 294, of which 234 were given in favour of the petitioner, and the remainder in favour of the respondent Sarsons. The burgess roll numbers so marked by the said Smith upon the ballot papers were, in fact, not seen so as to be identified, but they could have been seen by the persons present at the counting of the ballot papers, who were the returning officer and his assistant, the petitioner, the respondent, and their agents, and by referring to the burgess roll such persons could have identified the voters who had made use of such ballot papers.

At polling station No. 125, about twenty ballot papers were marked by the presiding officer at that station by the direction of voters who were unable to read. Each of such ballot papers was placed by the said presiding officer in the ballot box, wrapped up in the "declaration of inability to read," made by the voter for whom such votes were so marked as aforesaid. The declarations of inability to read were not made up into a separate packet, sealed with the seal of the presiding officer and so delivered to the returning officer, but were delivered to him in the ballot box with the ballot papers as aforesaid. Each of the votes so given and so marked by the presiding officer as aforesaid, could have been, but were not in fact, identified by the returning officer at the counting of the votes by comparing the declarations of inability to read in which each such ballot paper was wrapped as aforesaid with the ballot paper.

After the presentation of the petition, the petitioner having obtained inspection of the ballot papers, observed certain marks upon them, and contended that the votes hereinafter mentioned ought to have been rejected by the returning officer, by reason of the ballot papers by which the same were given bearing writings or marks by which the voter could be identified, or because they were void for uncertainty. The following were particulars of the writings or marks on the said ballot papers, and of the facts alleged to have rendered them void for uncertainty:

"(1) Two ballot papers, Nos. 844 and 889, bearing the name 'Sarsons' opposite the name of the respondent 'Sarsons' printed upon such ballot papers. (2) Five ballot papers, Nos. 433, 926, 928, 1364, 1426, marked with two crosses instead of one. (3) One ballot paper, No. 1726, marked with three crosses instead of one. (4) One ballot paper, No. 2140, marked with a straight stroke in addition to the cross. (5) One ballot paper, No. 3562, marked with the letter [P], in addition to the cross. (6) One ballot paper, No. 878, marked with a straight line instead of a cross. (7) One ballot paper, No. 641, marked with a star instead of a cross. (8) One ballot paper, No. 911, having the name of Woodward nearly struck out. (9) One ballot paper, No. 638, bearing the voter's signature. (10) Eight ballot papers, Nos. 117, 155, 190, 505, 174, 183, 842, 1413, marked with a cross placed on the left, instead of on the right hand side of the candidate's name."

Charles Russell, Q.C., and *E. C. Leigh* for the petitioner.

Sir Henry James, Q.C., and *Reginald Brown*, and *Giffard, Q.C.*, and *J. O. Griffits*, for the respondents.

Cur. adv. vult.

July 9, 1875. LORD COLERIDGE, C.J., read the following judgment of the court which had been prepared by **BRETT, J.**—In this case a petition had been presented, praying that the election of the respondent, Mr. Sarsons, to the office of town councillor, should be declared void, and a Case was stated for the opinion of the court. At the election the petitioner Woodward and the respondent Sarsons were the candidates, and the respondent Sadler was the alderman of the ward and returning officer. The returning officer appointed one Smith to be the presiding officer at polling station No. 130. Upon the electors applying for a ballot paper at that station, the presiding officer marked upon the face of the ballot paper given to each of them, the number of the voter appearing on the burgess roll. This he did to every ballot paper handed out by him. The number of ballot papers so marked and given out by him was 294, of which 234 were given in favour of the petitioner Woodward, and 60 in favour of the respondent Sarsons. The burgess roll numbers so marked were in fact not seen, so as to be identified; but they could have been seen by the persons present at the counting of the ballot papers. At polling station No. 125 about twenty ballot papers were marked by the presiding officer, by the direction of voters who were unable to read. Each of such ballot papers was placed by the presiding officer in the ballot box, wrapped up in the declaration of inability to read made by the voter for whom such vote was marked. Each of the votes, so given and so marked by the presiding officer, could have been, but was not, in fact, identified by the returning officer at the counting of the votes, by comparing the ballot papers with the declarations of inability to read in which they were wrapped. Twenty-two ballot papers, which had been counted as valid, were, on inspection after the presentation of the petition, found to be marked in a manner to which objection was now taken. It was contended that they ought all to have been rejected. The returning officer declared the number of votes thus: For Sarsons, 965; for Woodward, 775—majority for Sarsons, 190; and thereupon declared Sarsons to be duly elected.

The petition, without praying for a scrutiny, prayed that it might be determined that Sarsons was not duly elected, and that the election was void. Upon these facts it was argued, on behalf of the petitioner, that the election was void, because it had not been conducted in accordance with the Ballot Act, 1872; that it was void on that account according to the common law of Parliament, because the deviation from the Act was so great that the election could not be said to be an election by ballot; that it was void under the Ballot Act, 1872, itself, according to s. 13, because it had not been conducted according to the rules in the schedules, nor in accordance with the principles laid down in the body of the Act, and the noncompliance with the principles of the Act had affected the result of the election. As to the last allegation, it was said that the petitioner was not bound, in order to prove it, to show that on a scrutiny the respondent would be in a minority, but that it was enough if he could show that so large a body of electors as those who did not vote or who might have voted at the polling station No. 130 were or might have been virtually disfranchised. On behalf of the respondents, it was urged that the admitted error of the presiding officer at the polling station No. 130 was not of sufficient importance to avoid the election at common law, because the election was, notwithstanding such error, substantially conducted as an election by ballot; that in this case it could be demonstrated that the mistake relied on had not affected the result of the election; that a breach of the Ballot Act, 1872, however extensive, could not as such avoid an election, for there was no enactment in the Act to that effect; that no such enactment was contained in s. 13; that it was an enactment to save certain elections, and not to invalidate any; that it was an enactment of extreme caution, stating as law that which was equally the law before. Arguments were then gone into as to the alleged validity or invalidity of different classes of votes which had been counted. This

was not done by way of scrutiny, but in order to determine whether the alleged mistakes had or had not affected the result of the election.

The questions raised for discussion seem to be: (i) what is the true statement of the rule under which an election may be avoided by the common law of Parliament?; (ii) is the present case brought within the rule?; (iii) whether a breach of the Ballot Act can, as such, be a ground for avoiding an election?; and (iv) if yes, can this election be thereby avoided?

As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to Parliamentary elections if it was so conducted that the tribunal, which is asked to avoid it, is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. The tribunal should be so satisfied, i.e., that there was no real electing by the constitution at all, if it were proved to its satisfaction that the constituency had not, in fact, had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively, according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes, or false declaration of numbers by a returning officer, or by other such acts or mishaps. We think that the same result should follow, if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This, we think, is the result of comparing the judgments of GROVE, J., in *Hackney Case* (1), with the judgment of MARTIN, B., in *Salford Case* (2) and with that of MELLOR, J., in *Bolton Case* (3), all which judgments are in accordance with, but express more accurately, the grounds of the decisions in Parliament, in the older cases: *Norfolk Case* (4), *Morpeth* (*Borough*) *Case* (5), *Pontefract Case* (6), *Coventry Case* (7), *New Ross Case* (8), and *Drogheda* (*Borough*) *Case* (9) (10), all which are mentioned in ROGERS ON ELECTIONS (10th Edn.), p. 365.

As to the second ground, i.e., that the election was not really conducted under the subsisting election laws at all, we think, though there was an election in the sense of there having been a selection by the will of the constituency, that the question must in like manner be whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws; it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. For instance, if during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horserace, it might well have been said that the electors had exercised their free will, but it should have been held, that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting. So now, when the election is to be an election by ballot, if either wilfully or erroneously, a whole constituency were to vote, but not by

A ballot at all, the election would be a free exercise of their will, but it would not be an election by ballot, and, therefore, not an election under the existing election law. But if, in the opinion of the tribunal, the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, 1872, would justify the tribunal in declaring the election void by the common law of Parliament. We agree upon this point with the answer attributed to MARTIN, B., before a committee of the House of Commons (MINUTES OF EVIDENCE BEFORE SELECT COMMITTEE ON PARLIAMENTARY ELECTIONS, LEIGH AND LE MARCHANT (2nd Edn.), p. 144, n.), with his decision in *Salford Case* (2), and with the decisions of MELLOR, J., in *Bolton Case* (3), and of BARRY, J., in *Drogheda (Borough) Case* (11).

C If the rule be as thus stated, then the next question is whether we can say, upon the facts stated in the present case, that a majority of the electors have been, or that there is, reasonable ground to believe that a majority have been, by misconduct or error of the presiding officer, prevented from recording their votes with effect. There is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it by what D occurred. All who went to vote at the polling station No. 130, did vote. It was agreed that a report of the error being there perpetrated might have prevented others from going to vote, but this was answered by showing that the Case finds that no one noticed the error until after the election was over. The result is that all the electors who desired to vote did vote. And as to the votes which were given, and which were objected to, it is now known for whom each of E them was in fact given. In this case, therefore, when the objections to the particular votes have been determined, the effect of the mistakes on the result of the election will be exactly known. If so, there is no room for speculation or doubt whether a majority may or may not have been prevented from voting with effect. Those who did not vote were not prevented by the errors which occurred; it will be seen how the majority of those who did vote was affected F by such errors. In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine whether the majority has been prevented from voting with effect, to determine upon the validity or invalidity of the votes which were given and to which objection has been taken, and in order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act.

G The Act is divided into the principal part, which contains certain sections, and two schedules which contain certain rules and forms. By s. 28: "The schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act." The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing "directions." Comparing the sections and the rules, it will be seen that for H the most part, if not invariably, the rules point out the mode or manner of doing what the sections say shall be done. In Sched. 2, the first note states:

> "The forms contained in this schedule, or forms as nearly resembling the same as circumstances will admit, shall be used in all cases to which they refer and are applicable . . . ."

I In form of back of the ballot paper, as given in the schedule, we find: "Directions as to printing ballot paper," and "Form of directions for the guidance of the voter in voting," &c. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second schedule, are directory enactments, as distinguished from the absolute enactments in the sections of the body of the Act. And in such case, in order to determine the preliminary question, which is whether there has been a material breach of the Act, and which must be determined before determining what effect such breach has upon a vote or the election, the general rule is that

an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. Section 2 enacts what the voter shall do—that

> "the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box."

This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is, that the voter shall mark his paper secretly. How he shall mark it is in the directory part of the statute. By r. 25 in Sched. 1:

> "The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and there mark his paper, and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box . . . ."

This rule, it will be observed, does not yet say how the paper is to be marked. But in Sched. 2 is given the "form of ballot paper," and appended to the form is a note, which by s. 28 is to be construed and have effect as part of the Act. This note contains the form of directions for the guidance of the voter in voting:

> "The voter will go into one of the compartments, and, with the pencil provided in the compartment, place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X."

This is the only enactment throughout the statute as to the manner and form in which the voter is to mark the ballot paper. Therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly; but it would be sufficient that the manner of marking the paper should be obeyed substantially.

If these two enactments be so obeyed, there is no material breach of the Act. The extent of error which is to vitiate, so as to annul, the ballot paper, is further to be gathered from the statute itself. By s. 2:

> "Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked, by which the voter can be identified, shall be void and not counted."

It is not every writing or every mark, besides the number on the back, which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So in r. 36:

> " . . . The returning officer shall report . . . the number of ballot papers rejected and not counted by him, under the several heads of (1) want of official mark; (2) voting for more candidates than entitled to; (3) writing or mark by which voter could be identified; (4) unmarked or void for uncertainty . . ."

In Sched. 2, in the note to the form before referred to, we have the heading,

> "If the voter votes for more than candidate, or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted."

The result seems to be, as to writing or mark on the ballot paper, that if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for

too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted. Or, to put the matter affirmatively, the paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted. If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void. If these requirements are not substantially fulfilled the ballot paper is void and should not be counted, and if it is counted, it should be struck out upon a scrutiny. The decision in each case is upon a point of fact to be decided first by the returning officer and afterwards by the election tribunal on petition.

Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void, and ought not to be counted. There was a mark on them by which on reference to the burgess roll the way in which the voter had voted could be identified. As to the twenty ballot papers at the polling station No. 125, there was a breach by the presiding officer of the directions in r. 26, but there was no breach for which by enactment the ballot papers can be rejected. The votes were given in the way prescribed, but the presiding officer dealt with the declarations erroneously. We are of opinion that those votes were properly counted. As to the ballot papers in Appendix A, No. 638 is clearly bad, void, and must be disallowed. With some hesitation we disallow Nos. 844 and 889. There is no cross at all, and we yield to the suggested rule that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter. But we cannot think that the mere fact of two crosses being placed, as in Nos. 433 or 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote and no doubt as to the intention to vote emphatically for the one candidate. If there were evidence of an arrangement that the voters should place two marks, so as to indicate that it was he, that voter, who had used that ballot paper, then by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the papers, upon such proof being given, should be rejected. But the mere fact of there being two single crosses is not, in our judgment, a substantial breach of the statute. Neither is the mere fact of an additional mark, such as is found in No. 926, nor the mere fact of the peculiar forms of cross in Nos. 1364 and 641, nor the marks on Nos. 1726, 2140, 3562, or 911, though in these cases also extrinsic evidence might make such peculiarities indications of handwriting. We think that, inasmuch as the ballot paper was handed in by the voter as a vote, the mark on No. 875 substantially indicates that the voter intended to vote for the candidate against whose name it is placed, and that the paper ought to be allowed. And we think that the same reasoning applies to Nos. 117, 155, 190, 505, 174, 183, 842, 1413, in which the cross is placed on the left hand side of the candidate's name, instead of on the right hand side. The substance of the directions in the note in Sched. 2 is fulfilled, which is, in our opinion, that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially, and the absolute enactments as to secrecy be obeyed fully, we think that the statute is satisfied. For the same reasons in Appendix B, we disallow No. 410, but allow the rest.

We are aware that in so applying the principles which we have deduced from the statute, we are acting apparently in opposition to some of the decisions

in the *Wigtown* case (*Wigtown District Burgh Case* (12); *Haswell* v. *Stewart* (13)) but there may have been evidence in that case which does not exist in the present one, and which made many of the marks there marks of identification, which the mere presence of such marks here does not. If this was not so, we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of LORD BENHOLME given in that case. It follows from our decision as to the different ballot papers, that if the 60 which were given for Sarsons, but properly disallowed at the counting by the returning officer, had not been rendered void by the presiding officer, they would have made the votes for Sarsons 1025, striking from which three disallowed papers in Appendix A., his numbers would have been 1022. Adding the 230 for Woodward, but striking off one disallowed in Appendix B., his numbers would have been 1008. The twenty, being properly in our opinion allowed, do not affect the result. Inasmuch, therefore, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations Nos. 130 and 125 did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and, therefore, that the election cannot be declared void by the common law applicable to Parliamentary elections.

Then it is urged that there has been a breach of the Ballot Act, 1872, and, therefore, the election is, by virtue of the Act itself, void. This was the third question which was raised in argument before us. It is said that s. 13, though it is in a negative form, assumes as an affirmative proposition that a non-compliance with the rules, or any mistake in the use of the forms, would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election. If this proposition be closely examined, it will be found to be equivalent to this—that the non-observance of the rules or forms, which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of voters, or in other words, the result of the election. It, therefore, is, as has been said, an enactment ex abundanti cautelâ, declaring that to be the law applicable to elections under the Ballot Act, 1872, which would have been the law to be applied if the section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute. The petition must be dismissed.

Solicitors: *Sharpe, Parkers & Co.; Maples, Teesdale & Co.; Robinson & Preston.*

A

ERLANGER AND OTHERS *v.* NEW SOMBRERO PHOSPHATE CO.

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, Lord Blackburn and Lord Gordon), May 14, 16, 17, 20, 21, 23, 24, 27, July 25, 26, 29, 31, 1878]

B

[Reported 3 App. Cas. 1218; 48 L.J.Ch. 73; 39 L.T. 269; 27 W.R. 65]

Company—Promoter—Fiduciary position—Sale of property to company—Duty to disclose all material facts—Nomination of independent directors—Failure to perform duties—Rescission of contract.

C

The position of promoters vis-à-vis the company which they are promoting is not that of trustees to a cestui que trust, but they are in a fiduciary position towards the company. Consequently, where the promoters of a company sell property to the company the burden is on them of showing that they have not taken any unfair advantage resulting from their relations with the company. It is their duty to nominate independent directors of the company who are capable of acting impartially in defence of the company's interests and will be competent and impartial judges whether or not the purchase ought to be made. Furthermore, they must disclose to the company all the material facts relating to the transaction. They need not disclose what they paid for the property which they are selling to the company, but they must not be guilty of any conduct which amounts to unfair concealment of the real facts of the case which ought in common fairness to be disclosed to a person seeking to purchase or entering into a treaty with them for that purpose. Where a company is not given by the promoters an opportunity of exercising, through independent directors, a fair and independent judgment on the subject of the purchase by the company of property from the promoters, the court may order the contract to be rescinded and the purchase price to be returned.

D

E

F

Notes. Considered: *Re Cape Breton Co.* (1885), 29 Ch.D. 795; *Ladywell Mining Co.* v. *Brookes*, *Ladywell Mining Co.* v. *Huggons* (1886), 35 Ch.D. 400; *Re Sharpe*, *Re Bennett*, *Masonic and General Life Assurance* v. *Sharpe*, [1892] 1 Ch. 154. Explained: *Salomon* v. *Salomon & Co., Ltd.*, *Salomon & Co., Ltd.* v. *Salomon*, [1895-9] All E.R. Rep. 33. Considered: *Rochefoucald* v. *Boustead*, [1897] 1 Ch. 196; *Re Olympia*, [1898] 2 Ch. 153; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (*No. 2*) (1899), 43 Sol. Jo. 622; *A.-G. for Canada* v. *Standard Trust Co. of New York*, [1911] A.C. 498; *Omnium Electric Palaces* v. *Baines*, [1914] 1 Ch. 332. Applied: *Hulton* v. *Hulton*, [1916-17] All E.R. Rep. 595. Considered: *Armstrong* v. *Jackson*, [1916-17] All E.R. Rep. 1117; *Weld* v. *Petre* (1928), 97 L.J.Ch. 399. Referred to: *Re Pepperell*, *Pepperell* v. *Chamberlain* (1879), 27 W.R. 410; *Re Rica Gold Washing Co.* (1879), 27 W.R. 715; *Emma Silver Mining Co.* v. *Grant* (1879), 11 Ch.D. 918; *Emma Silver Mining Co.* v. *Lewis* (1879), 4 C.P.D. 396; *Re Ambrose Lake Tin and Copper Mining Co.*, *Ex parte Moss*, *Ex parte Taylor* (1880), 49 L.J.Ch. 457; *Re Incorporated Law Society and Four Solicitors* (1891), 7 T.L.R. 672; *Re Gallard*, *Ex parte Gallard* (1897), 2 Q.B. 8; *Gluckstein* v. *Barnes*, [1900] A.C. 240; *Re Lady Forrest* (*Murchison*) *Gold Mine*, [1901] 1 Ch. 582; *Burland* v. *Earle*, [1902] A.C. 83; *Re Leeds and Hanley Theatres of Varieties*, [1902] 2 Ch. 809; *Re Jubilee Cotton Mills*, [1922] 1 Ch. 100; *Jubilee Cotton Mills* v. *Lewis*, [1924] A.C. 958; *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805; *Weld-Blundell* v. *Petre*, [1928] All E.R. Rep. 564; *Lever Brothers* v. *Bell*, [1931] 1 K.B. 557; *Spence* v. *Crawford*, [1939] 3 All E.R. 271; *Agbeygbe* v. *Ikomi* (1948), 92 Sol. Jo. 155; *Re Coghlan*, [1948] 1 All E.R. 367; *Solle* v. *Butcher*, [1950] 1 K.B. 671.

G

H

As to the promotion of companies, see 6 Halsbury's Laws (3rd Edn.) 91-102; and

I

for cases see 9 DIGEST (Repl.) 33 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Lindsay Petroleum Co.* v. *Hurd* (1874), L.R. 5 P.C. 221; 22 W.R. 492, P.C.; 9 Digest (Repl.) 41, *73.*

(2) *Vigers* v. *Pike* (1842), 8 Cl. & Fin. 562, 648; 8 E.R. 220, H.L.; 9 Digest (Repl.) 499, *3287.*

(3) *Gibson* v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 43 Digest 779, *2201.*

(4) *Clough* v. *London and North Western Rail. Co.* (1871), L.R. 7 Exch. 26; 41 L.J.Ex. 17; 25 L.T. 708; 20 W.R. 189, Ex. Ch.; 35 Digest (Repl.) 74, *682.*

(5) *Western Bank of Scotland* v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 262, *1656.*

(6) *Clarke* v. *Dickson* (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur.N.S. 832; 120 E.R. 463; 35 Digest (Repl.) 82, *756.*

Also referred to in argument:

Re Coal Economising Gas Co., Gover's Case (1875), 1 Ch.D. 182; 45 L.J.Ch. 83; 33 L.T. 619; 24 W.R. 125, C.A.; 9 Digest (Repl.) 110, *528.*

Craig v. *Phillips* (1876), 3 Ch.D. 722; 46 L.J.Ch. 49; 35 L.T. 198; 9 Digest (Repl.) 108, *506.*

Hichens v. *Congreve* (1828), 4 Russ. 562; 1 Russ. & M. 150; 6 L.J.O.S. 167; 38 E.R. 917, L.C.; 10 Digest (Repl.) 1269, *8964.*

Fawcett v. *Whitehouse* (1829), 1 Russ. & M. 132; 8 L.J.O.S.Ch. 50; 39 E.R. 51, L.C.; 36 Digest (Repl.) 569, *1274.*

Beck v. *Kantorowicz*, *Kantorowicz* v. *Carter*, *Kalb* v. *Kantorowicz* (1857), 3 K. & J. 230; 69 E.R. 1093; 9 Digest (Repl.) 43, *86.*

Tyrrell v. *Bank of London* (1862), 10 H.L.Cas. 26; 31 L.J.Ch. 369; 6 L.T. 1; 8 Jur.N.S. 849; 10 W.R. 359; 11 E.R. 934, H.L.; 9 Digest (Repl.) 35, *40.*

Imperial Mercantile Credit Association (*Liquidators*) v. *Coleman* (1873), L.R. 6 H.L. 189; 42 L.J.Ch. 644; 29 L.T. 1; 21 W.R. 696, H.L.; 9 Digest (Repl.) 516, *3399.*

Parker v. *McKenna* (1874), 10 Ch.App. 96; 44 L.J.Ch. 425; 31 L.T. 739; 23 W.R. 271, L.C. & L.JJ.; 9 Digest (Repl.) 518, *3414.*

Re Canadian Oil Works Corpn., Hay's Case (1875), 10 Ch.App. 593; 44 L.J.Ch. 721; 33 L.T. 466; 24 W.R. 191, L.JJ.; 9 Digest (Repl.) 513, *3376.*

Phosphate Sewage Co. v. *Hartmont* (1877), 5 Ch.D. 394, 447; 46 L.J.Ch. 661; 37 L.T. 9; 25 W.R. 743, C.A.; 9 Digest (Repl.) 41, *74.*

Bagnall v. *Carlton* (1877), 6 Ch.D. 371; 47 L.J.Ch. 30; 37 L.T. 481; 26 W.R. 243, C.A.; 9 Digest (Repl.) 43, *88.*

Foss v. *Harbottle* (1843), 2 Hare, 461; 67 E.R. 189; 9 Digest (Repl.) 36, *48.*

Re Anglo-Moravian Hungarian Junction Rail. Co., Dent's Case, Forbes' Case (1873), 8 Ch.App. 768; 42 L.J.Ch. 857; 28 L.T. 888, L.C.; 9 Digest (Repl.) 92, *408.*

Eley v. *Positive Government Security Life Assurance Co.* (1876), 1 Ex.D. 88; 45 L.J.Q.B. 451; 34 L.T. 190; 24 W.R. 338, C.A.; 9 Digest (Repl.) 87, *372.*

Kelner v. *Baxter* (1866), L.R. 2 C.P. 174; 36 L.J.C.P. 94; 15 L.T. 213; 15 W.R. 278; sub nom. *Kelmer* v. *Baxter*, 12 Jur.N.S. 1016; 9 Digest (Repl.) 684, *4498.*

Oakes v. *Turquand and Harding*, *Peek* v. *Turquand and Harding*, *Re Overend, Gurney & Co.* (1867), L.R. 2 H.L. 325; 36 L.J.Ch. 949; 16 L.T. 808; 15 W.R. 1201, H.L.; 9 Digest (Repl.) 28, *1.*

Hallows v. *Fernie* (1868), 3 Ch.App. 467; 18 L.T. 340; sub nom. *Hallows* v. *Fernie*, *Castellan* v. *Fernie*, *Danson* v. *Fernie*, *Gruning* v. *Fernie*, 16 W.R. 873, L.C.; 9 Digest (Repl.) 120, *630.*

Pollard v. *Clayton* (1855), 1 K. & J. 462; 25 L.T.O.S. 50; 1 Jur.N.S. 342; 3 W.R. 349; 69 E.R. 540; 20 Digest (Repl.) 568, *2680.*

MacBryde v. *Weekes* (1856), 22 Beav. 533; 28 L.T.O.S. 135; 2 Jur.N.S. 918; 52 E.R. 1214; 12 Digest (Repl.) 351, *2720.*

Aberdeen Rail. Co. v. *Blaikie Brothers* (1854), 2 Eq. Rep. 1281; 23 L.T.O.S. 315; 1 Macq. 461, H.L.; 10 Digest (Repl.) 1267, *8948.*

Kirk v. *Bell* (1851), 16 Q.B. 290; 117 E.R. 890; 9 Digest (Repl.) 546, *3598.*

Benson v. *Heathorn* (1842), 1 Y. & C. Ch. Cas. 326; 9 L.T. 118; 62 E.R. 909; 9 Digest (Repl.) 519, *3424.*

Re Llanharry Hematite Iron Ore Co., Ltd., Roney's Case, Stock's Case (1864), 4 De G. J. & Sm. 426; 4 New Rep. 389; 33 L.J.Ch. 731; 10 L.T. 770; 10 Jur.N.S. 812; 12 W.R. 994; 46 E.R. 983, L.JJ.; 9 Digest (Repl.) 462, *3022.*

Dunne v. *English* (1874), L.R. 18 Eq. 524; 31 L.T. 75; 22 Digest (Repl.) 520, *5792.*

Parfitt v. *Lawless* (1872), L.R. 2 P. & D. 462; 41 L.J.P. & M. 68; 27 L.T. 215; 36 J.P. 822; 21 W.R. 200; 25 Digest (Repl.) 277, *850.*

Baker v. *Monk* (1864), 33 Beav. 419; 10 L.T. 86; 28 J.P. 407; 10 Jur.N.S. 62; 12 W.R. 521; 55 E.R. 430; affirmed, 4 De G. & Sm. 388; 10 L.T. 630, L.JJ.; 25 Digest (Repl.) 274, *835.*

Earl of Aylesford v. *Morris* (1873), 8 Ch.App. 484; 42 L.J.Ch. 546; 28 L.T. 541; 37 J.P. 227; 21 W.R. 424, L.C. & L.J.; 25 Digest (Repl.) 290, *964.*

Heymann v. *European Central Rail. Co.* (1868), L.R. 7 Eq. 154; 9 Digest (Repl.) 106, *492.*

Society of Practical Knowledge v. *Abbott* (1840), 2 Beav. 559; 9 L.J.Ch. 307; 4 Jur. 453; 48 E.R. 1298; 10 Digest (Repl.) 1289, *9118.*

Ashbury Rail. Carriage and Iron Co. v. *Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 29, *6.*

Atwool v. *Merryweather* (1867), L.R. 5 Eq. 464, n.; 37 L.J.Ch. 35; 9 Digest (Repl.) 659, *4362.*

Bentley v. *Craven* (1853), 18 Beav. 75; 52 E.R. 29; 43 Digest 638, *753.*

Appeal by the defendants in the action from a decision of the Court of Appeal (Sir George Jessel, M.R., James and Baggallay, L.JJ.), reversing a decree of Malins, V.-C., on a bill filed by the respondent company to rescind a contract for the purchase of a small island in the West Indies called "Sombrero," on the ground that all the circumstances attending the transaction had not been disclosed by the vendors, a "syndicate" of which the appellants were members, who had purchased the lease of the island, with the assent of the Court of Chancery, from the liquidator of a former company, and had re-sold it to the present company.

The plaintiff in the action in the Chancery Division was the New Sombrero Phosphate Co. Sombrero was a small island in the West Indies, about a mile and a quarter long, in which were deposits or beds of phosphate of lime. It belonged to the Crown, and a lease was made of it for twenty-one years from March, 1865, at a rent of £1000. This lease was assigned, in the first instance, to a company called the Old Sombrero Co., who paid £100,000 for it, taking it subject to a mortgage of £12,400. This company was wound-up by the Court of Chancery, and in 1871, in the winding-up, the lease of the island came to be sold. The appellants, along with one Thomas Westall, a solicitor, thought well of the speculation, and wished to buy the lease, and for this purpose they formed a syndicate. On Aug. 30, 1871, the members of the syndicate agreed to buy the lease from the official liquidator, for £55,000, the contract being made in the name of Westall on behalf of his principals. Shortly before Sept. 20, 1871, the syndicate determined to form a joint-stock company, which was registered on Sept. 21, and to sell the island to the company for £110,000. They took the necessary steps for this purpose, preparing the memorandum of association, and the articles, and also the prospectus which was to be issued. The memorandum of association stated that the object of the company was the purchasing, leasing,

and working of mines or quarries of phosphate of lime in the island of Sombrero. The articles stated that the number of directors should from time to time be determined by a general meeting, and that till any other number was determined there should be not less than four nor more than seven directors. Two directors should be a quorum for the transaction of business; and among the acts which the directors were empowered to do were the adoption and carrying into effect the contract for the assignment to the company of the island of Sombrero, dated the same day as the articles, namely, Sept, 20, 1871. By this contract John Marsh Evans agreed to sell, and Francis Pavy agreed to purchase, the lease of the island and the property on it for £110,000, £80,000 to be paid in cash and £30,000 in fully paid-up shares of the new company. Evans was a trustee or agent for Baron Erlanger and other members of the syndicate, and Pavy was a person whose name was introduced into the contract as a matter of form, to represent the company about to be created in case it should adopt the contract. The contract was, on the face of it, a provisional one, subject to the formation of the company and the adoption of the contract by it. In the whole of this proceeding up to this time the syndicate, or the house of Erlanger, as representing the syndicate, were the promoters of the company.

The memorandum of association of the company was signed by Evans and six other persons, all of whom were nominees of the syndicate, and none of whom was in a condition to afford disinterested protection to the interests of the company. Mr. Westall prepared the articles of association. By art. 65 :

> "The number of directors shall from time to time be determined by the company in general meeting; until any other number is so determined, there shall not be less than four directors nor more than seven. The first directors shall be His Excellency Monsieur Drouyn de Lhuys, E. B. Eastwick, Esq., the Right Hon Thomas Dakin, John Marsh Evans, Esq., and Rear-Admiral R. John Macdonald."

By art. 82 :

> "In their management of the business of the company the directors may, without any further power or authority from the members, do the following things, viz. : first, they may adopt and carry into effect the contract for the assignment to the company, bearing even date herewith, of the island of Sombrero, in the West Indies, and the factory, buildings, and works thereon, for the residue of a term of twenty-one years from Mar. 16, 1865, subject to the provisions contained in the lease thereof."

With regard to the five persons named as the first directors, M. de Lhuys was requested by Erlanger to act as director, and he assented. It was not pretended that he made, or was expected to make, any independent inquiry on behalf of the company. He was asked to be a director because from his position he would be influential in promoting the sale of phosphate on the continent; and he assented, trusting entirely to Baron Erlanger. His appointment, therefore, afforded no protection to the company. Mr. Eastwick had applied to Erlanger personally to be allowed to join the company, but had gone to Canada. Admiral Macdonald was stated by Lord Blackburn to have "evidently come into the company with a foregone conclusion that everything his friend Erlanger had done was right, and under such a bias he could afford no protection to the company." Evans was the agent of the syndicate. The company could not, therefore, have any protection unless from Sir Thomas Dakin. He was quite disinterested and he embarked his own money in the company, but before lending his name as director he made no inquiry although he was aware that those getting up the company were the vendors of the lease.

On Sept. 29, 1871, there was a meeting of directors, attended by Sir Thomas Dakin, Admiral Macdonald, Evans, and Mr. Westall, the solicitor to the syndicate,

These directors, without inquiry into facts and figures, ratified on behalf of the company, the proposed purchase of the island. A considerable number of shareholders came forward, and in November the purchase price of the island was paid. In February, 1872, the first meeting of shareholders took place, and in June of that year a committee of shareholders was appointed to investigate the matter of the purchase. The advice of counsel was taken, the committee reported, and on Dec. 24, 1872, the company filed the bill in the present action.

Southgate, *Q.C.*, *Benjamin*, *Q.C.*, and *Ingle Joyce* for the appellants.
Higgins, *Q.C.*, *Davey*, *Q.C.*, and *Alexander Young* for the respondent company.
Whitehorne for a party concerned, was not called on to address the House.

July 31, 1878. The following opinions were read.

LORD PENZANCE.—I will state to your Lordships my view of the circumstances under which the purchase now sought to be set aside was originally made. The syndicate had bought the property in question, with the intention of getting up a company which should buy it off them at an increased price. Baron Erlanger, who acted for the syndicate, took steps for that purpose within a few days of the purchase, and there is no proof that any steps were even considered for dealing with the property in any other way. No time was lost in carrying this intention into effect. The solicitor of the syndicate is set to work, he prepares articles of association and a prospectus. The articles provide that five gentlemen by name shall be the first directors of the company, and that any two of them shall be a quorum to bind the company. They also provide that, without any further authority from the shareholders, these five directors or any two of them may sanction and accept, on the part of the company, a contract, bearing even date with the articles, for the purchase by the company of the property in question. This contract had been prepared by the syndicate themselves, and was on the face of it a contract between Evans as the vendor, and Pavy on behalf of the future company as vendee. Both Evans and Pavy were persons who had no interest in the property, and were the nominees of the syndicate, and remunerated by them for their trouble. In this contract the syndicate fixed their own price at which the future company was to buy, this price being in round numbers double what they had given for it some days before.

The articles of association were, therefore, so drawn by the solicitor for the syndicate that the syndicate had it in their power to select, and did select, the five persons, any two of whom were to become the acting agents of the company for the acceptance or rejection of this bargain, by which the syndicate were to obtain for the property double what they had given for it.

In exercising this selection they chose, first, two gentlemen of high standing, one of whom resided abroad, and the other was about to leave England forthwith for Canada, neither of whom would be expected to take part in the decision whether this bargain, advantageous as it was to the syndicate, was also advantageous to the company. Of the other three persons nominated, one (Evans) was a person residing in Paris, who acted in the matter at the desire of Baron Erlanger, and was remunerated by him with the gift of 100 paid-up shares in the company. Another, Admiral Macdonald, was a personal friend of Baron Erlanger, who offered the office of director to him as a pecuniary benefit and an entrance into business affairs; while the third, Sir Thomas Dakin, was the Lord Mayor of London, against whose capacity, honesty, and independence nothing can be said. Of the whole five, however, only two, Sir Thomas Dakin and Monsieur Drouyn de Lhuys, appear on Sept. 29, 1871, to have embarked their money in the company, and thereby obtained a bona fide and independent interest in the welfare of the company, such as professed to be secured by the provision in the articles of association that each director shall be the holder of at least fifty shares "in his own right."

The agents, then, who were to have the power of binding the company to the purchase in question having been thus selected by the syndicate, and the articles of association having been signed by seven persons, all of whom, it was admitted, were connected with Baron Erlanger or other members of the syndicate, the next step was to hold a meeting of the directors. This was done on Sept. 29, 1871. It was attended by Sir Thomas Dakin, Admiral Macdonald, and Evans. It was also attended by Mr. Westall, the solicitor of the syndicate, and himself (on his own part or that of his friends) a member of the syndicate. His interest in and services for the syndicate had been further secured by the promise of a special fee of £500. These three directors, without any inquiry into facts or figures, proceeded at once under the auspices of the vendor's solicitor, to adopt and ratify the proposed purchase of the island on behalf of the company which had been completely formed and registered only eight days previously, and became thereby bound to pay for the property double the sum which had been settled shortly before by the Vice-Chancellor as its true and marketable value.

Can a contract so obtained by allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions—first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and secondly, that this result was brought about by the conduct and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that, with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing, they used that power and opportunity for the furtherance of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were bound, according to the principles constantly acted upon in the courts of equity, if they wished to make a valid contract of sale to the company, to nominate independent directors, and fully disclose the material facts. The obligation rests upon them to show they have not made use of the position which they occupied to benefit themselves, but I find no proof in the present case that they have discharged that obligation. There is no proof that either Sir Thomas Dakin or Admiral Macdonald was aware of the price at which the property had just been bought under the authority of the Court of Chancery, nor indeed that they even knew that the real vendors were also the promoters of the company. There is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body, capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside. The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, which is strictly applicable to the present case. The relations of principal and agent—trustee and cestui que trust—parent and child—guardian and ward—priest and penitent—all furnish instances in which the courts of equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the courts have always cast upon him who holds that position the burden of showing that he has not used it to his own benefit. I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the Lord Chancellor, that if within a proper time after the completion of this purchase a bill had been filed by the company, the purchase must have been set aside.

The question remains whether the present bill has been filed with sufficient

promptitude for that purpose. On this question I do not think it easy, guiding myself by any decided cases, to come to a conclusion adverse to the company's claim. The nearest approach to a definition of the equitable doctrine upon this head, which is to be found among the cases cited, is the statement made in *Lindsay Petroleum Co.* v. *Hurd* (1) (L.R. 5 P.C. at pp. 239, 240). Delay is there said to be material

> "Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were to be afterwards asserted."

How far the company has brought itself by its conduct within either branch of this definition I will presently inquire, but I think it is clear that the company having, in the first instance, a right to relieve itself from this contract, which the promoters have unfairly fastened upon it, it is for the vendors to show affirmatively that the company has forfeited that right. The actual lapse of time before commencing the suit was not very great. Delay, as it seems to me, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things, that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay, and it is in many cases particularly applicable to property of a mining character. But delay must also imply acquiescence, and in this aspect it equally bars the respondent company's right, for such a contract as is now under consideration is only voidable, and not void. It conduces to clearness, and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief, to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case. And so dealing with the facts of the present case, I find myself unable to conclude affirmatively that it has been made out by the argument that either the character of the property, or the way in which the company had dealt with it, did in point of fact preclude the possibility of justice being worked out on the basis of the contract being rescinded. If the decree which has been made does not work out the justice of the case, it should have been pointed out in what respect it fails to do so, and either an amendment prayed, or the impossibility of such amendment clearly shown.

The substantial question, therefore, is whether there was such delay as fairly imports acquiescence. [His Lordship referred to the evidence.] The position of Mr. Evans, whose name appeared as vendor of the property in the contract made on behalf of the company, and also as one of the original directors who attended the meeting of Sept. 29, 1871, and affirmed that contract, was much commented upon in the course of the argument. It was said that Mr. Evans being thus both vendor and purchaser, the company had at once the right to set aside the contract. But this can hardly be so in all cases. It is a very common thing for individuals having an established business to get up a company which shall purchase their business of them, they taking part payment in paid-up shares of the company, and becoming original directors. In such cases it is often an inherent part of the scheme, in the interests of the company, that they who already understand the business should take a leading part on the board of directors which is to conduct that business in future; and if all is fair and open in the conduct of such persons, the fullest disclosures being made of all matters material to be known to the company, it would be difficult to maintain that the purchase which had been adopted by an adequate quorum of independent directors could be set aside merely because one of the directors, who was also a vendor,

had concurred in that adoption. In the present case there is nothing on the face of the contract with the company to indicate to the shareholders that Mr. Evans was not in a position something like that which I have just described. It might well be surmised by any shareholder who knew nothing of the real facts that he, either alone or in conjunction with others, had purchased the island, and had worked the phosphate of lime, previous to the sale to the company, of which he was to become a director, taking £30,000 of the purchase money in paid-up shares of the company; and his position, thus regarded, would hardly put any shareholder upon inquiry as to the company having been unfairly dealt with. On the whole I am unable to satisfy myself, either that it is not practicable to do justice on the basis of the contract being rescinded, or that the company has by any laches or delay laid itself fairly open to the imputation of having acquiesced in the contract which they now seek to set aside; and with some hesitation and much diffidence, after having been made aware of the opinion of my noble and learned friend on the Woolsack, I must advise your Lordships to reject this appeal.

LORD CAIRNS, L.C..—The appellants complain of a decree of the Court of Appeal which has set aside a sale made to the Sombrero company of the island of Sombrero, and ordered repayment and re-transfer by the appellants of large sums of money and shares which had passed to them from the company on the occasion of the sale.

His Lordship stated the facts, and continued: It is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have had in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision it shall start into existence and commence to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is in my opinion incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors who shall both be aware that the property which they are asked to buy is the property of the promoters, and shall be competent and impartial judges whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint-stock company and then sell his property to it, but I do say that, if he does, he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and are not left under the belief that the property belongs, not to the promoter, but to some other person.

If this is the position and duty of a promoter, I ask your Lordships in the next place to consider how far that duty was discharged by the promoters in the present case. The company was formed to purchase mines in the island of Sombrero, and the directors were armed specifically with the power of adopting the contract of Sept. 20, 1871. The promoters, in framing the constitution of the company, have themselves given us what they considered to be the proper measure of strength of a board of directors who were to be entrusted with the execution of this power. They were to be not less than four nor more than seven, and in point of fact five names were given as the first directors. They were at once to enter upon business, and the first duty they would have to perform would be to consider whether the contract should be adopted or not. How far then were they in a position to perform this duty? The first name was that of Monsieur Drouyn de Lhuys. It is not pretended that the idea was ever enter-

tained by the promoters that he either would or could take any part in the first great act of the directors, the adoption of the contract, or that he could attend any meeting for the purpose. Of the second director named, Mr. Eastwick, the same may be said. He was absent at a distance from England, and did not take his seat at the board till the end of December, 1871. The third director, Evans, was himself the vendor, and whether he was vendor as being beneficially interested in the property or as trustee for the syndicate, is, in my opinion, immaterial. There remained two directors only, Sir Thomas Dakin and Admiral Macdonald, and of these I will speak when I come to the first meeting of the directors.

The company was registered on Sept. 21, 1871, and the first meeting of directors took place on the 29th of that month. There were present of the directors Sir Thomas Dakin, Admiral Macdonald, and Evans. There was also present Mr. Westall, who had been appointed and was acting as solicitor for the company, but was himself one of the syndicate, although it is said that on the syndicate he merely represented certain other names not disclosed, and had himself no interest beyond the promise of a payment of £500. At this meeting a prospectus was produced, ready for issue to the public, stating that the contract for purchase had been made by the directors; and the first resolution proposed and carried, almost as a matter of course, was that the contract should be approved and confirmed. Neither Sir Thomas Dakin nor Admiral Macdonald have given evidence in the case, and it is difficult to say positively what they knew or what they inquired about that which they were professing to buy.

The conclusion at which I have arrived, from such materials as are before your Lordships, is that both Sir Thomas Dakin and Admiral Macdonald treated from the first the adoption of the contract as a foregone conclusion. But whether this was so or not, it was the duty of the promoters to take care that the contract for the purchase of their property was submitted to the intelligent consideration of a competent number of independent directors; and I cannot but regard a meeting at which two of the principal directors did not and could not attend—at which one who did attend, and take part in the deliberations, was at once a person buying and selling—where the legal adviser present and assisting was virtually another vendor, and where the two remaining directors are not shown to have had the means of exercising, or to have exercised, any intelligent judgment on the subject—as little else than a mockery and a delusion. I have said nothing as to the provision that two directors should be a quorum. That is a provision which, in my opinion, could not be held to remedy defects such as I have pointed out as going to the entire constitution of the board.

I cannot, therefore, entertain any doubt that, if within a proper time after the completion of this purchase a bill had been filed by the company, impeaching it on the grounds that I have stated, the purchase must have been set aside. The part of the case which, however, has given me the most anxiety is the question whether, having regard to what was made known at the time that the company was formed, and to what became known, and to what also might further have become known, shortly after it was formed, and having regard further to the very peculiar nature of the property which had been purchased, and to the impossibility of restoring the parties to their original position, relief can or ought now, consistently with the principles of equity, to be given to those who seek to impeach the contract. On this question I entertain considerable doubt, or more than doubt. [His Lordship examined the evidence, and concluded:] Under these circumstances, looking to the very peculiar nature of the property and the utter impossibility of restoring the property, and the commercial undertaking connected with it, to the vendors in the state in which it was when the company took possession of it, and looking to the amount of notice which the company had by the prospectus, and to the knowledge which they might have obtained by pursuing the inquiries which the prospectus ought to have suggested, I am

of opinion that it would be contrary to the principles of equity to give to the company the relief which at an earlier period they might have obtained.

LORD HATHERLEY.—After the view which has been so clearly expressed by my noble and learned friend, I certainly feel diffidence in coming to a conclusion contrary to that which he has adopted. In the present contention between the appellants and the company there were three several heads argued as to some of which every judge who has heard the case has been agreed.

In the first place, the company endeavoured to set aside this contract on the ground of the persons who sold the property having filled a fiduciary position as actual trustees for the company which was formed, and being disentitled to participate in any profit which could be made in the sale in consequence of that trusteeship. The court below, as well as all your Lordships, have been of opinion that they were in no such sense as that trustees for the company, but that the syndicate, which was formed for the original purchase of the mines, which they did purchase under arrangements made in the winding-up of the old company, were entitled to hold that purchase as a syndicate and to deal with it as they thought proper. Consequently, any authority derived from those cases which insist that no profit can be derived by a trustee out of that which is the property of his cestui que trust has no application to the present case, inasmuch as the syndicate never constituted themselves trustees, but intended to sell and did sell this property to the new company or association which was about to be formed, and for the purpose of making which sale they desired that the company should be formed, and took an interest in its formation. Secondly, it was urged in this case, and upon this point also the courts were agreed, that although the purchase so made was not liable to be interfered with on the ground that I have stated, as being a purchase made by persons who were trustees for the company, nevertheless it was liable, if due steps were taken at the proper time, to be impeached upon other grounds disclosed by the bill and sustained by the evidence. On that point my noble and learned friend who has just addressed the House has concurred in the view unanimously taken by the learned judges in the courts below, and I believe your Lordships are also unanimous on the point. The circumstances of this particular case are such that, if there was no delay and no laches in asserting the remedy, the remedy which the company seeks was open to them.

The question is, therefore, reduced simply to this point of delay, and, in considering it, I think it very important to see what the exact position of the parties was at the moment when the contract was entered into by the company. The courts of equity have at all times carefully abstained from attempting a nice definition of imposition with reference to the rights which the practice of such imposition may confer upon the parties injured by it. It is notorious that every mode that can well be conceived of dealing with contracts which ought not to be maintained in consequence of some deception which vitiates them has from time to time come before the consideration of the courts of equity, and there is scarcely any one which can be set on foot that is not struck at by the general doctrines of the courts of equity, although the precise circumstances of the case may have never yet come before the court. There are three particular classes of cases of what the court terms fraud, which may be pointed to as having some analogy with or some bearing upon the present case. The first is as between vendor and purchaser; the next is as between partner and co-partner; and the third is the case in which an agent for a purchaser receives a gratuity from a vendor. As to the first of these, a vendor need not do what was at one time asserted by this bill, namely, disclose what he has paid in effecting his own anterior purchase before asking an enhanced price from him to whom he seeks to sell the property; but he must not be guilty of any conduct which amounts to unfair concealment on his part of the real facts of the case, which ought in

common fairness to be disclosed to a person seeking to purchase or entering into a treaty with him for that purpose. As regards partners there is no doubt that one partner is bound to exercise uberrima fides with regard to any transactions in which the partners may be engaged in common. There is another class of cases well known in courts of equity which has some bearing upon the case before us, and that is where a person, acting as agent for a purchaser, receives a gratuity of some description from the intending vendor. In that case, again, the courts interfere, and say that a negotiation carried on between the agent for the purchaser, and the vendor as principal, in which the agent for the purchaser receives benefits or advantages of any kind from the intending vendor, is one which can be impeached, and which would be set aside in a court of equity.

[His Lordship examined in detail the evidence as to the purchase of the property, the re-sale to the company, the formation of the board of directors, and their first meeting, and concluded:] We have the company quite right, as appears to me, down to Oct. 23 with regard to the question of laches. The bill was filed on Dec. 24. I confess, that being so, considering the magnitude of the case and the difficulties there would be in the way of any rapid progress, the quantity of information that had to be obtained, and the action of the [shareholders'] committee in endeavouring to bring about a compromise, I do not see in that interval between Oct 23 and Dec. 24, filled up as it was in a great degree, although not wholly, with communications with Baron Erlanger, that amount of laches which would induce your Lordships to say that the right which, as every court and every judge before whom the case has come agrees, once clearly existed, was waived and lost in consequence of the neglect of the company to take steps in due time to free themselves from the contract. No doubt the case of a mine is one which we must look into with very great accuracy; and if once we saw the slightest appearance of mala fides, if we saw the slightest indication of wavering and indecision whether or not the remedy should be taken until they saw how the thing would turn out, that might be a very different matter. But although it is true that things were prosperous in February, that was not brought home to the minds of all the shareholders who were not present at that meeting. At the next meeting the appointment takes place of the committee of shareholders, obviously for the purpose of seeing what can be done to free themselves from the contract. Negotiations take place immediately after that, because the committee were recommended to see what could be done by negotiation; and after the failure of the negotiation there is no long or unreasonable time until the filing of the bill. I am satisfied that in this case the appeal ought to fail, and should be dismissed with costs.

LORD O'HAGAN.—All the facts material for our consideration, and all the questions raised upon them, have been so elaborately stated and discussed by my noble and learned friends that I shall only indicate, as briefly as possible, the conclusions at which I have arrived after anxious consideration.

The original purchase of the island of Sombrero was perfectly legitimate, and it was not less so because the object of the purchasers was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction. The law permitted them to take that course and provided the machinery by which the transfer of their interests might be equitably and beneficially effected for themselves and those with whom they meant to deal. But the privilege given them for promoting such a company for such an object involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future shareholders. The power to nominate a directorate is manifestly capable of great abuse, with very evil consequences to multitudes of people who have little capacity to guard themselves. It should be watched with jealousy, and restrained from employment in such a way as to mislead the ignorant, the unwise, or the

unwary. In all such cases the directorate nominated by the promoters should stand between them and the public, with such independence or intelligence that they may be expected to deal fairly, impartially, and with adequate knowledge, in the affairs submitted to their control. If they have not those qualities, they are unworthy of trust; they are the betrayers and not the guardians of the company they govern, and their acts should not receive the sanction of a court of justice.

For reasons given by my noble and learned friends, I think that the promoters in this case failed to remember the exigencies of their fiduciary position when they appointed directors who were in no way independent of themselves, and who did not sustain the interests of the company with ordinary care and intelligence. The majority seem to me to have represented simply the great financier to whom they owed their appointments. They were not independent directors dealing for the shareholders, with a single regard to their security and advantage. The value of the island was judicially ascertained to be £55,000; and a few days after, circumstances remaining wholly unchanged, a contract for the sale of it at £110,000 was ratified by three of the five directors, two of them being Mr. Evans and Admiral Macdonald, assisted by their solicitor, who was a member of the syndicate. Apparently, there was no inquiry as to the enormous advance in the price beyond that which the Vice-Chancellor had accepted, no consideration of the state of the property, and no intelligent estimate of its capabilities and prospects. If the directors were nominated merely to ratify any terms the promoters might dictate, they discharged their functions; if it was their duty, as it certainly was, to protect the shareholders, they never seem to have thought of doing it. Their conduct was precisely that which might have been anticipated from the character of their selection, and taking that conduct and character together, I concur in the unanimous opinion of your Lordships that such a transaction cannot be allowed to stand.

The promoters who so forgot their duty to the company they formed as to give it a directorate without independence of position, or vigilance and caution in caring for its interests, which were accordingly subordinated to their own, misused their power, and must take the consequences. This does not necessarily imply the imputation of evil purpose or conscious fraud, and I make no such imputation. The fiduciary obligation may be violated, though there may be no intention to do injustice. If the protection proper and needful for a person standing at disadvantage in relation to his guardian, or his solicitor, or a company so largely in the power of the promoters, be withheld, the guardian, the solicitor, or the promoter cannot sustain a transaction equitably invalidated by the want of it, merely because he is not impeachable with indirect or improper motives.

If for any of the reasons which have been given the purchase would have been set aside by a court of equity if a bill had been filed immediately after it was made, the remaining question is whether the respondents by their laches or acquiescence have deprived themselves of the right to a rescission? I cannot think so. No doubt there is force in the arguments which have been urged as to the peculiar nature of the property, the shortness of the lease, the deterioration of the value, and the consequent difficulty of replacing the parties on either side in statu quo ante. But, notwithstanding, I have seen no sufficient reason to hold that the lapse of fourteen months before the suit was instituted, under the peculiar circumstances of the case, disentitled the respondents to seek relief. [His Lordship referred to the evidence.] I am of opinion that the decree should be affirmed and the appeal dismissed with costs.

LORD SELBORNE stated the facts, and continued: By such an adoption of such a contract the company could not be bound in equity if, when the material facts became known to the shareholders, they sought to be relieved from it within a reasonable time; nor could the nature of the property (a lease of minerals for years, of speculative value) make any difference in this respect. It was the act

of the vendors to put their property, being of that character, in such a position; and, unless some equity arises against the company from some conduct or omission of their own, the vendors must take the consequences of that act. The company were put into possession of the property as a going concern; they took over the manager, and all the other agents whom they found upon it, and did not alter or interfere with the course of management until they found that the manager was not doing his duty properly, when they promptly did what was right, and appointed a new, and a fit, person to succeed him. There has, therefore, been nothing done, or left undone, to the injury of the property, since it came into the company's hands, which can now stand in the way of the company's right to relief, unless they have precluded themselves from it by acquiescence, and the relief given by the decree is such as, under these circumstances, is proper and usual, and is granted upon the usual equitable conditions.

With respect to the question of acquiescence, HIS LORDSHIP said, two things were generally necessary—first, that there should have been sufficient knowledge of the facts on which the equity depended, and, secondly (when a contract was sought to be rescinded), that there should have been substantial freedom of choice and action, independent of the original influence under which the voidable contract was made. On consideration of the evidence he could not impute any acquiescence, which would make it inequitable to rescind the contract. The decision of the Court of Appeal in Chancery was correct, and ought to be affirmed.

LORD BLACKBURN.—In this suit the plaintiff is a limited company incorporated under the provisions of the Companies Act, 1862, and, suing as such, they can only ask for relief on grounds affecting them in their corporate capacity. If individuals were deceived by misrepresentations, a case might exist entitling such individuals to be personally relieved against the consequences of such misrepresentations, but the company would not have any title to be relieved on account of such misrepresentations to individuals, especially if the misrepresentations were made by those who at the time represented the company. All this is clearly stated by LORD COTTENHAM in *Vigers* v. *Pike* (2) (8 Cl. & Fin. at p. 647). But inasmuch as a corporation acts by individuals who have the proper authority to manage their affairs, and by those who are duly appointed by that governing body to act as agents for the company, it may well happen that proof that the defendants have deceived the individuals who form the governing body, or the agents appointed by them, is proof that they have deceived the corporation, and gives the corporation a substantive title to relief. And it may happen that the defendants have corrupted or unduly influenced the governing body without deceiving them, so as to get the corporation to make a contract from which the corporation, on proving such corruption or undue influence, has a right to relief. This again is stated by LORD COTTENHAM in *Vigers* v. *Pike* (2) (ibid. at p. 648).

I own it seems to me that, as soon as these distinctions are stated, they appear to be obviously right, and if they had been borne in mind, a good deal of the argument in this case might have been spared. But I think that though representations made by the governing body of the company and the defendants in concert, or by the defendants alone, with intent to deceive individuals, do not afford any substantive ground for relief to the company, it by no means follows that the statement of such representations in a bill by the company is necessarily impertinent. It may be that such representations may be so made as to afford strong evidence that the defendants had either deceived or corrupted that governing body, and so obtained the contract against which the company seek to be relieved, and so tend to prove what, if established, would be a ground for relief to the company. In the present case the suit was commenced by a bill filed on Dec. 24, 1872. [HIS LORDSHIP went through the history of the case before MALINS, V.-C., and the Court of Appeal, and continued:] The Court of Appeal said that the syndicate might lawfully sell to a stranger without telling him

anything further than that they had the island for sale, and that £110,000 was the price at which it suited them to sell, leaving it to the purchaser to find out for himself whether it suited him to buy at that price, and that, though no doubt the fact that they had a few days before bought for £55,000 would, if known to that purchaser, make him inquire much more before he came to the conclusion that it was worth £110,000, there was no legal or equitable obligation on the vendors to disclose that fact. They further said that when the vendors promoted and formed a company for the purpose of purchasing at that price, they were not entitled to treat that company as a stranger, but that as promoters of a company they stood in a fiduciary position towards the company they were creating, and that the bargain between the promoters and that company could not stand unless more was done for the purpose of protecting the interest of that company than was done in this case. It seems to me that the bill does sufficiently allege such a case, and the first question which I think has to be considered is whether enough is proved in fact to make a case good in law under which, if the company had come promptly, they would have been entitled to the relief given by the decree appealed against.

The Court of Appeal were also of opinion that the defendants' plea of laches was not made out, and that under all the circumstances the court could do complete justice by rescinding the contract. The second question is whether the facts proved are such as to justify this decision. The decision is of very great importance to the parties from the largeness of the sums involved, but I think it is of even more importance to the public from the great general importance of the principles which must be considered, and to some extent at least decided, in answering those questions.

I proceed to consider the first of those questions. Throughout the Companies Act, 1862 [repealed], the word "promoters" is not anywhere used. [The term appears in s. 43 and other sections of the Companies Act, 1948 (dealing with liability for mis-statements in a prospectus).] It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company. Neither does this Act in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select having powers such as they choose to give those managers, so that the promoters can create a corporation such that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. Consequently, they do stand with regard to that corporation, when formed, in what is commonly called a fiduciary relation to some extent.

Some reference was made in the argument to the Companies Act, 1867 [repealed], s. 38, on the construction of which there has been a great diversity of judicial opinion. That section does contain the word "promoters," which, as I have already observed, is not to be found in the Companies Act, 1862, but it imposes no fresh duty on them with regard to the company. It imposes a fresh duty towards, and gives a new cause of action to, persons who take shares in the company as individuals; it does not affect the obligation of the promoters towards the corporation. The extent of that fiduciary relation, which, in my opinion, the promoters bear to the company, is a very important consideration in construing that section; and I am desirous of avoiding prejudging that question

by saying in this case more than is necessary for its decision. Where, as in the present case, the company is formed for the purpose of becoming purchasers from the promoters as vendors, the interests of the promoters and of the company clash. It is the vendors' interest to get as high a price as possible, and they have a strong bias to over-value the property which they are selling; it is the purchasers' interest to give as low a price as possible, and to secure that the price actually given is not more than the property is really worth to them.

Lord Eldon, in *Gibson* v. *Jeyes* (3) (6 Ves. at p. 278), says that

> "it is a great rule of the court that he who bargains in matters of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence—a rule applying to trustees, attorneys, or any one else."

I think persons having property to sell may form a company for the purpose of buying it in such a manner as to show this, and when they do so the sale will be unimpeachable. I shall inquire what on the evidence appears to have been done in this case, and then confine myself to saying whether, on the facts of this particular case, it appears that an unreasonable use has been made of that confidence, which the company did not indeed place in the promoters, for the company did not then exist, but which the legislature did place in them for the company when it gave the promoters power to create it.

All who were concerned in this purchase must have known that the phosphate in the island could hardly practically be worked except through the medium of a company, and though it was possible that they might find persons willing to purchase their bargain on behalf of a company to be formed by those persons, without any intervention of the syndicate in its formation, they must, I think, have known that it was most likely that they would have to form, or at least to take part in forming, that company themselves, and as early as Sept. 5 Westall began to take steps to form that company. Up to this time I see nothing illegal or inequitable in what was done; but I think, and submit to your Lordships, that Westall and Evans, though having no share in the profit and loss of the syndicate, had so connected themselves with it as to be quite as incapable of giving a disinterested protection to the interests of the Company as if they had been beneficially interested in the syndicate.

I have felt much doubt and difficulty as to the second question, though on the whole I think the plaintiffs have not lost their remedy. The point on which I have difficulty, and to which I shall confine my remarks, is whether laches and acquiescence is made out to such an extent as to deprive the company of the remedy by rescission which they had if they had come promptly. Some things are to my mind clear. The contract was not void, but only voidable at the election of the company. In *Clough* v. *London and North Western Rail. Co.* (4), in the judgment of the Exchequer Chamber, it is said (L.R. 7 Exch. at pp. 34, 35):

> "We agree that the contract continues valid till the party defrauded has determined his election by avoiding it. . . . In such cases [i.e. of fraud] the question is: Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that, so long as he has made no election, he retains the right to determine it either way, subject to this, that if, in the interval, while he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind."

It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a restitutio in integrum. The parties must be put in

in statu quo: see per LORD CRANWORTH in *Western Bank of Scotland* v. *Addie* (5) (L.R. 1 Sc. & Div. at p. 165).

It is a doctrine which has often been acted upon both at law and in equity. But there is a considerable difference in the mode in which it is applied in courts of law and equity, owing to the difference of the machinery which the courts have at command. It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, which, though not destroyed, has been in the interval deteriorated, and without making any compensation for that deterioration. But as a court of law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property, and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke* v. *Dickson* (6), and the cases there cited. But a court of equity could not give damages, and unless it can rescind the contract can give no relief. On the other hand, it can take accounts of profits and make allowances for deterioration, and I think the practice has always been for a court of equity to give this relief whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. A court of equity requires that those who come to it to ask its active interposition to give them relief should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by, and any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party in mora than a similar change before he was in mora should do.

In *Lindsay Petroleum Co.* v. *Hurd* (1) it is said (L.R. 5 P.C. at pp. 239, 240):

> "The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case of an argument against relief, which otherwise would be just if founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must, therefore, be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry. [HIS LORDSHIP considered the evidence and concluded that the company were not guilty of laches which would disentitle them to judgment.]

LORD GORDON.—I have no doubt that the syndicate, which was formed for the purchase of the interest of the Old Sombrero Co. in the island in question,

and by which the rights of the old company were purchased, acquired the property for its own behoof, and not in trust for the company which was afterwards formed. The property when purchased belonged absolutely to the members of the syndicate, who were entitled to deal with it in any way they thought proper. Having acquired the property, they resolved to form a company for the working of the produce of the island, and to make over their purchase to that company. They became promoters of the company, and prepared the necessary documents for its formation, and issued a prospectus to the public with the view of inducing the public to take up its shares. In doing this the syndicate changed the position it originally held, and put itself in a fiduciary relation to the company which it was engaged in forming. It thus became incumbent on the promoters, not only to make a full disclosure of the position they as owners of the property which they proposed to sell to the company held in regard to that property, but also to make arrangements, by the appointment of competent officials and otherwise, for enabling the company to form an independent judgment as to the propriety of purchasing the property of the promoters, and of the value of that property, and the price to be paid for it. I agree with your Lordships in thinking that the promoters failed in their duty in this respect, and that the company was not put in a position for forming an intelligent and independent judgment as to the contract between the promoters and the company, and that if the contract had been challenged by the company in proper time it might have been set aside.

The only questions of difficulty in this case are whether the contract has been challenged in due time or whether there has been such laches on the part of the company so as to prevent their now demanding the rescission of the contract, and whether the terms on which the Court of Appeal has set aside the contract are fair and equitable. After very careful consideration, I am of opinion that the company has not lost its right of challenge. The onus lay on the appellants of showing that there had been such laches on the part of the company as to deprive it of the right to set aside the contract. I think that the appellants have failed to show that there has been such laches on the part of the company. Therefore, I am of opinion that the judgment appealed against is right, and should be affirmed.

Appeal dismissed.

Solicitors : *Bischoff, Bompas & Bischoff; John Holmes.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

MORDAUNT *v.* MONCRIEFFE

[House of Lords (Lord Chelmsford, Lord Hatherley and Lord Colonsay (a)), July 1, 1873, May 15, June 22, 1874]

[Reported L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 23 W.R. 12]

Divorce—Insanity—Respondent of unsound mind—Divorce sought on ground of adultery—Competency of proceedings.

Proceedings for the dissolution of a marriage on the ground of adultery can be instituted and proceeded with against a respondent who, before the proceedings were instituted, became incurably of unsound mind.

Bawden v. *Bawden* (1) (1862), 2 Sw. & Tr. 417, not approved.

Divorce—Suit—Not criminal proceeding—Decree sought on ground of adultery.

Per Lord Hatherley: A suit for divorce on the ground of adultery is not a criminal proceeding.

Notes. A person of unsound mind may commence and prosecute any matrimonial cause by his next friend: see Matrimonial Causes Rules, 1957, r. 66, substituted by the Matrimonial Causes (Amendment) (No. 2) Rules, 1960, S.I. 1960, No. 1261. By s. 1 (1) (d) of the Matrimonial Causes Act, 1950, a petition for divorce may be presented on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for at least five years immediately preceding the presentation of the petition. The present case renders a mental patient liable to be proceeded against on the other grounds set out in s. 1, and so would apply where the requirements of para. (d) could not be fulfilled.

Considered: *Baker* v. *Baker* (1880), 5 P.D. 142; *Redfern* v. *Redfern*, [1886-90] All E.R. Rep. 524; *Apted* v. *Apted and Bliss*, [1930] P. 246. Referred to: *Branford* v. *Branford* (1878), 4 P. & D. 72; *Giles* v. *Giles* (1899), 69 L.J.P. 26; *Tilley* v. *Tilley*, [1948] 2 All E.R. 1113; *Davis* v. *Davis*, [1950] 1 All E.R. 40; *Gower* v. *Gower*, [1950] 1 All E.R. 804; *Preston-Jones* v. *Preston-Jones*, [1951] 1 All E.R. 124; *Galler* v. *Galler*, [1954] 1 All E.R. 536; *Haywood* v. *Haywood*, [1961] 1 All E.R. 236; *Ross Smith* v. *Ross Smith* (*otherwise Radford*), [1962] 1 All E.R. 344.

As to divorce proceedings against an insane respondent, see 12 Halsbury's Laws (3rd Edn.) 292, 293; and for cases see 27 Digest (Repl.) 374. For the Matrimonial Causes Act, 1950, see 29 Halsbury's Statutes (2nd Edn.) 388.

Cases referred to:

(1) *Bawden* v. *Bawden* (1862), 2 Sw. & Tr. 417; 31 L.J.P.M. & A. 94; 6 L.T. 27; 8 Jur.N.S. 157; 10 W.R. 292; 164 E.R. 1057; 27 Digest (Repl.) 374, *3085*.

(2) *Countess of Portsmouth* v. *Earl of Portsmouth* (1828), 1 Hag. Ecc. 355; 162 E.R. 611; 27 Digest (Repl.) 39, *158*.

Also referred to in argument:

Hancock v. *Peaty* (1867), L.R. 1 P. & D. 335; 36 L.J.P. & M. 57; 16 L.T. 182; 15 W.R. 719; 27 Digest (Repl.) 577, *5355*.

Barham v. *Barham* (1789), 1 Hag. Con. 5; 1 Phillim. 184, n.; 161 E.R. 455; 19 Digest (Repl.) 350, *1401*.

Beauraine v. *Beauraine* (1808), 1 Hag. Con. 498; 161 E.R. 630; 27 Digest (Repl.) 457, *3919*.

Parnell v. *Parnell* (1814), 2 Hag. Con. 169; 2 Phillim. 158; 161 E.R. 704; 27 Digest (Repl.) 457, *3925*.

Woodgate v. *Taylor* (1861), 2 Sw. & Tr. 512; 30 L.J.P.M. & A. 197; 5 L.T. 119; 164 E.R. 1095; 27 Digest (Repl.) 457, *3927*.

Galizard v. *Rigault* (1702), Holt, K.B. 597.

a) Lord Colonsay was also present during the argument, but died before the House delivered their opinions.

Appeal by the petitioner in a divorce suit from a decision of the Full Court affirming an order of LORD PENZANCE, J.O., staying the proceedings on the ground of the insanity of the respondent.

In April, 1869, the appellant, Sir Charles Mordaunt, presented a petition to the Court for Divorce and Matrimonial Causes praying for a dissolution of his marriage on the ground of his wife's adultery. In May, 1869, an application was made on her behalf to stay the proceedings on the ground that she was not of sound mind, and was consequently unable to give instructions for her defence. In July, 1869, an order was made by LORD PENZANCE, J.O., that the respondent, Sir Thomas Moncrieffe, should appear as her guardian ad litem for the purpose of raising the question. In Feb. 1870, the case was heard before the Judge Ordinary and a special jury, who found "that on the day of the service of the citation Lady Mordaunt was in such a state of mental disorder as to be totally unfit and unable to answer the petition and duly to instruct her attorney for her defence, and that she has been ever since, and still is, unfit." An order was thereupon made to stay proceedings in the suit until she should recover her mental capacity, and on June 2, 1870, this order was affirmed upon an appeal to the Full Court (LORD PENZANCE, J.O., KELLY, C.B., and KEATING, J., KELLY, C.B., dissenting: L. R. 2 P. & D. 109). From this decision Sir Charles Mordaunt brought the present appeal. The judges were summoned, and KELLY, C.B., MARTIN and POLLOCK, BB., KEATING, BRETT and DENMAN, JJ., attended.

Sir George Jessel, Q.C., Serjeant *Ballantine*, *Dr. Spinks, Q.C.*, and *Inderwick* for the appellant.

Dr. Deane, Q.C., *H. Giffard, Q.C.*, and *Searle* for the respondent.

At the conclusion of the arguments their Lordships put the following question of law to the judges: Whether under the Matrimonial Causes Act, 1857, proceedings for the dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or wife who, before the proceedings were instituted, has become incurably lunatic? On May 15, 1874, the learned judges delivered their opinions, KELLY, C.B., POLLOCK, B., and DENMAN, J., answering the question in the affirmative, BRETT, J., in the negative, and KEATING, J., expressing the view that proceedings might be instituted, but not continued, against a lunatic duly found. MARTIN, B., retired from the Bench before the judges delivered their opinions, but KELLY, C.B., in conformity with the practice in that behalf informed the House that MARTIN, B., agreed that the question should be answered in the affirmative.

Their Lordships took time for consideration.

June 22, 1874. The following opinions were read.

LORD CHELMSFORD.—It is very much to be regretted that this question, which is of such painful interest and which so nearly concerns the most important and intimate domestic relation, should have led to a difference of opinion not only in the court below, but also among the learned judges who were summoned to assist your Lordships upon the hearing of the appeal. I cannot forbear also to lament the loss of my noble and learned friend LORD COLONSAY, who was present during the argument at your Lordships' Bar, and whose long judicial experience and sound judgment would have greatly aided us in our deliberations and added weight to our decision.

The question your Lordships are called upon to determine is one which in the particular case, whichever way it is decided, necessarily involves the most painful consequences, and your decision will establish for the future whether any effect upon suits to be instituted for the dissolution of marriage for adultery is produced by the circumstance of the alleged guilty party having afterwards

unhappily been visited with incurable lunacy. In considering this question, it is almost impossible to repress the feeling which arises upon a view of the evils which must attend a decision either way, or to restrain the mind from receiving a bias from such extraneous considerations. They can only be effectually resisted by keeping steadily in view that the solution of the question submitted by your Lordships to the judges—Whether, under the Matrimonial Causes Act, 1857, proceedings for the dissolution of a marriage can be instituted or proceeded with either on behalf of or against a husband or wife who, before the proceedings were instituted, had become incurably lunatic—depends solely and entirely on the construction of the statute. In confining our attention strictly and exclusively to the Act, it becomes unnecessary to consider (as some of the learned judges have done) whether proceedings for a divorce are of a civil or criminal or quasi criminal nature. No aid to its construction can be obtained by determining the exact character of the proceedings, nor from analogies derived from considerations applicable to cases of these different descriptions respectively. It is only necessary to bear in mind that the Act gives a right, not previously existing, to obtain the dissolution of a marriage for adultery by a decree of the newly created court of law, and from its provisions alone we must learn the conditions upon which the jurisdiction is to be exercised.

In construing the Act it would not be correct to argue, from the seeming hardship of instituting or continuing a suit for a divorce against a lunatic, that it cannot be supposed that the legislature could have intended to allow a petition to be presented in such a case. This would not be construction, but conjecture. To sustain an objection to such a suit it must be shown, not that the Act contains in it nothing to sanction the proceedings, but that by express words or necessary implication it prohibits them. Brett, J., in the opinion which he delivered to your Lordships, stated that the incapability of making a defence which arises from the lunacy of the respondent creates an invincible impediment to a proceeding under the Act. He said:

> "It seems to me that the reciprocity of charge and countercharge is made so necessary a part of the procedure that the Court of Divorce cannot pronounce a decree where that procedure cannot be carried out."

I confess that I do not quite comprehend this proposition, which is expressed in the most general and unqualified terms. If in cases where there is a countercharge, and the party who would have preferred and proved it is incapacitated from doing so by unsoundness of mind, the procedure of charge and countercharge cannot be carried out, must it, therefore, follow that in every petition against a lunatic, without any exception, even in cases where there is no ground for any countercharge, the mere existence of a right under the Act to make one must have the effect of preventing a decree being pronounced? And even where there exist grounds for a countercharge, why should it be assumed by the learned judge that in all cases the lunacy of the respondent would prevent the procedure being carried out? The incapacity of the respondent may occasion the loss of an important witness, but it is very possible that the countercharge may be capable of being established by other evidence. It might have been reasonable and proper for the legislature to have protected a lunatic in every case from the institution of proceedings for a divorce, but this does not warrant the conclusion that it has done so.

Great stress has been laid on the judgment of Sir Cresswell Cresswell in *Bawden* v. *Bawden* (1), and on that of Lord Penzance in the present case, as proceeding from judges of the highest authority, and more particularly conversant with the procedure of the Divorce Court. But, as the question before your Lordships depends entirely upon a judicial construction of an Act of Parliament, the judgment of those eminent judges cannot derive any particular advantage from their experience of the practice in that court.

Turning, then, to the Act as the only guide to a determination of the question raised by the appeal, I proceed to consider whether there is anything to be found in it which can warrant the court dismissing summarily a petition for a divorce, which is regular in every respect both in form and in substance, upon the ground that the respondent may be disabled from fully meeting the charge of adultery, or of encountering it by the best evidence of a countercharge by reason of her state of incurable lunacy. By s. 27 of the Act [now Matrimonial Causes Act, 1950, s. 1 (1) (a)], a husband is empowered to present a petition to the court for the dissolution of his marriage on the ground of his wife's adultery, stating in his petition the facts on which his claim to have the marriage dissolved is founded. And by s. 29 [s. 4 of 1950 Act], the court is to satisfy itself, so far as it reasonably can, as to the facts alleged, and whether the petitioner has connived at or condoned the adultery, and also to inquire into any countercharge which may be made against the petitioner. By s. 31 [s. 4 of 1950 Act], the petitioner is absolutely entitled to a decree (the words being, "the court shall pronounce a decree declaring such marriage to be dissolved"), unless any of the acts mentioned in the proviso are proved against him. By this proviso the court is relieved from the obligation of pronouncing a decree (the words are, "shall not be bound to pronounce such decree"), if it find that the petitioner has been guilty of adultery or has been guilty of unreasonable delay in presenting or prosecuting his petition, or of cruelty towards the other party, or of having deserted or wilfully separated from the other party without reasonable excuse before the adultery, or of such wilful neglect or misconduct as has conduced to the adultery. These are the only grounds upon which by the Act the court is not bound to pronounce a decree, and from the wording of the proviso it must be taken that, if none of the specified acts are proved against the petitioner, he is absolutely entitled to a decree.

But to these the decree appealed from has virtually added these words: "The court shall not be bound to pronounce such decree if the respondent has become incurably lunatic before the suit was instituted." It may undoubtedly be a great hardship and misfortune that a person accused of adultery should be unable to defend himself or herself by his or her own testimony, or to prove matters of recriminatory defence which may be peculiarly within his or her knowledge, although there must be very few of the countercharges specified in the Act in which other evidence would not generally be capable of being produced. It is enough, however, to say that the legislature has not thought proper to provide for such a case. Either the possibility of its occurrence did not suggest itself to the framers of the Act, and so no provision was made for it, or, if it did, they did not consider that it ought to be a ground for staying the proceedings. What the legislature has not expressly enacted the judges ought not to presume that it intended, and upon that presumption to add an implied ground for the dismissal of a petition to those expressed in the Act.

After the most anxious and careful consideration, and with no other doubt than that which has been occasioned by the opinions of the learned judges which are opposed to mine, I think that there is nothing in the Act of Parliament to prevent proceedings for the dissolution of a marriage for adultery being instituted or proceeded with, where the party proceeded against has before the institution of the proceedings become incurably lunatic. The alternative question submitted to the judges, whether proceedings for the dissolution of a marriage can be instituted on behalf of a lunatic husband or wife, is unnecessary to be determined; and as it involves considerations very different from those which apply to the case where the respondent is a lunatic, and as there may be conditions annexed by the Act to the presenting a petition for a divorce with which a lunatic may be unable to comply, I should not like to express any

opinion without hearing a fuller argument upon the question than was necessary upon the hearing of this appeal [as to present law see note, ante p. 288]. I think that the decree appealed from should be reversed and that the case should be remitted to the Court of Divorce and Matrimonial Causes, with directions to restore the petition presented by Sir Charles Mordaunt, to hear and determine the matters of the said petition, and to pronounce a decree upon the same.

LORD HATHERLEY.—This very painful case has occasioned much diversity of opinion on the part of the learned judges by whom it was originally decided, and also on the part of those whose advice and assistance your Lordships have requested, in order the better to enable the House to arrive at a sound conclusion. This conflict of opinion is not surprising, seeing that the court whose jurisdiction and procedure are in question was created only a few years ago, and that until that time the dissolution of the marriage union was unknown to our law, and could be effected only by special legislation in each case.

The question immediately before us is this: Can a husband prosecute a suit in the Divorce Court created by the Matrimonial Causes Act, 1857, after it has been ascertained in the progress of the suit, and in this case before any answer put in, that the principal respondent, his wife, is afflicted with incurable insanity, and that such insanity existed before the institution of the suit and has continued to the period when the discussion of the question arose? It is important to state clearly the exact question, which resolves itself simply into one of jurisdiction—namely, whether the court constituted by the Act of 1857 has jurisdiction to try the question raised by the petition of the husband, as between him and his wife, the wife being insane. Other questions might be raised if the trial had taken place and the adultery of the wife had been proved before she was deprived of reason; but it appears to me that any argument in support of the present appeal founded upon the assumed adultery of the respondent is out of place, the preliminary question being whether any trial of that fact can, under the circumstances, be had in the Divorce Court. [His Lordship stated the facts.] I cannot consider the point now raised to be one free from difficulty. I do not, however, feel such a degree of doubt as would justify me in suggesting to your Lordships a further argument in this already painfully protracted case.

It is agreed by all the parties to this appeal, and by those who have had judicially to investigate the point before us, that it must be determined by the construction of the statute which created the new jurisdiction, for the tribunal itself, and this particular portion of its jurisdiction, are entirely new. Marriage was indissoluble except by death until the passing of the Act before us. It is true that the legislature had for a long period before the passing of that Act passed special Acts, expressed to be on the petition of the injured husband, or (in rarer cases) of the wife; and it was usually expressed that the sovereign, compassionating the condition of the petitioner, had assented to the special Act by which the tie was dissolved on proof of adultery and subject to certain conditions and provisos with reference to the property of the parties, but each Act of Parliament was passed on full examination of all the circumstances and the special merits of the case. In consequence of the report of a Royal Commission the legislature was induced to pass the Act of 1857 constituting a court to which all matrimonial causes were transferred from the ecclesiastical courts, and in addition a husband, and (in certain cases) a wife, might have a readier and cheaper remedy by petition in respect of the dissolution of marriage on the ground of the adultery of the respondent than could be had in Parliament. The court was constituted as follows. The Lord Chancellor, the three Chiefs and the three senior puisne judges of the three Common Law Courts, and the Judge of the Court of Probate (to be called the Ordinary), were made the judges.

[HIS LORDSHIP referred to s. 10, s. 22, s. 29, s. 42, s. 46, s. 47, s. 52, s. 53, of the Act of 1857 and the Matrimonial Causes Act, 1860, and contd.:] I have enumerated these various enactments, because I find it difficult to concur in that part of the very able opinion of BRETT, J., in which he holds that there is an omission to arm the court with powers sufficient to reach the present case. I apprehend that a new court established as a "court of record," with power to "hear and determine" the matters referred to it, and armed also with all the powers and authorities enacted in the Act of 1857, of examining witnesses, directing issues, and enforcing its orders, must be taken to have full jurisdiction over all the subjects of the Queen within the realm without distinction, and that any exception from such jurisdiction must either be found in express words contained in the Act, or inferred by way of clear deduction from some of its provisions or omissions. It is for this reason that great stress has been laid in the court below, as well as in some of the opinions delivered in your Lordships' House, on the supposed incompatibility of the enactments with the supposition of any principal respondent, or, indeed, any petitioner, being a lunatic, or a person incapable from insanity of acting on his or her own behalf. Section 41, for instance, is pointed out as regards the petitioner, which requires him or her to verify the petition by affidavit. But be observed that this section applies to petitions in suits for nullity, judicial separation, or jactitation of marriage, as much as to those for divorce a vinculo. Suits for nullity, judicial separation, and jactitation of marriage, had long been cognisable in the ecclesiastical courts; and suits for nullity, as in *Countess of Portsmouth* v. *Earl of Portsmouth* (2), often proceeded on the insanity of the applicant for a decree. All these are now transferred to the new court, and are directed by s. 22 of the Act to be conducted as heretofore with regard to procedure, and s. 41 cannot be taken to have stayed such suits from proceeding, by the simple fact of requiring an affidavit, which, in the *Portsmouth Case* (2), for instance, could not have been made.

Then it is said that s. 29 [s. 4 of 1950 Act] directs the court to inquire as to connivance or condonation, and also into countercharges against the petitioner, and by the following section the court is required, on proof of connivance, condonation, or collusion in the suit, to dismiss the petition. Much stress has been laid upon these directions, and it is said that the inquiry into such matters cannot properly be conducted where one of the persons best informed upon them is incapable of understanding or answering any question. I think that these observations may be justly made as pointing out the hardship and risk of injustice when proceedings are carried on against a person of unsound mind; but such hardship or risk of injustice might equally occur by the absence, or death, or lunacy of a witness; and these conditions do not lead to the necessary inference that lunatics are not within the purview of the Act. Power is expressly given to the court to proceed, even after dispensing with service of the petition on the respondent: s. 42 [see now Matrimonial Causes Rules, 1957, r. 9 (5)], and though one of the learned judges in the court below remarks that the court would in that case have been satisfied, doubtless, that the party was in some way cognisant of the petition, yet the objection would remain that the court would not obtain the information in his or her absence which the objection I am observing upon supposes to be essential.

It is said that neither the Act nor the Rules (which have legislative authority) provide for the conduct of suits either by or against lunatics, although provision is made for the guardianship ad litem of minors. But I conceive that every civil court that has power to "hear and determine" and to make rules for its procedure has necessarily power to appoint guardians for persons incapable of defending suits on their own behalf, and that the inference does not arise that a lunatic is excluded from the Act because no special reference is made as to his or her mode of defence. In the suits previously conducted in the ecclesiastical

courts, and in all other courts exercising a civil jurisdiction, a power has been held, incident to the existence of the court, of proceeding against defendants or respondents of unsound mind, and as a consequence a power of appointing a guardian ad litem to defend them or to proceed in their behalf. This new court, then, constituted as a court of record to hear and determine upon a new class of rights, must, I apprehend, have all the same powers with reference to procedure, that any other court possessing civil jurisdiction can exercise, unless by the Act it is forbidden to exercise them. By s. 22 of the Act of 1857, for instance, the cases of divorce a vinculo are expressly excepted from the procedure of the ecclesiastical courts. This is an exclusion in the particular case of a mode of procedure not satisfactory to the legislature in that case, but can it be said that any other procedure is excluded? The wide terms of s. 29 [s. 4 (1), (2) of 1950 Act] directing the court to satisfy itself, "so far as it reasonably can," upon the several matters of the petition, and the collateral inquiries directed by the Act must, in my opinion, be held to authorise every mode of conducting a suit incident to a court having judicial authority to determine it, and not forbidden by the Act. The appointing of a guardian ad litem to an insane defendant appears to me to be a power necessarily incident to the inquiry positively ordered by the Act.

Much has been said, both in the court below, and before your Lordships, as to the analogy of the suit for a divorce to a criminal proceeding, and it has been inferred that, inasmuch as every step in the proceedings against a criminal is arrested by his or her becoming lunatic, so by parity of reasoning lunacy should bar all procedure against a respondent in a divorce case. But the procedure in a divorce is not a criminal procedure. It is true that the consequences of a divorce may be far more severe than those in any merely civil suit, but it is consequentially only that this result takes place. The divorce Bills in Parliament were not Bills of pains and penalties. They proceeded on the ground of relieving the petitioner for the Bill from his unhappy position, that of indissoluble union with one who had herself, as far as was in her power, broken the marriage tie. The remedy applied was simply dissolution of the tie. No ordinary divorce Act punished the adulterous party personally, or inflicted any pecuniary penalty. They usually, indeed, debarred the woman of dower and thirds, but that consequentially because she ceased to be the wife; and on the same grounds they usually required the husband to give up his marital rights in the wife's property. The new court was instituted to administer the same relief in the same manner. The co-respondent—that is, the person charged with adulterous intercourse with the wife—is indeed subjected to what is in effect a fine, but even that is given in the character of damages.

In those cases of civil injuries which, as in cases of libel, might also be the subject of indictment, the civil court is not on that account stayed in its proceedings on an action against a lunatic. The Judge Ordinary justly observes that a divorce Bill was treated by the House of Lords

> "rather as a matter of general morals, as laying the foundation for a measure of grace, than a mere investigation of delinquency drawing after it an absolute right to redress. The entire conduct of the husband was submitted to review; the complaints and excuses of the wife, however guilty, were entertained, and the Bill, which passed only if the case were in all respects meritorious, was liable to be defeated in the last stage if the husband failed to restore an adequate part of the fortune, if any, that his wife had brought to him."

This is a correct description of the procedure by a Bill in Parliament, and it is evidently not a penal procedure, but a procedure for the necessary adjustment of the civil rights of the parties consequent on an alteration of their status. But it is stated that the change of status is in itself penal. No doubt the con-

sequences of the change are in most cases very severe. In many others the dissolution of the one marriage is immediately succeeded by the marriage of the divorced wife with the adulterer. But, however this may be, the divorce Act did not proceed penally.

The whole of the new procedure seems to me to be constructed on the principle of passing over to the new court all the powers of procedure formerly exercised by Parliament in the matter. If we look to the character of the court, and of the high functionaries who constitute it, the reference to the execution of its orders and decrees, which is to follow the course of the Court of Chancery, the direction that suits may proceed without even service of the petition if the court shall so direct, the power of examining the parties—every enactment indicates an analogy to civil and not criminal process. The Court of Chancery, of course, has no difficulty in enforcing its orders against lunatics, and the orders of the Divorce Court are to be enforced in like manner.

I have purposely abstained, up to this point, from considering the question of hardship. Such a question can only arise in case your Lordships should be of opinion that hardship and injustice would be inflicted to such an extent by construing the Act as affecting lunatics, that Parliament cannot be conceived to have intended to include them within the jurisdiction of the new court; and it may be said that Parliament may more reasonably be taken to have reserved to itself the power of dealing with so special a case as that of lunacy on the part of the husband or wife. I think this proposition not in itself probable when we look to the eminence of the persons selected to preside in the court. But, further, I think it not a legal presumption where we are dealing with an Act which lays down special and guarded limits as to the mode in which the jurisdiction is to be exercised, and does not expressly restrict the ordinary power which I conceive to exist in every civil court of dealing with lunatic parties to a litigation. Here, too, it may be justly added that certain cases are specified in which to decree a divorce is not competent to the court, others in which it may be refused if the court think fit, and such provisions do not include that of either party being lunatic.

If the suit must cease at the moment of either party becoming lunatic, then it would be stayed even after a finding of the adultery, should the reasoning from criminal procedure prevail. It does not appear, indeed, that any case can be found in which Parliament has granted a divorce when either party has been a lunatic, neither has any case of refusal on that ground been found, and I think the cases are not so numerous in which lunacy after adultery takes place as to justify the House in considering that the procedure of the new court should on that account be stayed as inconsistent with the previous course in Parliament. If the legislature be taken to have purposely omitted all mention of lunacy, one way or the other, I think the inference is that they have not prohibited ordinary procedure of a civil court in such a case.

As regards the hardship, it is certainly greater on the part of the wife than on the part of the husband, for if your Lordships should hold the case to be excepted from the Act of 1857 there is nothing to prevent the husband from obtaining a private Act. Such Acts have been several times passed since the Act constituting the Divorce Court, when peculiar cases have arisen. I have seen two such Acts (Dr. Cashel's case and Colonel Thomson's case) passed in the month of April, 1866 and 1867, respectively. But the wife could not, of course, be replaced in her original status if your Lordships erroneously held her to be subject to the jurisdiction of the court, and the court should dissolve the marriage. Yet (if Parliament would allow the husband to apply for an Act, and I cannot think they would refuse) the friends of the wife have as ample means of fully bringing out the truth of her case before one tribunal as before the other, and the hardship really is that, whether in Parliament or before the court, the lunacy under which she labours must be detrimental to her interests in

this great crisis of her life in a far higher degree than in other matters concerning her position or property.

I ought not to omit noticing *Bawden* v. *Bawden* (1). The decision there adds the weight of Sir Cresswell Cresswell's opinion to that of the minority of the judges in the present case and of the Judge Ordinary, and I admit that weight and regard his judgment as worthy of all respect; but where no argument could be had on one side the weight of all decisions must be greatly impaired. On the whole, I do not think that this case can be more fully investigated. It was most fit that it should be most amply discussed, but I conclude as I began, by stating that I should not feel myself justified in further protracting the inquiry, and I concur, therefore, in the vote proposed by my noble and learned friend.

Appeal allowed.

Solicitors: *B. Hunt; Benhow & Saltwell.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

DEMPSEY *v.* LAWSON

[Probate, Divorce and Admiralty Division (Sir James Hannen, P.), January 11, February 20, 1877]

[Reported 2 P.D. 98; 46 L.J.P. 23; 36 L.T. 515; 41 J.P. 696; 25 W.R. 629]

Will—Revocation—Intention of testator—Later will—No express revocation clause—Later will not covering whole subject-matter of earlier will.

Where a testator makes two wills and the later will contains no express revocation clause and in some particulars does not completely cover the whole subject-matter of the earlier will, the dispositions of the two wills, as indicating the intentions of the testator, may, nevertheless, show that the testator intended wholly to revoke the first will.

Notes. Considered: *Jenner* v. *Ffinch* (1879), 5 P.D. 106. Applied: *In The Estate of Bryan*, [1907] P. 125. Considered: *Jones* v. *Treasury Solicitor* (1932), 48 T.L.R. 615; *In The Estate of Fawcett*, [1941] 2 All E.R. 341; *In The Estate of Wayland*, [1951] 2 All E.R. 1041. Referred to: *Chichester* v. *Quatrefages*, [1895] P. 186; *Re Bagnall, Scale* v. *Willett*, [1949] L.J.R. 1.

As to revocation of a will by a later instrument, see 39 Halsbury's Laws (3rd Edn.) 890-894; and for cases see 44 Digest 321 et seq.

Cases referred to:

(1) *In The Goods of Petchell* (1874), L.R. 3 P. & D. 153; 43 L.J.P. & M. 22; 38 J.P. 824; 22 W.R. 353; sub nom. *In The Goods of Pechell*, 30 L.T. 74; 44 Digest 332, *1622*.

(2) *Plenty* v. *West and Budd* (1845), 1 Rob. Eccl. 264; 4 Notes of Cases, 103; 9 Jur. 458; 163 E.R. 1033; 44 Digest 330, *1611*.

(3) *Cutto* v. *Gilbert* (1854), 9 Moo.P.C.C. 131; 1 Ecc. & Ad. 417; 24 L.T.O.S. 193; 18 Jur. 560; 14 E.R. 247, P.C.; 44 Digest 331, *1614*.

(4) *Lemage* v. *Goodban* (1865), L.R. 1 P. & D. 57; 35 L.J.P. & M. 28; 13 L.T. 508; 12 Jur.N.S. 32; 44 Digest 331, *1613*.

(5) *Denny* v. *Barton* (1818), 2 Phillim. 575; 161 E.R. 1236; 44 Digest 322, *1545*.

(6) *Henfrey* v. *Henfrey* (1842), 4 Moo.P.C.C. 29; 1 Notes of Cases 356; 6 Jur. 355; 13 E.R. 211, P.C.; 44 Digest 333, *1629*.

(7) *Methuen* v. *Methuen* (1817), 2 Phillim. 416; 161 E.R. 1186; 44 Digest 321, *1542*.

Also referred to in argument:

In The Goods of Leese (1862), 2 Sw. & Tr. 442; 31 L.J.P.M. & A. 169; 5 L.T. 848; 26 J.P. 232; 164 E.R. 1068; 23 Digest (Repl.) 89, *898*.

In The Goods of Graham (1863), 3 Sw. & Tr. 69; 32 L.J.P.M. & A. 113; 8 L.T. 610; 11 W.R. 638; 164 E.R. 1198; 44 Digest 339, *1690*.

Geaves v. *Price* (1863), 3 Sw. & Tr. 71; 32 L.J.P.M. & A. 113; 8 L.T. 610; 11 W.R. 809; 164 E.R. 1199; 44 Digest 339, *1689*.

Birks v. *Birks* (1865), 4 Sw. & Tr. 23; 34 L.J.P.M. & A. 90; 13 L.T. 193; 29 J.P. 360; 13 W.R. 638; 164 E.R. 1423; 44 Digest 321, *1543*.

In The Goods of Fenwick (1867), L.R. 1 P. & D. 319; 36 L.J.P. & M. 54; 16 L.T. 124; 31 J.P. 359; 44 Digest 320, *1525*.

In The Goods of Griffiths (1872), L.R. 2 P. & D. 457; 26 L.T. 780; 36 J.P. 424; 20 W.R. 495; 44 Digest 340, *1694*.

Probate Suit in which the plaintiff, the Mother Superior of the Roman Catholic Convent of Sisters of Mercy at Bermondsey, propounded a will of the late Baroness Stafford, dated Aug. 28, 1858, and prayed that the will might be admitted to probate in conjunction with and as part of a later will of the Baroness Stafford, dated Dec. 5, 1860, which had already been admitted to probate, and that it might be held to form a part of that last will. Sir William Lawson, the defendant, opposed the suit and pleaded that the will propounded by the plaintiff was revoked by the later will of 1860.

The testatrix, Elizabeth Baroness Stafford, of Hornby Castle, in Yorkshire, died on Oct. 29, 1862, possessed of large real and personal estate in this country and in the United States of America. She made and executed a will on Aug. 28, 1858, and bequeathed by it, first, her American property, and then the remainder in this country to Sir William Lawson, of Brough Hall, in Yorkshire, and his two sons, John and Thomas, in trust, first, to pay her debts and funeral expenses; secondly, to pay a perpetual annuity of £100 to Dr. Grant, Roman Catholic Bishop of Southwark and his successors; thirdly, to pay certain annuities under the will; fourthly, to raise and pay a sum of £3000 to her stepson, Lord Stafford; fifthly, to pay the interest arising from the residue to her sister, the Duchess of Leeds, for her life, and after her death to her other sister, Mrs. Emily MacTavish, for her life,

> "and after the death of the survivor of my said sisters upon trust as to such portions of my said residuary personal estate as may by law be bequeathed to charitable purposes; and the stocks, funds, and securities in which the same may have been invested as aforesaid, as to one-third part thereof to pay, assign, transfer, and apply the same to or for the benefit of the Roman Catholic Convent of the Sisters of Mercy at Bermondsey for ever; and as to one other third part, to pay, assign, transfer, and apply the same to or for the benefit of the Roman Catholic Convent at Richmond, in the county of York, for ever; and as to the remaining one-third part, to pay, assign, transfer, and apply the same to and for the benefit of the Roman Catholic Convent of the Association called the Sisters of the Good Shepherd at Hammersmith, in the county of Middlesex, for ever, for the respective charitable purposes of the said charitable institutions respectively. And as to any parts of my residuary personal estate which cannot by law be bequeathed to charitable purposes, and also as to any part of my personal estate hereinbefore bequeathed, the trusts whereof may on any account fail or become involved or incapable of taking effect, I give

and bequeath the same to my said sisters, Louisa Catherine, Duchess of Leeds, and Emily MacTavish, their executors, administrators, and assigns, as joint tenants for their use and benefit. I give and bequeath to the said Sir William Lawson the sum of £200 as an acknowledgment for the trouble he will have in the trusteeship or executorship of this my will; and in the event of his dying in my lifetime, I bequeath the same to his sons, John and Thomas Lawson, equally to be divided amongst them in like acknowledgment, provided they act as executors and trustees of this my will. I appoint the said Sir William Lawson and the said John and Thomas Lawson executors of this my will, save and except as to my property aforesaid in the United States of America, of which I have already appointed executors."

This will was prepared by Mr. Charles Blount, of Richmond, in Yorkshire, the solicitor to the testatrix. In 1860 the testatrix instructed Mr. Blount to prepare a new will for her, and a fair copy of a will, embodying her wishes, and containing a clause revoking all previous wills, was forwarded to her in December, 1860. The testatrix never executed this paper, and in the course of her correspondence with Mr. Blount wrote to him as follows:

"The Duchess showed me your letter, and I thank you for your care of me. I am sure it is out of pure kindness, but such calamities have happened in our family that the will was no longer applicable, and besides, I have given away a great deal of property lately. I have written my own will—a very simple one. My funds I have left to Sir William and his sons, who, after paying the annuities, will divide the remainder between my sisters, and after their death half will go to charities and half to my little great nieces and nephews, just enough to keep them from starving. Of course I shall repay you for your trouble about the will, though I do not use it."

The will which the testatrix herself prepared contained no clause of revocation, and was executed by her on Dec. 5, 1860. By it she bequeathed to Basil Spalding, Esq., of Baltimore, in the United States of America, all her real estate in that country, whatsoever, wheresoever, and howsoever in trust as to certain lands for the use and benefit of her sister the Duchess of Leeds, and various other devises and bequests, varying some of the dispositions of the will of 1858 as to the American estates, and repeating others, but not mentioning by description all the estates referred to in that will. The will then continued:

"I give and bequeath to Sir William Lawson, Baronet, of Brough Hall, in North Yorkshire, and his two sons John and Thomas, all my Baltimore and Ohio Railway Shares, all my Spanish stocks and certificates, and all other shares and stocks I may be possessed of or entitled to at the time of my death, whatsoever, wheresoever, and howsoever in trust for the following purposes. First, to pay my debts and funeral expenses which I desire may be as moderate as possible. Secondly, to pay to Henry Valentine Lord Stafford three thousand pounds sterling if he survives me. Thirdly, to pay the following annuities to the persons hereinafter mentioned. [Here followed a list of annuities mostly to the same persons and of the same amounts as in the will of 1858.] All the residue of income from the above stocks and shares, after paying the annuities above mentioned, I bequeath equally between my two sisters, the Duchess of Leeds and Mrs. Emily MacTavish during their lives; if the Duchess survives Mrs. MacTavish, then I give the whole income for her life. At the death of both my sisters, I leave one half of all the said stocks and shares whatsoever, and wheresoever, to the children of Charles MacTavish my nephew; the other half of the said stocks and shares I request Sir William and his two sons to hold for the following charities, to secure the funds to them for the use of this

country and not to be diverted to any Foreign Charitable Institutions. I request my trustees to appropriate one fourth of the above sum to the establishment of the Order of Sisters of Charity in London, in connexion with Lady Georgiana Fullarton, if she be living or the establishment she shall have founded; one fourth to the Good Shepherd at Hammersmith; one fourth to the Priory of our Lady of Peace, at Richmond in Yorkshire; one eighth to a fund for aged and infirm Roman Catholic Priests in England; and one-eighth for the education of poor Roman Catholic children. I appoint Sir William Lawson and his sons John Lawson, Esq., and Thomas Lawson, Esq., executors of this my last will and testament for all matters and things in England, and in respect of all my shares, stocks, and funds, wheresoever, and howsoever."

On June 18, 1862, the testatrix executed a codicil, and by it, after making some unimportant alterations in her testamentary dispositions, she confirmed her "last will and testament" in all respects, save where altered by the codicil.

The testatrix died on Oct. 29, 1862, and on her death it was found that she had to her credit with Messrs. Rothschilds a sum of £8987 4s. 6d., being the proceeds of the sale of some Spanish certificates which she held at the time of the execution of the will of 1858, and which by her directions had been sold on June 30, 1862. She had not at the time of her death given any instructions as to the reinvestment of this money. She also had at the time of her death two balances at her bankers of £438 16s. 8d. and £187 4s. 6d., and a sum of £52 due to her in respect of her jointure, making in all a sum in cash of £9665 5s. 8d. The executors and trustees proved on Mar. 24, 1863, the will of 1860 and the codicil of 1862, in common form, and acted on the assumption that the testatrix had died intestate in respect of this sum of money. In the administration of the estate, however, a doubt was raised whether the money did not pass under the residuary clause of the will of 1858, and hence this action.

Inderwick, *Q.C.*, and *Searle* for the plaintiff.
Spinks, *Q.C.*, *Bayford* and *Williamson* for the defendant.

Cur. adv. vult.

Feb. 20, 1877. **SIR JAMES HANNEN, P.,** read the following judgment.—On behalf of the plaintiff it has been argued that as the will of 1860 contains no clause expressly revoking the earlier will, it was to be considered as only revoking those parts of it with which the provisions in the later will are inconsistent, and that the dispositions in the will of 1860 are not inconsistent with the residuary bequest for the benefit of the three Roman Catholic Convents. In support of this contention, WILLIAMS ON EXECUTORS (7th Edn.), vol. 1, p. 163, and the cases there cited, were relied on.

I assent to the principle expressed in the passage referred to, and I have had occasion to act upon it in *In the Goods of Petchell* (1), but it becomes necessary upon the present occasion to consider more minutely the nature and extent of the inconsistency of a later will which will have the effect of revoking an earlier testamentary instrument. In this investigation the court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in his own language has to be ascertained by reference to the facts in connection with which it was used; but in seeking for the true intent and meaning of the testator, the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it in an earlier document, the earlier document will be revoked, and this although in some particulars the later will does not completely cover the whole subject matter of the earlier will.

This is what was decided in *Plenty* v. *West and Budd* (2), the court holding upon all the facts before it that it was the intention of the testator that the later paper should stand alone, although that disposed of a part only of his personal estate, and, therefore, that in effect, though not in terms, it revoked the earlier will. The authority of this case has been stated in WILLIAMS ON EXECUTORS (7th Edn.), vol. 1, p. 163, note c., to be doubtful, since the decision of the Privy Council in *Cutto* v. *Gilbert* (3), and LORD PENZANCE is said to have regarded it as overruled. *Cutto* v. *Gilbert* (3), however, merely decides that the bare fact of a testator having executed an instrument as his "last will and testament," the contents of which are unknown, does not operate as a revocation of a previous will, and this seems very obvious, for the missing instrument may have been confirmatory of the first: see WILLIAMS ON EXECUTORS (6th Edn.), vol. 1, p. 156, note c. It certainly does not appear from the judgment in *Cutto* v. *Gilbert* (3) that there was any intention to overrule the decision in *Plenty* v. *West and Budd* (2). DR. LUSHINGTON says (9 Moo. P.C.C. at p. 146):

> "Upon this case we will first observe that the two wills were essentially different, that no executors were appointed by the first, that executors were appointed by the second, and that the only ground of argument for uniting the papers was that the whole of the personal estate was not disposed of by the second will. It is true that SIR H. J. FUST in his judgment relies upon the fact that the testator called the will of 1838 his last will, but that is only one circumstance in conjunction with others on which he founded his decision."

The Judicial Committee thus appear to have approved of the decision in *Plenty* v. *West and Budd* (2) upon the ground that the fact that the whole of the personal estate was not disposed of by the second will was not by itself a sufficient reason for uniting the earlier with the later will, and admitting both to probate, the wills being in other respects "essentially different." And LORD PENZANCE himself in *Lemage* v. *Goodban* (4) does not say that *Plenty* v. *West and Budd* (2) is overruled, but, with his accustomed accuracy, only says:

> "The case of *Plenty* v. *West and Budd* (2), so far as it supports the doctrine that the use of the words 'last will' in a testamentary paper, necessarily imports a revocation of all previous instruments, is, I think, overruled by *Cutto* v. *Gilbert* (3)."

LORD PENZANCE further says:

> "The intention of the testator in the matter is the sole guide and control, but the intention to be sought and discovered relates to the disposition of the testator's property, and not to the form of the will. What disposition did he intend?—not which or what number of papers did he desire or expect to be admitted to probate."

I followed that decision in *In the Goods of Petchell* (1). I considered that the intention of the testator in the second will was to benefit her daughter by postponing the payment of the specific legacies until after her daughter's death, and that no intention appeared to deprive her daughter of the residue after payment of the legacies. I, therefore, came to the conclusion that the original residuary bequest in her favour was not revoked.

Even if the second instrument contains a general revocatory clause, this is not conclusive, and the court will, notwithstanding, consider whether it was the intention of the testator to revoke a bequest contained in a previous will: *Denny* v. *Barton* (5). On the other hand, though there be no express revocatory clause, the question is whether the intention of the testator to be collected from the instrument was that the dispositions of the earlier will should remain in whole or in part inoperative. DR. LUSHINGTON, in giving the judgment of the Privy Council in *Henfrey* v. *Henfrey* (6) says: "The question is total revocation

or partial revocation." On this question SIR JOHN NICHOLL says, in *Methuen* v. *Methuen* (7): "In the Court of Probate the whole question is one of intention; animus testandi and the animus revocandi are both completely open to investigation in this court."

In the present case I am of opinion that the intention of the testatrix to be collected from the dispositions of the two wills is that the second should stand alone and be in complete substitution for the first, and that it contains all the testamentary dispositions which she intended at the time to constitute her last will and testament, and consequently that it does by implication revoke the whole of the will of 1858. I think that the whole scheme of the will of 1860 shows that it was intended to be in substitution for the will of 1858. I do not think it necessary to state in detail the several passages from which I draw this inference, because I adopt the view of LORD PENZANCE that the question is what disposition did the testatrix intend, not which or what number of papers did she desire or expect to be admitted to probate. It is sufficient to observe that it was not suggested, and it may be stated with confidence that it is impossible to show, that there is any provision of the will of 1858, unless it be the residuary clause in question, which is kept in operation by the will of 1860, otherwise than by its repetition in that instrument, and if this be the case it strongly tends to show, though it falls short of absolute proof, that the non-repetition of the residuary clause in the will of 1860 indicates that the testatrix did not intend that it should continue in force.

With regard to the disposition of the residuary personal estate contained in the will of 1858, it seems to me to be clear that the testatrix intended by the will of 1860 to make a totally different disposition of that property, which was included in the residuary clause of the first will. In the first place she omits altogether the Roman Catholic Convent of the Sisters of Mercy, at Bermondsey, while she seems to have desired to admit to a participation in her bounty another establishment connected in some way with Lady Georgiana Fullarton, as well as the two charities for aged priests and poor Roman Catholic children; secondly, those establishments which she still continues to wish to benefit (including the plaintiff's convent), are to receive only one-fourth of one-half of her stocks and shares after the death of her sisters, instead of one-third of the whole as under the will of 1858. The other half of her stocks and shares she gives, after the death of her sisters, to the children of her nephew. These stocks and shares constituted, at the time she made her will of 1860, the whole, or nearly the whole, of the personal property which by the will of 1858 she had given to the three convents. The intention and effect of the will of 1860 was to deprive these three establishments to a large extent of the benefits she had previously conferred upon them, and to give them what remained in a different manner and in different proportions. This appears to me to amount to what is called in *Cutto* v. *Gilbert* (3) an "essentially different" disposition of the principal subject matter of the residuary clause of the will of 1858, and, therefore, to be a revocation of that clause. It is true that, by a sale of the Spanish certificates in 1862, the testatrix had removed them from the operation of her will of 1860, but when we are considering the question of the intention of the deceased in 1860, the accidental change in her investments in 1862 can give little, if any, assistance.

It is in the highest degree improbable that the testatrix was aware that the sale of the certificates had any effect upon her testamentary dispositions. It is incredible to me that she knew that, by so doing, she was depriving the children of her nephew of nearly £5000. Seeing that in a letter written in February, 1862, she writes:

> "My Funds I have left to Sir William and his sons, who, after paying my annuities, will divide the remainder between my sisters, and, after

their death, half will go to charity, and half to my little great nieces and nephews, just enough to keep them from starving."

It may be doubted whether the testatrix intended at the time she made the will of 1860 to dispose only of the "shares and stocks." It is more probable that the absence of more comprehensive words was purely accidental; but I entertain no doubt that if the testatrix had such intention it was because she considered that the "shares and stocks" constituted the whole of her personal property not previously disposed of, and, therefore, any general residuary bequest was useless and unnecessary. The possibility of an undisposed of residue arising did not occur to her mind as a contingency to be provided for, and, therefore, she made no provision with regard to it. To put the matter in familiar language, I think that, if the testatrix had been asked, after the execution of the will of 1860: "Do you intend the convents to have any residue which there may be?", her answer, fairly to be collected from that will, would have been: "No; because I have otherwise provided for them and others by a disposition which I anticipate will leave no residue, and, therefore, I have not thought it necessary to make any general residuary bequest." The result is, that I am of opinion that the will of 1858 was entirely revoked by the will of 1860, and I, therefore, reject the application to admit it to probate.

Judgment for defendant.

Solicitors: *Thomas Sisney; Williamson, Hill & Co.*

[*Reported by* H. B. Deane, Esq., *Barrister-at-Law.*]

Re LEADBITTER

[Court of Appeal (Sir George Jessel, M.R., Baggallay and Thesiger, L.JJ.), November 13, 1878]

[Reported 10 Ch.D. 388; 48 L.J.Ch. 242; 39 L.T. 286; 27 W.R. 267]

Costs—Taxation—Bill paid by trustee in bankruptcy—Application by discharged bankrupt for taxation.

Where a solicitor's bill of costs had been paid by a trustee in bankruptcy, the bankrupt, when discharged, even though all the creditors had been paid in full and there was a surplus, was **held** not to be "a party interested" within the meaning of s. 39 of the Solicitors Act, 1839 [now s. 70 of Solicitors Act, 1957], at the time when the bill of costs was paid, so as to be entitled to an order for taxation of the bill of costs.

Notes. The Solicitors Act, 1843, s. 39 has been replaced by s. 70 of the Solicitors Act, 1957.

Considered: *Bird* v. *Philpott*, [1900-3] All E.R. Rep. 439; *Re Jones and Everett*, [1904] 2 Ch. 363; *Jarrett* v. *Barclays Bank, Ltd., and Nash*, *Nash* v. *Jarrett*, [1946] 2 All E.R. 266. Referred to: *Re Debtor (No. 400 of 1940)*, *Ex parte Debtor* v. *Dodwell*, [1949] 1 All E.R. 510.

As to taxation of costs, see 36 Halsbury's Laws (3rd Edn.) 139 et seq.; and for cases see 42 Digest 159 et seq. For the Solicitors Act, 1957, s. 70, see 37 Halsbury's Statutes (2nd Edn.) 1113.

Case referred to:

(1) *Rochfort* v. *Battersby* (1849), 2 H.L.Cas. 388; 14 Jur. 229; 9 E.R. 1139, H.L.; 36 Digest (Repl.) 369, *74*.

Also referred to in argument:

Re Blackmore, Re Billing, Re Spike (1851), 13 Beav. 154; 18 L.T.O.S. 2; 15 Jur. 784; 51 E.R. 60; 44 Digest 140, *1367*.

Re Drake (1856), 22 Beav. 438; 52 E.R. 1177; 44 Digest 174, *1808*.

Appeal by the applicant from an order of Bacon, V.-C., on an adjourned summons taken out by the applicant, J. Patterson, for delivery by Messrs. Leadbitter and Harvey of a bill of costs for taxation.

The applicant was adjudicated a bankrupt in 1876. Part of his property was subject to a mortgage, and was sold by the trustee in bankruptcy. The solicitors of the mortgagees delivered their bill of costs amounting to £79, to the trustee, and it was paid by him in May, 1877. In June 1877, the creditors, on receiving 20s. in the pound, passed a resolution discharging the bankrupt and closing the proceedings.

Bacon, V.-C., held that the applicant was not a "party interested" within the meaning of s. 39 of the Solicitors Act, 1843, and refused the application with costs.

Oswald for the applicant.

F. C. J. Millar for the respondents.

SIR GEORGE JESSEL, M.R.—I am of opinion that the decision of Bacon, V.-C., is a correct one. Section 39 of the Solicitors Act, 1843, says that

> "it shall be lawful in any case in which a trustee, executor, or administrator has become chargeable with a bill of costs, for the Lord Chancellor . . . upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same to be taxed."

It has always been held that the words "party interested" mean a party interested under a trust, deed, will or intestacy, and, of course, the trustee must be a person who is really chargeable. At the time when the Act of 1843 was passed the word "trustee" could not describe an assignee in bankruptcy, and, although by the Bankruptcy Act, 1869, the word "assignee" has been changed to "trustee," the nature of the office and the relative positions of bankrupt and assignee have not been changed. The change was a mere change of name, and it is quite clear from the Act that the words "trustee, executor, or administrator" do not include a bankruptcy case.

Moreover, the bankrupt in this case was not "a party interested" in the property out of which the bill was paid. At the time when the payment was made there could not have been more than a possibility of a surplus. A legacy might be left or a reversion might fall in, but at the most there was no more than a probability of a surplus. When all the debts had been paid, and not before, there was a surplus; and until they were paid the bankrupt was not "a party interested" in the property. The probability of surplus did not give the bankrupt an interest in the property, and that point was settled by *Rochfort* v. *Battersby* (1).

A third objection to the application is that the trustee in bankruptcy is not really the person chargeable with the bill, although the mortgagees may be entitled to retain the amount of it out of the mortgaged estates. There is no personal liability to pay it on the part of the trustee. Section 39 only applies to the case of a trustee, executor or administrator employing a solicitor on his own responsibility. If the trustee had paid a bill for an improper amount, the

bankrupt would not be without his remedy, for he could compel the trustee to account in the Court of Bankruptcy for the estate.

BAGGALLAY, L.J.—I am of the same opinion. In s. 18 of the Bankruptcy Act, 1869, the trustee is termed "trustee of the bankruptcy," but he is not a trustee of the bankrupt so as to bring him within s. 39 of the Solicitors Act, 1843. On the payment of the debts and the giving of the bankrupt's discharge, no doubt the surplus would revert to the bankrupt, but that is merely as successor to the trustee.

THESIGER, L.J.—The relation between a bankrupt and his trustee is the same now as it was under the Solicitors Act, 1843, between a bankrupt and his assignee. Although the name may be changed, it is not a change of substance. As there is no question that the assignee does not come within s. 39 of the Solicitors Act, 1843, it follows that the trustee in this case does not.

Appeal dismissed.

Solicitors: *Pitman & Lane*, for *W. S. Young*, South Shields; *Flux & Leadbitter*, for *Leadbitter, Harvey & Smithson*, Newcastle-upon-Tyne.

[*Reported by* E. S. Roche, Esq., *Barrister-at-Law.*]

JONES *v.* WILLIAMS AND ANOTHER

[Common Pleas Division (Grove and Lindley, JJ.), April 20, May 4, 1877]

[Reported 46 L.J.M.C. 270; 36 L.T. 559; 41 J.P. 614]

Game—Licence—Parol reservation of game by landlord on parol demise of land—Right of landlord to grant licence to kill game—Game Act, 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 30.

A verbal reservation of game to himself by a landlord on a verbal demise of land is sufficient authority for the landlord to give a person leave to kill game on the land and so prevent that person from being a trespasser in pursuit of game within the meaning of the Game Act, 1831, s. 30.

Magistrates—Jurisdiction—Reversal of earlier decision—Conviction not drawn up.

Two justices convicted W. of committing a trespass in pursuit of game under the Game Act, 1831, s. 30. Before the conviction was formally drawn up, the two justices, together with a third, dismissed a similar complaint against R. by a majority of two to one, one of the original justices having changed his mind. The conviction against W. was thereupon reversed by the same majority.

Held: the formal conviction against W. not having been drawn up, there remained a locus penitentiae in the justices, and so there was no valid conviction of W.

Notes. Considered: *Bagg* v. *Colquhoun*, [1904] 1 K.B. 554; *R.* v. *Manchester Justices, Ex parte Lever*, [1937] 3 All E.R. 4.

As to rights over game, see 18 Halsbury's Laws (3rd Edn.) 130 et seq.; and for cases see 25 Digest (Repl.) 372 et seq. As to the decision of a magistrates' court, see 25 Halsbury's Laws (3rd Edn.) 213 et seq.; and for cases see 33 Digest (Repl.) 244-246. For the Game Act, 1831, s. 30, see 10 Halsbury's Statutes (2nd Edn.) 696.

Case Stated by justices of the county of Carnarvon.

At a court of summary jurisdiction sitting at Pwllheli on Jan. 13, 1877, the appellant preferred two informations against the respondents, John Williams and Morris Roberts, charging that, on Jan. 1, 1877, they committed a trespass in pursuit of game under the Game Act, 1831, without the licence or consent of the owner of the land. The land had been let verbally to a tenant, but the landlord, Isaac Williams, had verbally reserved the game to himself. The respondents were on two separate fields, part of a farm called Bodwrog. The respondent Williams was on a ploughed field, walking backwards and forwards with two dogs, and the respondent Roberts was in another field with a dog and another man.

The information against the respondent Williams was taken first before L. J. Parry and B. T. Ellis, Esqrs., when Williams was convicted, and ordered to pay a penalty of 5s. and costs. The information against the respondent Roberts was then taken, but before it commenced T. Jones, Esq. (another justice) had taken his seat on the Bench, he not having taken any part in the previous case. The respondent Roberts produced an unstamped paper in the Welsh language, which, being translated, was as follows:

> "December 26, 1876.—I do hereby give leave to Morris Roberts, Rhander Llangian, to course and shoot the whole of the rabbits, hares, or game, that is upon all my land everywhere. (Signed) Isaac Williams, Ship Inn, Llanbedrog."

Isaac Williams gave evidence that he had signed the paper writing, and that he had given a verbal authority to Roberts to course over all his land. It was proved that the respondents had started a hare on a farm belonging to Isaac Williams, which ran into the ploughed field at Bodwrog, and that the respondents ran after her with the dogs.

The Bench were divided in opinion, two of them being for dismissing the case, and the other (B. T. Ellis, Esq.) for a conviction, and, in consequence, the case was dismissed. As the previous case was involved with it, the judgment in that also was reversed, and it was dismissed by the same majority.

The questions for the opinion of the court were (i) Whether the authority granted to the respondent Roberts in writing, and verbally, or either, was sufficient? and, if so, whether that was a justification for the respondent Williams as well as the respondent Roberts to enter on the land of Bodwrog? (ii) Whether Isaac Williams, who stated on oath that he had let the tenement verbally to his tenant, and reserved the game to himself, had any right to grant authority to another party to kill game? (iii) Whether the two justices, L. J. Parry, and T. Jones, Esqrs., were justified in reversing the first judgment against the respondent Williams, the other justice, B. T. Ellis, Esq., not concurring.

By the Game Act, 1831, s. 30:

> "If any person whatsoever shall commit any trespass by entering or being in the daytime upon any land in search or pursuit of game . . ., such person shall, on conviction thereof before a justice of the peace forfeit and pay any such sum of money, not exceeding [£20] as the justice shall seem meet . . . Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon the land, by virtue of any reservation or otherwise . . ."';

Mackey for the appellant.

Corbet Yale for the respondents.

GROVE, J.—This is a case of some difficulty, because the evidence on the points submitted to us is vague. The first question inquires whether, under s. 30 of the Game Act, 1831, which relates to trespass in pursuit of game, the parol permission of a landlord—who has himself merely a verbal reservation of the game on an estate which he has demised to somebody else—will save a person from a charge of such trespass. Next, whether a person having such a licence can be properly punished if found in fresh pursuit of game in another field. As to the respondent Roberts, I think that there was—to answer the first question categorically—a justification. As to the respondent Williams, the Case does not find whether he was acting in concert with the respondent Roberts, or whether he was there for his own pleasure; so that we can arrive at no conclusion as to him.

On the second question, I am of opinion that Williams had a right to grant authority to the respondent Roberts, supposing he himself had a reservation of the game; and, if so, the respondent Roberts could not be prosecuted as a trespasser under s. 30. Another question arises as to him—whether he was in fresh pursuit of game. I am of opinion that he was.

The third question asked of us relates to the proceedings. There was, in the first instance, a verbal conviction against the respondent Williams, which was not formally drawn up, and, in consequence, there remained, in my opinion, a locus pœnitentiæ. That being so, the convicting magistrates changed their minds. It may, therefore, be said that there was no conviction; but, if there had been, the subsequent proceedings would have been irregular. Whether the magistrates have now power to direct a new trial or not is a question on which I have some doubt. At any rate, the conviction cannot stand.

LINDLEY, J.—The Game Act, 1831, contains various provisions having different objects in view. Some of its sections relate to trespass, and others to licences. The respondents were not charged under s. 23 with not having licences, but with trespass under s. 30. First, as to the respondent Roberts. It appears that one Isaac Williams demised a farm to a tenant, reserving the game on it to himself. Section 8, and the decisions on it, show that there may be such a thing as a parol reservation of game on a parol demise. The property in the game thus remained in the landlord. He gave a licence to the respondent Roberts, who, therefore, was not a trespasser whilst on his land. But he was also charged with being in fresh pursuit of a hare on the next field to Isaac Williams' land. This is a case specially provided for by s. 35, and the magistrates properly dismissed the charge against him. As to the respondent Williams' case, another point arises, namely, that the licence did not mention his name. But we have not before us sufficient evidence as to him.

The important point is as to the proceedings. Of the two magistrates who were in favour of dismissing the case against the respondent Williams, only one had heard the evidence, while one magistrate who had heard it was in favour of upholding the conviction. No conviction, however, was drawn up, and, therefore, the proceedings may be said to have come to nothing. The Bench changed their opinion of the case, and they could not now be compelled by mandamus to record a conviction. Their action was not, perhaps, an acquittal, but it certainly did not amount to a conviction; it may be considered as only a part hearing.

Solicitors: *Jones, Blaxland & Sons.*

[*Reported by* S. Hare, Esq., *Barrister-at-Law.*]

COOPER AND ANOTHER *v.* COOPER

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan and Lord Moncrieff), April 30, May 1, 4, 1874]

[Reported L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 22 W.R. 713]

Election—Power of appointment—Appointment by will adverse to appellants—Bequests in will—Obligation of appellants to elect whether to frustrate appointment or take benefits.

A lady, having a power of appointment over a reversion in a trust fund expectant on her death in favour of her issue, appointed the fund by deed in favour of her three sons equally. Her youngest son died intestate during her lifetime, with the result that under the deed of appointment his next of kin became entitled on her death to one-third of the fund, subject to the payment of the deceased son's debts, etc. By her will, the lady purported to appoint the whole trust fund in favour of her eldest son, but this was held to be ineffective. She also, by her will and by a codicil, gave part of her own property—namely, pecuniary legacies and a share of residue—to the children of her deceased son. The question raised was whether the children of the deceased son could entirely frustrate the purported appointment in the will and also claim the benefits contained therein, or whether they were put to their election.

Held: the children of the deceased son were required to elect, in respect of all the benefits contained in the will and codicil, whether to take under or against the instrument.

Lady Cavan v. *Pulteney* (1) (1795), 2 Ves. 544 and *Grissell* v. *Swinhoe* (2) (1869), L.R. 7, Eq. 291, distinguished.

Per Curiam: If a creditor of the deceased son had received a benefit under the will, he would not have been put to his election.

Notes. Distinguished: *Bate* v. *Willats* (1877), 37 L.T. 221. Considered: *Re Barber, Dardier* v. *Chapman* (1879), 11 Ch.D. 442; *Re Jones, Christmas* v. *Jones*, [1895-9] All E.R. Rep. 1084; *Blake* v. *Bayne*, [1908] A.C. 371. Distinguished: *Vanneck* v. *Benham*, [1916-17] All E.R. Rep. 741. Considered: *Re Dicey, Julian* v. *Dicey*, [1956] 3 All E.R. 696. Distinguished: *Re Edwards, Macadam* v. *Wright*, [1957] 2 All E.R. 495. Referred to: *Codrington* v. *Codrington* (1875), L.R. 7 H.L. 854; *Re Vardon's Trusts* (1885), 31 Ch.D. 275; *Re Chesham, Cavendish* v. *Dacre* (1886), 31 Ch.D. 466; *Re Bradshaw, Bradshaw* v. *Bradshaw*, [1902] 1 Ch. 436; *Re Hole, Davies* v. *Witts*, [1906] 1 Ch. 673; *Blake* v. *Bayne*, [1908] A.C. 371; *Pitman* v. *Crum Ewing*, [1911] A.C. 217; *Re Williams, Cunliffe* v. *Williams*, [1915] 1 Ch. 450; *Brown* v. *Gregson*, [1920] All E.R. Rep. 730; *Re McKee, Public Trustee* v. *McKee*, [1931] 2 Ch. 145; *Re Donkin, Public Trustee* v. *Cairns*, [1948] Ch. 74; *Re Cunliffe-Owen, Mountain* v. *I.R. Comrs.*, [1953] 2 All E.R. 196; *Re Mengel's Will Trusts, Westminster Bank* v. *Mengel*, [1962] 2 All E.R. 490.

As to election, see 14 Halsbury's Laws (3rd Edn.) 588-598; and for cases see 20 Digest (Repl.) 425 et seq.

Cases referred to:

(1) *Lady Cavan* v. *Pulteney* (1795), 2 Ves. 544; 30 E.R. 768, L.C.; 20 Digest (Repl.) 459, *1700.*

(2) *Grissell* v. *Swinhoe* (1869), L.R. 7 Eq. 291; 17 W.R. 438; 20 Digest (Repl.) 459, *1698.*

(3) *Cooper* v. *Martin* (1867), 3 Ch. App. 47; 17 L.T. 587; 16 W.R. 234, L.JJ.; 37 Digest 426, *341.*

(4) *Streatfield* v. *Streatfield* (1735), Cas. temp. Talb. 176; 1 Swan. 436, n.; 25 E.R. 724, L.C.; 20 Digest (Repl.) 458, *1687.*

(5) *Noyes* v. *Mordant* (1706), Gilb. Ch. 2; 25 E.R. 2; sub nom. *Noys* v. *Mordaunt*, 2 Vern. 581; Prec. Ch. 265; 20 Digest (Repl.) 456, *1677*.

(6) *Birmingham* v. *Kirwan* (1805), 2 Sch. & Lef. 444; 38 Digest (Repl.) 811, **293*.

(7) *Churchill* v. *Churchill* (1867), L.R. 5 Eq. 44; 37 L.J.Ch. 92; 16 W.R. 182; 20 Digest (Repl.) 453, *1658*.

Also referred to in argument:

Whistler v. *Webster* (1794), 2 Ves. 367; 30 E.R. 676; 20 Digest (Repl.) 450, *1627*.

Wilson v. *Wilson* (1847), 1 DeG. & Sm. 152; 9 L.T.O.S. 291; 11 Jur. 793; 63 E.R. 1011; 44 Digest 214, *414*.

Wollaston v. *King* (1869), L.R. 8 Eq. 165; 38 L.J.Ch. 61, 392; 20 L.T. 1003; 17 W.R. 641; 20 Digest (Repl.) 425, *1473*.

Dillon v. *Parker* (1818), 1 Swan. 359; (1822), Jac. 505, L.C.; affirmed (1833), 7 Bli.N.S. 325; 1 Cl. & Fin. 303; 5 E.R. 796, H.L.; 20 Digest (Repl.) 466, *1753*.

Moore v. *Butler* (1805), 2 Sch. & Lef. 249; 20 Digest (Repl.) 430, **267*.

Woolridge v. *Woolridge* (1859), John. 63; 28 L.J.Ch. 689; 33 L.T.O.S. 254; 5 Jur.N.S. 566; 70 E.R. 340; 20 Digest (Repl.) 453, *1655*.

Thellusson v. *Woodford* (1806), 13 Ves. 209; 33 E.R. 273, L.C.; affirmed sub nom. *Rendlesham* v. *Woodford* (1813), 1 Dow. 249, H.L.; 20 Digest (Repl.) 450, *1628*.

Willoughby v. *Middleton* (1862), 2 John. & H. 344; 31 L.J.Ch. 683; 6 L.T. 814; 8 Jur.N.S. 1055; 10 W.R. 460; 70 E.R. 1089; 20 Digest (Repl.) 471, *1796*.

Appeal by the children of R. E. Cooper, deceased, from a decree of the Court of Appeal, reported 6 Ch. App. 15, reversing a decision of STUART, V.-C., reported in 22 L.T. 430, holding that they were not required to elect, as a result of the provisions of a will and codicil of their grandmother which conferred benefits on them, but contained a purported exercise of a power of appointment to their detriment.

By his will dated May 30, 1840, one W. H. Cooper directed his estate at Pain's Hill, in Surrey, to be vested in trustees for sale, the proceeds, subject to the life interest of his widow, to be disposed of among his three children in such manner and form as his widow, before each and every of his children should have attained the age of twenty-five years, or died under that age, should appoint, and in default of appointment upon the trusts therein mentioned. On April 5, 1841, Mrs. Cooper made an appointment by deed by which she appointed the proceeds of the Pain's Hill estate to her three sons equally on their attaining twenty-one, and reserved to herself the power of revocation and new appointment. On April 10, 1841, she made a will by which she disposed of other property, and also "gave and appointed" Pain's Hill to her eldest son, the respondent, absolutely. At this time her sons were all living, and had not attained twenty-five. By a subsequent codicil she gave her residuary property equally to her three sons. Roland E. Cooper, the third son, died in 1858 intestate, leaving children, the appellants in this case. After his death Mrs. Cooper by a codicil gave two-thirds of the residuary estate which had been intended for him to his children, and the remaining third to her other sons. She died in 1863, and all her sons attained twenty-five in her lifetime. After her death it was decided in a suit of *Cooper* v. *Martin* (3) that as the children had all attained twenty-five before her will came into operation the appointment made therein was inoperative, and that the proceeds of the estate passed under the deed to the respondent, F. Cooper (the second son) and the estate of R. E. Cooper. The respondent then filed his bill to put F. Cooper and the children of R. E. Cooper to their election, and if necessary to have Mrs. Cooper's estate administered. On Feb. 23, 1870, STUART, V.-C., decided that there was no case of election, and the respondent appealed to the lords justices, who, on Nov. 14, 1870, reversed

that decision. From that decision the children of R. E. Cooper brought the present appeal. F. Cooper, the second son, did not appeal.

Dickinson, Q.C., Fry, Q.C., and *H. Rawlinson* for the appellants.
Greene, Q.C., H. F. Bristowe, Q.C., and *Kekewich* for the respondent.

LORD CAIRNS, L.C.—The circumstance that the testatrix was not the owner of the Pain's Hill estate, and had no disposing power over it, clearly raises the question of election in the case of any persons taking under the will, and having an interest in that estate.

Before examining the matter in detail, I would remind your Lordships of the way the law has been expressed in two cases: *Streatfield* v. *Streatfield* (4) where LORD TALBOT says (Cas. temp. Talb. at pp. 182, 183):

> "When a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee to take entirely but not partially under it; there being a tacit condition annexed to all devises of this nature that the devisee do not disturb the disposition which the devisor hath made";

and *Noys* v. *Mordaunt* (5) where LORD COWPER says (2 Vern. at p. 582):

> "In all cases of this kind where a man is disposing of his estate among his children, and gives to one fee simple lands, and to another lands entailed, or under settlement, it is upon an implied condition, that each party acquit and release the other."

In addition to what I have said, I should also remind your Lordships that when the testatrix made her will her youngest son Roland E. Cooper, was alive, and that before she made the codicil he had died intestate. By the codicil pecuniary benefits were given both to the appellants and the second son of the testatrix, so that as regards the persons interested, the eldest son (the respondent) takes the Pain's Hill estate by the will, or one-third of it under the appointment, and no question of election arises as to him; the second son is entitled to one-third under the appointment, and receives benefits under the will. He has not appealed, and I apprehend there could be no appeal. In point of form, no doubt, by the appointment he was entitled to one-third of the proceeds, and not to one-third of Pain's Hill in specie; but this is to be considered only as a point of form, and is altogether immaterial. In a court of equity he must be held to be the owner of one-third, and as such is bound to elect.

This brings us to the third son, Roland E. Cooper, who has died intestate. The case may be considered as if he had only left one next of kin, as the fact that there are more in fact is immaterial as regards the principle. If there were only one he would be entitled to one-third, subject to the debts, and funeral, and administration expenses of the intestate; and, as I said in the case of the second son, there would be no difficulty in considering him as in equity the owner of the remaining third, subject to the debts, etc. It has been urged at the Bar that the interest of the next of kin of an intestate is of an undefined and intangible nature, and is merely a right to have the residue converted into money after all debts have been discharged; and if so, it can only be ascertained by calling upon the administrator to do his duty, which may require that the estate should be so converted. But the rule of law and the statute which require this conversion into money were introduced for the benefit of creditors, and to facilitate its division as substantive property. The next of kin has a right to the whole subject to this paramount claim of the creditors. It has been well expressed in BACON'S ABRIDGMENT, under the head "Executors and Administrators," on the clause which enacts that there should be no distribution within a year after the death of the intestate:

"It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an interest vested in him as shall go to his executor or administrator, for the statute doth not make any suspension or condition precedent to the interest of the parties, but is a clause merely for the benefit of creditors. Also this statute being in the nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue which remains over, and not the executor of the first testator."

This goes far to dispose of the argument of the appellants. If the Statute of Distribution is regarded as a will made by the legislature for the intestate, and the case is looked at from that point of view, the residuary legatee had an interest in specie in the Pain's Hill Estate, just as the second brother had. It has been contended at the Bar that if this be so, your Lordships could not stop short of holding that if it was found that a creditor of the intestate who had a claim on his estate received any benefit from property coming to the estate under the will, he would be put to his election. Is the appellants' case in anyway different? A simple test will satisfy your Lordships that it is so. Can your Lordships doubt that anyone of the next of kin might, before action, have released to the others, or assigned to a third party his interest in any specific portion of the intestate's estate, or in any specific item, subject to that item bearing its proportionate share of the administrator's expenses? Could a creditor do the same? He clearly could do nothing of the kind. He has no interest in any specific item of the property, or personal claim to which effect can be given. This disposes of the main question argued on behalf of the appellants. The children of Roland E. Cooper take benefits under the will of the testatrix, and an aliquot share of the Pain's Hill estate under the appointment, and must elect whether they will take under or in opposition to the will.

It is said that this election only applies to the benefits they receive under the codicil, and need not take effect upon the legacies of £1000 given by the will before the death of their father. I see no ground for any such distinction. As Lord Talbot, cited above, says, "he must take the entire benefit." No distinction can be founded on the supposed intention of the testatrix; for the rule, as was admitted in argument, does not proceed upon express intention, but is founded upon the highest principles of equity; and the courts are not required to find what intention is present to the mind of the party.

I must, however, call your Lordships' attention to one provision contained in the decree of the lords justices, and to the absence of another. I find no direction as to what is to be done in the case of one of the appellants, who is a married woman, and unable to act for herself. I, therefore, move that your Lordships should direct an inquiry to be made whether it is for her interest to take under or in opposition to the will.

The lords justices have also said that the Pain's Hill estate must be considered as subject to its rateable apportionment of all the debts and charges payable out of the general personal estate of Roland E. Cooper at the time of the testatrix's death. I am rather of opinion that it should be all the debts and charges payable at the time of the intestate's death; and, with these variations, I beg to move that the decree appealed from be affirmed, and the appeal dismissed, but, considering the circumstances of the case, without costs.

LORD HATHERLEY.—I entirely concur in what has been said by the noble and learned Lord on the Woolsack, and he has so clearly and fully stated his views on the case and the law, that I have but few words to add. The

difficulty which has been supposed by the appellants to exist arises from some expressions which have been thrown out in other cases, such as *Lady Cavan* v. *Pulteney* (1) to the effect that the doctrine of election is not applicable to a derivative interest, but the derivative interest in that case was that of a tenant by the curtesy after his wife had been put to her election, and it is unnecessary to discuss it, for it is entirely different to the present case. Here the parties are in possession by right of a fund to which they are entitled by the will of the original testator, and the testator's widow by her will affects to dispose of their interest under the former will.

According to all the authorities it is a simple case; where a legatee is the owner of property disposed of by the will, the law has been laid down for a long period, and though for a time there was a doubt whether it should proceed on the principle of forfeiture or of compensation, the main principle has never been disputed, that he must give full effect to the will if he take any benefit under it, and the will purports to deal with that which is beyond the power of the testator, to which effect can be given. Counsel for the appellants, in an ingenious argument, tried to establish the doctrine of an implied obligation but in this case it could not be implied that the appellants should give up their right to the Pain's Hill estate when they took the legacy of £1000, because at the date at which that legacy was given to them they had not such right; their father was alive, and there are indications in the will that the testatrix was aware of it, and contemplated his living, and being in possession of the property. The fallacy is obvious. On the death of the testatrix the law imposes the equitable duty of giving full effect to what is intended in her whole will; and, having it very clearly proved that she expressed an intention of disposing of what belonged to others, the law implies nothing more, except that she intended all that she expressed. When that is ascertained nothing remains to be done in reference to the election, except to see which the owner will take; and if he takes the benefit which has been erroneously conferred upon him by the will, he must then give effect to that will, though founded on error, by making a compensation. That being so, there is no need for an inquiry as to what was her supposed view as to this particular legacy of £1000, or as to others; the only question is whether the person who takes the benefit possesses the power to give effect to the will; and if he does possess it the law fixes him with the obligation.

But then counsel for the appellants says that what the appellants take is not a distinct amount, but only a right to have the assets divided by the administrator when the intestate's debts have been satisfied, and that this balance is not a subject for election. The Lord Chancellor has already disposed of that argument, and I will not pursue it, except to add an illustration; besides that the next of kin differs from a creditor in his clear power to release his interest in any specific property to which he was entitled under the will of the original testator, a creditor could under no circumstances acquire an interest in the specific chattels in question; a right to be paid a debt is wholly different from a right to a specific chattel, and if the sole next of kin could retain the property not disposed of for payment of debts in specie, what difference does it make if there is more than one? I also concur in the variations which the Lord Chancellor has proposed in the decree of the lords justices.

LORD O'HAGAN.—For my own part, but for the division of opinion there has been below, I should have entertained no doubt on this question. The facts are not in controversy, nor the general law that if a man takes under an instrument, he must take under the whole of it, and if he receives the benefit he must bear the burden. In this case the conditions are clearly fulfilled. There is a clear intention to dispose of property over which the testatrix had no disposing power, and at the same time to confer a benefit upon the true owners of the property. The application of the principle of election is inevitable. I do not see that

it makes any difference that Mrs. Cooper's power of appointment under the will of her husband was exhausted, whether she had not the power, or had disabled herself from the exercise of it is immaterial: *Birmingham* v. *Kirwan* (6). The observations which have been addressed to the House upon the meaning of intention have made it perfectly clear that the intention to be ascertained is not the intention to create a case of election, for in that case I do not understand how a case of election could ever have been raised; but the intention to do this, to dispose of the property, and to benefit the true owners; and then the law draws the conclusion from the principles of equity, not of evidence.

As to the point which has been pressed upon us by counsel for the appellants, that the property to which the appellants are entitled is nothing specific, but merely the residue of their father's estate after his debts and administration expenses have been satisfied, the Lord Chancellor and LORD HATHERLEY have already made it clear that it is beside the question. In the course of the argument I put it to the learned counsel what would be the position if the property were realty, and had devolved to the heir or devisee of R. E. Cooper, and they admitted that they could not argue the case if it were so; and there is no distinction between property already specific, and that which can be made specific after inquiry according to the principles of equity.

As to the point that was taken that this is a derivative interest, I am unable to see the distinction between the derivative interest of the heir and of the next of kin upon whom all the property devolves by law. In *Grissell* v. *Swinhoe* (2) the interest devolved after the death of the testator, which makes a material difference between that and the other cases cited and the present case, in which the property in question was vested in the appellants at the time the will came into effect. I see nothing to distinguish this case from the ordinary case of election, founded, as the Lord Chancellor has put it, upon reason and authority.

I also concur in the alterations he has proposed in the decree, and I think there should be no costs, on account of the difference of opinion among the judges below, and the difficulty of the case.

LORD MONCRIEFF.—I also concur in the opinion of your Lordships. When the testatrix died two separate rights opened to the appellants, to take under the will or against it. That they could entirely frustrate the gift of the Pain's Hill estate in the will there is no doubt: *Cooper* v. *Martin* (3). The only question is could they also claim benefits under the will. That the law will not permit a legatee to claim under and defeat a will is quite clear, whether the principle goes to the full extent of holding by or renouncing the whole, or is limited to compensation, and the doctrine of election is the consequence; but it must be clear that the interest is one which the legatee has power to frustrate. It is not necessary to refer to the point which has been raised with regard to the appointment (*Churchill* v. *Churchill* (7)), for it is certain that the principle is not varied; because there the testator exceeded the power, but the necessary implication that he intended to dispose of property beyond his power was not questioned. The testator intends the full effect of the will, which the legatee may frustrate. I cannot concur in the view that was put forward that intention means an intention to create an election; that would exclude every case in which the testator supposed he had full powers, and is contrary to all the authorities; it is wholly immaterial whether he thought he had power, or knew he had not, the rule is the same. The question of derivative interest only being incidental to the universitas of the succession of R. E. Cooper has been so exhaustively discussed that I have no more to add on that point. *Grissell* v. *Swinhoe* (2) was a question of a subsequent acquisition after the benefit conferred by the will had vested, and is quite different from this case, where the rights were co-existent when the will came up. The appellants assert that they have nothing but a

pecuniary claim after the intestate's debts and expenses have been satisfied, but I concur in thinking that they are in a position effectually to elect.

Decree of Court of Appeal varied.

Solicitors: *Dimond & Son; White, Broughton & White.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HUMPHRIES *v.* COUSINS

[COMMON PLEAS DIVISION (Denman and Lindley, JJ.), November 10, 15, 1876, January 12, 1877]

[Reported 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371]

Sewage—Overflowing—Damage to adjacent property—Drain running under defendant's premises and thence under plaintiff's—Seepage through earth and party wall—Ignorance of defendant—Liability.

An occupier of land can recover against an adjoining occupier for damage caused by noxious substances coming on to his premises, in a way in which he is not bound to receive them, from any artificial structure on the adjoining premises, although the adjoining occupier is ignorant of the facts which cause the injury and there is no negligence.

The plaintiff and the defendant were occupiers of adjoining premises. An old drain, commencing on the defendant's premises, ran under several other houses, doubled back under the defendant's premises, and from there ran under the plaintiff's cellar and away to a public sewer. The drain became out of repair under the defendant's premises and sewage and water seeped into the plaintiff's premises causing damage. The defendant was ignorant of the fact that the drain turned back through his premises and under the plaintiff's, and did not know of its state of disrepair. The jury found that the damage was caused by the seepage from the defendant's premises, but was not attributable to any negligence on his part. On a motion for judgment,

Held: the plaintiff was bound to receive sewage from the defendant's land through the drain, but not otherwise, e.g., through the surrounding earth or the party wall, through which, in fact, it came; it was the defendant's duty to keep sewage, which he was himself bound to receive, from passing from his own to the plaintiff's premises otherwise than along the drain; and, therefore, the plaintiff's rights had been infringed and he was entitled to damages.

Notes. Applied: *Firth* v. *Bowling Iron Co.* (1878), 3 C.P.D. 254; *Gill* v. *Edouin* (1894), 71 L.T. 762; *Holland* v. *Lazarus* (1897), 66 L.J.Q.B. 285. Considered: *Ilford Urban District Council* v. *Beal*, [1925] All E.R. Rep. 361. Distinguished: *Noble* v. *Harrison*, [1926] All E.R. Rep. 284. Considered: *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349. Referred to: *Edwards* v. *Birmingham Canal Navigations* (1923), 40 T.L.R. 88; *Kiddle* v. *City Business Properties, Ltd.*, [1942] 2 All E.R. 216; *Peters* v. *Prince of Wales Theatre (Birmingham), Ltd.*, [1942] 2 All E.R. 533; *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923; *Prosser & Son* v. *Levy*, [1955] 3 All E.R. 577; *Davey* v. *Harrow Corpn.*, [1957] 2 All E.R. 305.

As to liability under the rule in *Rylands* v. *Fletcher*, see 28 HALSBURY'S LAWS (3rd Edn.) 145 et seq.; and for cases see 36 DIGEST (Repl.) 287 et seq.

Cases referred to:

(1) *Smith* v. *Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 248, *8*.

(2) *Baird* v. *Williamson* (1863), 15 C.B.N.S. 376; 3 New Rep. 86; 33 L.J.C.P. 101; 9 L.T. 412; 12 W.R. 150; 143 E.R. 831; sub nom. *Williamson* v. *Baird*, 10 Jur.N.S. 152; 33 Digest (Repl.) 866, *1146*.

(3) *Fletcher* v. *Rylands* (1865), 3 H. & C. 774; 34 L.J.Ex. 177; 13 L.T. 121; 29 J.P. 599; 11 Jur.N.S. 714; reversed (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 283, *334*.

(4) *Broder* v. *Saillard* (1876), 2 Ch.D. 692; 45 L.J.Ch. 414; 40 J.P. 644; 24 W.R. 1011; 36 Digest (Repl.) 288, *360*.

(5) *Ashby* v. *White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; on appeal (1704), 1 Bro. Parl. Cas. 62, H.L.; 17 Digest (Repl.) 79, *22*.

(6) *Tenant* v. *Goldwin* (*or Golding*) (1704), 1 Salk. 21, 360; Holt, K.B. 500; 2 Ld. Raym. 1089; 6 Mod. Rep. 311; 91 E.R. 20, 314; 36 Digest (Repl.) 287, *356*.

(7) *Russell* v. *Shenton* (1842), 3 Q.B. 449; 2 Gal. & Dav. 573; 11 L.J.Q.B. 289; 6 Jur. 1083; 114 E.R. 579; 36 Digest (Repl.) 318, *642*.

(8) *Bell* v. *Twentyman* (1841), 1 Q.B. 766; 1 Gal. & Dav. 223; 10 L.J.Q.B. 278; 6 Jur. 366; 113 E.R. 1324.

(9) *Lambert and Olliot* v. *Bessey* (1679), T. Raym. 421; sub nom. *Olliet* v. *Bessey*, T. Jo. 214; 84 E.R. 1223; 38 Digest (Repl.) 63, *366*.

(10) *Hodgkinson* v. *Ennor* (1863), 4 B. & S. 229; 2 New Rep. 272; 32 L.J.Q.B. 231; 8 L.T. 451; 27 J.P. 469; 9 Jur.N.S. 1152; 11 W.R. 775; 122 E.R. 446; 44 Digest 38, *276*.

(11) *Hammond* v. *St. Pancras Vestry* (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 41 Digest 27, *217*.

(12) *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 293, *393*.

(13) *Carstairs* v. *Taylor* (1871), L.R. 6 Exch. 217; 40 L.J.Ex. 129; 19 W.R. 723; 36 Digest (Repl.) 284, *337*.

Motion for judgment in an action brought by the plaintiff, the occupier of the Old Red Lion public-house, No. 339, Strand, against the defendant, who was the occupier of the adjoining premises, No. 6, Helmet Court, to recover damages for injury caused to the plaintiff's premises and stock-in-trade by water and sewage coming into his cellar from the defendant's premises. The case was tried at Westminster before BLACKBURN, J., who reserved leave to enter judgment for the plaintiff for £30, the amount of damages assessed by the jury.

Talfourd Salter, *Q.C.*, and *C. C. Scott* (*Glyn* with them) for the plaintiff.
Robinson and *Shortt* for the defendant.

Cur. adv. vult.

Jan. 12, 1877. **DENMAN, J.,** read the following judgment of the court.—The plaintiff and the defendant in this case are tenants and occupiers of adjoining houses; and the plaintiff, upon the facts and findings of the jury, now complains of injuries caused to his premises and stock-in-trade by water and sewage coming into his cellar from the defendant's premises. The jury have found in effect that the injuries complained of are so caused, and have assessed the damages sustained by the plaintiff at £30. The plaintiff has moved for judgment for the amount of the damages so assessed.

The facts relied on as a defence to the action are in substance as follows. The water and sewage in question came from an old drain, which commenced on the defendant's premises, and received his sewage, ran under and received the sewage

of several other houses, turned back through the defendant's premises, ran under the plaintiff's cellar, and then away to a public sewer. This drain was not known to the defendant to turn back and run through his premises under those of the plaintiff, and was not known to be out of repair. It was, however, in fact, out of repair by reason of age and wear and tear, and its defective state under the defendant's premises was the real cause of the mischief. The jury found that the defective state of the drain was not attributable to any negligence of the defendant.

Upon these facts it is to be observed at the outset that the water and sewage which injured the plaintiff came on to the defendant's land by an artificial drain made for the convenience of the defendant and the other persons whose houses were higher up. We have not, therefore, to deal as the court had in *Smith* v. *Kenrick* (1) with the case of water or other matter coming naturally from or through the defendant's land on to the plaintiff's. Bearing this in mind, it appears to us that it is incumbent on the defendant to show what right he had to allow the filth brought artificially on his land to escape on to the land of the plaintiff. The prima facie right of every occupier of a piece of land is to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter, but the burden of showing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it. That these are the rights of an occupier of land appears to us to be established by *Smith* v. *Kenrick* (1); *Baird* v. *Williamson* (2); *Fletcher* v. *Rylands* (3), and the older authorities there referred to, and the recent decision of *Broder* v. *Saillard* (4).

In the present case the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise; he was not bound to receive it through the surrounding earth or the party wall, through which, in fact, it came. Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain on any of the dominant tenements. The plaintiff's rights, therefore, have been infringed, and the loss he has sustained cannot be said to be damnum absque injuria: see the note to *Ashby* v. *White* (5) (1 SMITH'S LEADING CASES (6th Edn.) 263).

But the question still remains: Has the defendant infringed those rights, and is he the person liable for the infringement? It is said this case is not like *Tenant* v. *Goldwin* (6) or *Fletcher* v. *Rylands* (3) because in both of those cases the defendant himself brought on his land that which occasioned the mischief, whereas in this case the defendant received the sewage, and was bound so to do. So far, however, as we can judge some of the sewage must, in fact, have come from the defendant's own premises in the first instance; but even if this is not to be taken as proved, we are of opinion that as between the plaintiff and the defendant, it was the defendant's duty to keep the sewage which he was himself bound to receive, from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land: see *Russell* v. *Shenton* (7); and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge, and the fact that he unknowingly receives it affords no justification for allowing it to escape in a manner in which he had no right to let it pass. *Fletcher* v. *Rylands* (3) is a strong authority to show that this conclusion is correct, for although in that case the defendant knew of the existence of his reservoir, he did not know that the ground underneath it was in such a state as to render its existence dangerous.

It was strenuously but ineffectually urged that he could not be liable in respect of damage caused by a state of things of which he knew nothing. *Bell* v. *Twenty-man* (8) is a strong authority to the like effect. Indeed, if it be once established that the plaintiff's rights have been infringed by the defendant, and that the plaintiff has been thereby damnified, the fact that the defendant infringed them unknowingly, and without negligence, cannot avail him as a defence to an action by the plaintiff: see *Lambert and Olliot* v. *Bessey* (9). In short we think that the true doctrine is contained in the following passage of the judgment of BLACKBURN, J., in *Hodgkinson* v. *Ennor* (10) (4 B. & S. at p. 241):

> "I take the law to be as stated in *Tenant* v. *Goldwin* (6) that you must not injure the property of your neighbour, and consequently if filth is created on any man's land, then, in the quaint language of the report in 1 Salk. 361, 'he, whose dirt it is, must keep it that it may not trespass.' "

Hammond v. *St. Pancras Vestry* (11), which was relied upon by the counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the clauses of a particular Act of Parliament imposing certain duties upon a public body, and no question arose as to the common law liability of the occupier of adjoining premises: see the judgment of BRETT, J., L.R. 9 C.P. at p. 322.

It was, however, contended that the present case was governed by *Ross* v. *Fedden* (12), but that was a case in which the plaintiff and the defendant occupied separate stories in the same house, and it was expressly distinguished from a case like the present, which depends simply on those principles of law which regulate the rights and duties of the occupiers of adjacent pieces of land. *Carstairs* v. *Taylor* (13) is also clearly distinguishable on the same ground.

The question whether the defendant was bound as between himself and the plaintiff to repair the drain, or so much of it as ran under the defendant's land, was much discussed, but does not really arise, for the plaintiff's cause of action, as originally relied upon, is not that the defendant omitted to repair the drain, but that he omitted to prevent the sewage on his land from coming on the plaintiff's land otherwise than as the plaintiff was bound to receive it. If the defendant had prevented the sewage from so coming the plaintiff would have had no cause of action whether the drain was repaired or not. The defendant may perhaps be entitled as between himself and the owners and occupiers of the other dominant tenements to call upon them to contribute to the expenses of keeping his and their common drain in repair, and it may be, that the plaintiff might have sued all those owners or occupiers, including the defendant, for the damage which he has sustained by reason of such non-repair. But, even if the plaintiff could have sued them all he was not, in our opinion, bound to do so; he was not bound to rest his case on his ability to establish a duty on them to repair the drain, and a breach of such duty by all who used it.

Lastly, it was contended that as the defendant was only a tenant and not an owner he was not responsible; but he was in point of law tenant, and as such responsible to the plaintiff: see *Russell* v. *Shenton* (7), and he could himself have maintained an action for any invasion of such possession. For these reasons our judgment is for the plaintiff.

The defendant appealed against the above decision, and the appeal came on for hearing on May 4, 1877.

Robinson and *Shortt* for the defendant.

T. Salter and *C. C. Scott* for the plaintiff.

An additional point was now taken by the defendant's counsel, viz., that the drain in question was a public sewer, for the condition of which the defendant was not responsible. The court expressed an opinion that this view was correct;

but that in order to raise the point, which would be conclusive in favour of the defendant, an amendment of the pleadings was necessary. Therefore, on the suggestion of the court, the parties agreed to a "stet processus," with no costs on either side.

Solicitors: *Beard & Sons; Halse, Trustram & Co.*

[*Reported by* P. B. HUTCHINS, ESQ., *Barrister-at-Law.*]

JACKSON *v.* UNION MARINE INSURANCE CO., LTD.

[COURT OF EXCHEQUER CHAMBER (Blackburn, Mellor and Lush, JJ., Bramwell, Cleasby and Amphlett, BB.), June 18, 19, November 30, 1874]

[Reported L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435]

Insurance—Marine insurance—Freight—Delay in arrival of ship to begin voyage —Rejection of charter by charterers—Delay due to excepted perils—No action by shipowner possible against charterers—Right of shipowner to recover under policy.

In November, 1871, the assured entered into a charterparty by which a ship belonging to him was "with all convenient speed" to proceed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, "all and every the dangers and accidents of the seas excepted." By a policy of insurance, dated Dec. 9, 1871, the assured insured "chartered freight valued at £2900 at and from Liverpool to Newport in tow, whilst there, and thence to San Francisco." On Jan. 2, 1872, the ship left Liverpool. On Jan. 3, before reaching Newport, she ran on the rocks in Carnarvon Bay and was so much damaged that on Feb. 15 the charterers gave to the assured notice rejecting the charterparty and chartered another ship to carry their cargo. The ship was got off and she returned to Liverpool by April 12 where it was ascertained that the necessary repairs could not be completed for some months. In an action by the assured on the policy the jury found that that time was so long that it "put an end in the commercial sense to the speculation entered upon by the shipowner and the charterers."

Held (CLEASBY, B., dissenting): a condition must be implied in the charterparty that the ship should arrive at Newport at a reasonable time to begin the contemplated voyage to San Francisco; that condition not having been fulfilled, the charterparty was at an end and the charterers were absolved from their obligation to load the vessel; as the delay had been caused by excepted perils no action against the charterers lay at the instance of the assured; and, therefore, the freight having thus been lost, the assured was entitled to recover under the policy.

Notes. Considered: *Hudson* v. *Hill* (1874), 43 L.J.C.P. 273; *King* v. *Parker* (1876), 34 L.T. 887. Applied: *Poussard* v. *Spiers* (1876), 1 Q.B.D. 410. Explained: *Dahl* v. *Nelson, Donkin* (1880), 6 App. Cas. 38. Considered: *Inman Steamship Co.* v. *Bischoff* (1882), 7 App. Cas. 670; *Bush* v. *Whitehaven Town and Harbour Trustees* (1888), 52 J.P. 392. Applied: *The Alps*, [1893] P. 109. Considered: *Bensaude* v. *Thames and Mersey Marine Insurance* (1896), 75 L.T. 155. Explained: *Krell* v. *Henry*, [1900-3] All E.R. Rep. 20. Applied: *Storey* v. *Fulham Steel Works Co.* (1907), 24 T.L.R. 89. Considered: *Embiricos* v. *Reid*, [1914] 3 K.B. 45; *Horlocks*

v. *Beal*, [1916-17] All E.R. Rep. 81; *F. A. Tamplin Steamship Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916-17] All E.R. Rep. 104. Explained: *Millar* v. *Taylor*, [1916] 1 K.B. 402. Considered: *Scottish Navigation Co.* v. *Souter, Admiral Shipping Co.* v. *Weidner, Hopkins*, [1917] 1 K.B. 222. Explained: *Bank Line, Ltd.* v. *Arthur Capel & Co.*, [1918-19] All E.R. Rep. 504. Considered: *Re An Arbitration Between Commercial Anversois and Powers, Son & Co.*, [1918-19] All E.R. Rep. 661; *Petros M. Nomikos, Ltd.* v. *Robertson*, [1939] 3 All E.R. 249; *Reardon Smith Line, Ltd.* v. *Ministry of Agriculture, Fisheries and Food*, [1961] 2 All E.R. 577; *Hong Kong Fir Shipping Co., Ltd.* v. *Kawasaki Kisen Kaisha, Ltd.*, [1962] 1 All E.R. 474. Referred to: *De Wolf* v. *Archangel Maritime Bank and Insurance* (1874), L.R. 9 Q.B. 451; *Re Jamieson and Newcastle Steamship Freight Insurance Association*, [1895] 2 Q.B. 90; *Weir* v. *Pirie (No. 2)* (1898), 3 *Com. Cas.* 271; *Carlton Steamship Co.* v. *Castle Mail Packets Co.* (1898), 78 L.T. 661; *Turnbull Martin & Co.* v. *Hull Underwriters' Association*, [1900-3] All E.R. Rep. 85; *Nickoll and Knight* v. *Ashton, Edridge* (1900), 69 L.J.Q.B. 640; *Manchester Liners* v. *British and Foreign Marine Insurance* (1901), 18 T.L.R. 183; *Herne Bay Steam Boat Co.* v. *Hulton*, [1900-3] All E.R. Rep. 627; *Krell* v. *Henry*, [1900-3] All E.R. Rep. 20; *Re Carver and Sassoon* (1911), 17 Com. Cas. 59; *Dunford* v. *Cia Maritima Union* (1911), 104 L.T. 914; *Smith, Coney and Barrett* v. *Becker*, [1914-15] All E.R. Rep. 398; *Leiston Gas Co., Ltd.* v. *Leiston-cum-Sizewell Urban District Council*, [1916-17] All E.R. Rep. 329; *Heilgers* v. *Cambrian Steam Navigation Co.* (1917), 33 T.L.R. 348; *Metropolitan Water Board* v. *Dick Kerr & Co., Ltd.*, [1916-17] All E.R. Rep. 122; *Blackburn Bobbin Co.* v. *Allen*, [1918] 2 K.B. 467; *Countess of Warwick Steamship Co.* v. *Nickel Société Anonyme, Anglo-Northern Trading Co.* v. *Emlyn Jones and Williams*, [1918] 1 K.B. 372; *Naylor, Benzon & Co.* v. *Krainische Industrie Gesellschaft* (1918), 87 L.J.K.B. 1066; *Akt. Olivebank* v. *Dansk Svovlsyre Fabrik*, [1919] 2 K.B. 162; *Larrinaga* v. *Société Franco-Americaine Des Phosphates de Medulla, Paris*, [1923] All E.R. Rep. 1; *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.*, [1926] All E.R. Rep. 51; *Maritime National Fish, Ltd.* v. *Ocean Trawlers, Ltd.* (1935), 104 L.J.P.C. 88; *Carras* v. *London and Scottish Assurance Corpn., Ltd.*, [1935] All E.R. Rep. 246; *Kulukundis* v. *Norwich Union Fire Insurance Society*, [1936] 2 All E.R. 242; *Tatem, Ltd.* v. *Gamboa*, [1938] 3 All E.R. 249; *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corpn., Ltd., The Kingswood*, [1941] 2 All E.R. 165; *Fibrosa Spolka, Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Sir Lindsay Parkinson & Co.* v. *Commissioner for Works and Public Buildings*, [1950] 1 All E.R. 208; *Chandris* v. *Isbrandtsen-Moller Co. Inc.*, [1950] 1 All E.R. 768; *British Movietonews, Ltd.* v. *London and District Cinemas, Ltd.*, [1951] 2 All E.R. 617; *Arab Bank, Ltd.* v. *Barclays Bank (D.C. & O.)*, [1953] 2 All E.R. 263; *Tsakiroglou & Co., Ltd.* v. *Noblee and Thorl*, [1961] 2 All E.R. 179.

As to insurance of freight, see 22 Halsbury's Laws (3rd Edn.) 65-67, 147-149; and for cases see 29 Digest (Repl.) 128-130, 325-327.

Cases referred to:

(1) *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183; 26 L.J.Ex. 26; 156 E.R. 1168; 41 Digest 326, *1836*.

(2) *Touteng* v. *Hubbard* (1802), 3 Bos. & P. 291; 127 E.R. 161; 41 Digest 647, *4788*.

(3) *Hadley* v. *Clarke* (1799), 8 Term Rep. 259; 101 E.R. 1377; 12 Digest (Repl.) 459, *3426*.

(4) *Hurst* v. *Usborne* (1856), 18 C.B. 144; 25 L.J.C.P. 209; 27 L.T.O.S. 80; 4 W.R. 458; 139 E.R. 1321; 41 Digest 322, *1814*.

(5) *MacAndrew* v. *Chapple* (1866), L.R. 1 C.P. 643; Har. & Ruth. 745; 35 L.J.C.P. 281; 14 L.T. 556; 12 Jur.N.S. 567; 14 W.R. 891; 2 Mar. L.C. 339; 41 Digest 488, *3184*.

(6) *Rankin* v. *Potter* (1873), L.R. 6 H.L. 83; 42 L.J.C.P. 169; 29 L.T. 142; 22 W.R. 1; 2 Asp.M.L.C. 65, H.L.; 29 Digest (Repl.) 325, *2462*.

(7) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268.

(8) *Freeman* v. *Taylor* (1831), 8 Bing. 124; 1 Moo. & S. 182; 1 L.J.C.P. 26; 131 E.R. 348; 41 Digest 329, *1856*.

(9) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242*.

(10) *Glaholm* v. *Hays* (1841), 2 Man. & G. 257; Drinkwater, 130; 2 Scott, N.R. 471; 10 L.J.C.P. 98; 8 L.T. 93; 133 E.R. 743; 41 Digest 331, *1867*.

(11) *Ollive* v. *Booker* (1847), 1 Exch. 416; 17 L.J.Ex. 21; 154 E.R. 177; sub nom. *Olive* v. *Booker*, 10 L.T.O.S. 137; 41 Digest 326, *1839*.

(12) *Clipsham* v. *Vertue* (1843), 5 Q.B. 265; Dav. & Mer. 343; 13 L.J.Q.B. 2; 2 L.T.O.S. 120; 8 Jur. 32; 114 E.R. 1249; 41 Digest 488, *3184*.

(13) *Wheeler* v. *Bavidge* (1854), 9 Exch. 668; 2 C.L.R. 1077; 23 L.J.Ex. 221; 156 E.R. 286; 41 Digest 328, *1851*.

(14) *Blight* v. *Page* (1801), 3 Bos. & P. 295, n.; 127 E.R. 163, N.P.; 41 Digest 454, *2849*.

(15) *Medeiros* v. *Hill* (1832), 8 Bing. 231; 1 Moo. & S. 311; 1 L.J.C.P. 77; 131 E.R. 390; 41 Digest 521, *3493*.

(16) *Paradine* v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

(17) *The Tutela* (1805), 6 Ch. Rob. 177; 165 E.R. 892; 37 Digest 625, *738*.

(18) *Scott* v. *Libby*, 2 Johnson's Cases in the Supreme Court of New York, p. 336.

Also referred to in argument:

Havelock v. *Geddes* (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, *1834*.

Behn v. *Burness* (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L.J.Q.B. 204; 8 L.T. 207; 9 Jur.N.S. 620; 11 W.R. 496; 1 Mar.L.C. 329; 122 E.R. 281, Ex. Ch.; 41 Digest 327, *1840*.

Stanton v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 21 W.R. 71; 1 Asp.M.L.C. 449; affirmed (1874), L.R. 9 C.P. 390; 30 L.T. 643; 22 W.R. 223, Ex. Ch.; affirmed (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp.M.L.C. 23, H.L.; 41 Digest 303, *1651*.

Barker v. *Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 41 Digest 454, *2851*.

Barker v. *M'Andrew* (1865), 18 C.B.N.S. 759; 6 New Rep. 227; 34 L.J.C.P. 191; 12 L.T. 459; 11 Jur.N.S. 637; 13 W.R. 779; 2 Mar.L.C. 205; 144 E.R. 643; 41 Digest 332, *1872*.

Blasco v. *Fletcher* (1863), 14 C.B.N.S. 147; 3 New Rep. 38; 32 L.J.C.P. 284; 9 L.T. 169; 9 Jur.N.S. 1105; 11 W.R. 997; 1 Mar.L.C. 380; 143 E.R. 401; 41 Digest 650, *4820*.

Mordy v. *Jones* (1825), 4 B. & C. 394; 6 Dow. & Ry. K.B. 479; 3 L.J.O.S.K.B. 250; 107 E.R. 1106; 29 Digest (Repl.) 243, *1829*.

Anderson v. *Wallis* (1813), 2 M. & S. 240; 3 Camp. 440; 105 E.R. 372; 29 Digest (Repl.) 321, *2435*.

Everth v. *Smith* (1814), 2 M. & S. 278; 105 E.R. 385; 29 Digest (Repl.) 327, *2471*.

McCarthy v. *Abel* (1804), 5 East, 388; 1 Smith, K.B. 524; 102 E.R. 118; 29 Digest (Repl.) 242, *1826*.

Scottish Marine Insurance Co. v. *Turner* (1853), 4 H.L.Cas. 312, n.; 21 L.T.O.S. 10; 17 Jur. 631; 1 W.R. 537; 1 Macq. 334; 10 E.R. 483, H.L.; 29 Digest (Repl.) 243, *1827*.

Taylor v. *Dunbar* (1869), L.R. 4 C.P. 206; 38 L.J.C.P. 178; 17 W.R. 382; 29 Digest (Repl.) 234, *1763*.

Appleby v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669; 12 Digest (Repl.) 696, *5334*.

Boast v. *Firth* (1868), L.R. 4 C.P. 1; 38 L.J.C.P. 1; 19 L.T. 264; 17 W.R. 29; 12 Digest (Repl.) 697, *5337*.

Howell v. *Coupland* (1876), 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470, C.A.

Appeal by the defendants from a decision of the Court of Common Pleas on a rule obtained by the plaintiff for judgment in an action on a policy of insurance on chartered freight, valued at £2900, to be earned by the plaintiff's ship *Spirit of the Dawn* on a voyage from Newport to San Francisco.

The action was tried before BRETT, J., at the Liverpool Summer Assizes, 1872, when it appeared from the evidence that the plaintiff had, on Dec. 9, 1871, effected with the defendant insurers an insurance "on chartered freight valued at £2900, at and from Liverpool to Newport in tow, whilst there and thence to San Francisco," and by the charterparty it was stated that the ship should with all convenient speed proceed from Liverpool direct to Newport, and there load a cargo of iron rails for San Francisco, "all and every the dangers and accidents of the seas excepted." On Jan. 2, 1872, the ship left Liverpool, but on Jan. 3, before reaching Newport, she got on the rocks in Carnarvon Bay, and was so much damaged that on Feb. 15 the charterers gave notice of abandonment of the charter and hired another ship in which to forward their goods. The *Spirit of the Dawn* was with difficulty got back to Liverpool on April 12, when, upon survey, the cost of necessary repairs was estimated at £3650. Notice of abandonment was given under both policies, but not accepted.

The questions left to the jury were: First, whether there was a constructive total loss of the ship; secondly, whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; thirdly, whether such time was so long as to put an end in a commercial sense to the speculation entered upon by the shipowner and the charterers. The jury answered all these questions in the affirmative, and the learned judge directed a verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter the verdict for him on either or both of the policies. Upon the argument of the rule which was, accordingly, obtained, an agreement was come to in respect of the policy on the ship, but with regard to the policy on the chartered freight the court below was divided, KEATING and BRETT, JJ., holding that the charterers were absolved from loading the vessel, and that the plaintiff, therefore, might recover for the loss of freight, and BOVILL, C.J., holding on the other hand, that the charterers were not entitled to throw up the charter and consequently the plaintiff could not recover against the underwriters. Upon the judgment of the majority of the court below the defendants brought error, which was now argued.

Benjamin, Q.C., *Charles Russell, Q.C.*, and *Aspland* for the defendants.

Butt, Q.C., and *Gully* for the plaintiff.

Cur. adv. vult.

Nov. 30, 1874. The following judgments were read.

BRAMWELL, B.—The first question in this case is whether the plaintiff could have maintained an action against the charterers for not loading, for if he could there certainly has not been a loss of the chartered freight by any of the perils insured against. In considering this question the finding of the jury, that

> "the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers,"

is all important. I do not think the question could have been left in better terms, but it may be paraphrased or amplified.

A I understand that the jury have found that the voyage the parties had contemplated had become impossible, that a voyage undertaken after the ship was sufficiently repaired, would have been a different voyage—not indeed different as to the ports of loading and discharge, but different as a different adventure—a voyage for which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterer the cargo—a voyage as different as though B it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage. It is manifest that, if a definite voyage had been contracted for and became impossible by perils of the seas, that voyage would have been prevented, and the freight to be carried thereby would have been lost by the perils of the seas. The power which undoubtedly would exist to perform, say an autumn voyage in lieu of a spring voyage, if both C parties were willing, would be a power to enter into a new agreement, and would no more prevent the loss of the spring voyage and its freight than would the power (which would exist if both parties were willing) to perform a voyage between different ports with a different cargo. But the defendants say here the contract was not to perform a definite voyage, but was at some and any D future time, however distant, provided it was by no default in the shipowners, and only postponed by perils of the seas, to carry a cargo of rails from Newport to San Francisco; and that, no matter at what distance of time, at what loss to the shipowner, whatever might be the ship's engagements, however freight might have risen or seamen's wages, though the voyage at the time when the ship was ready might be twice as dangerous, and possibly twice as long, from E fogs, ice, and other perils, though war might have broken out meanwhile between the country to whose port she was to sail and some other, still she was bound to take and had the right to demand the cargo of the shippers, who in like way had a right to have carried and was bound to find the agreed cargo, or if that had been sent on already, a cargo of the same description no matter at what loss and however useless the transport of the goods might be to F them. This is so inconvenient, that though fully impressed with the considerations so forcibly put by counsel for the defendants, and retaining the opinion I expressed in *Tarrabochia* v. *Hickie* (1), I think that unless the rules of law prohibit it we ought to hold the contrary.

The question turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible dispatch, perils of the seas G excepted. It is said this constitutes the only agreement as to time, and, provided all possible dispatch is used, it matters not when she arrives at Newport. I am of a different opinion. If this charterparty be read as a charter for a definite voyage or adventure, then it follows that there is necessarily an implied condition the ship shall arrive at Newport in time for it. Thus, if a ship was chartered to go from Newport to St. Michaels in terms in time for H the fruit season, and take coals out and bring fruit home, notwithstanding the opinion expressed in *Touteng* v. *Hubbard* (2), on which I will remark later, it would follow that, if she did not get to Newport in time to get to St. Michaels for the fruit season, the charterer would not be bound to load at Newport, though she had used all possible dispatch to get there, and though there was an I exception of perils of the seas. The two stipulations to use all possible dispatch and arrive in time for the voyage are not repugnant, nor is either superfluous or useless. The shipowner in the case put expressly agrees to use all possible dispatch. That is not a condition precedent; the sole remedy for and right consequent on the breach of it is an action. He also impliedly agrees that the ship shall arrive in time for the voyage; that is a condition precedent as well as an agreement, and its non-performance not only gives the charterer a cause of action, but also releases him. Of course, if these stipulations owing to excepted perils are not performed, there is no cause for action, but there is the same release of the charterer. The same reasoning would apply if the terms

were to "use all possible dispatch, and further and as a condition precedent to be ready at the port of loading on June 1." That reasoning applies to the present case.

If the charterer be ready as for a voyage or adventure not precisely defined by time or otherwise, but still for a particular voyage, arrival at Newport in time for it is necessarily a condition precedent. It seems to me it must be so read, I should say reason and good sense require it. The difficulty is supposed to be that there is some rule of law to the contrary. This I cannot see, and it seems to me that in this case the shipowner undertook to use all possible dispatch to arrive at the port of loading, and also agreed that the ship should arrive "there at such a time that in a commercial sense the commercial speculation entered into by the shipowner and charterer should not be at an end but in existence." That latter agreement is also a condition precedent. Not arriving at such a time puts an end to the contract; though, as it arises from an excepted peril, it gives no cause of action. The same result is arrived at by what is the same argument differently put. Where no time is named for the doing of anything, the law attaches a reasonable time.

Let us suppose this charterparty had said nothing about arriving with all possible despatch. In that case, had the ship not arrived at Newport in a reasonable time owing to the default of the shipowner, the charterer would have had a right of action against the owner, and would have had a right to withdraw from the contract. It is impossible to hold that in that case the owner would have a right to say: "I came a year after the time I might have come, because meanwhile I have been profitably employing my ship. You must load me, and bring your action for damages." The charterer would be discharged, because the implied condition to arrive in a reasonable time was not performed. Let us now suppose the charter contains, as here, a provision that the ship shall arrive with all possible dispatch. I ask again: Is that so inconsistent with or repugnant to a further condition that at all events she shall arrive within a reasonable time, or is that so needless a condition, that it is not to be implied? I say certainly not. I must repeat the foregoing reasoning. Let us suppose both these provisions expressed, and it will be seen they are not inconsistent nor needless. Thus, I will use all possible dispatch to get the ship to Newport, but at all events she shall arrive in a reasonable time for the adventure contemplated. I hold, therefore, that the implied condition of a reasonable time exists in this charter.

What is the effect of the exception of perils of the seas, and of delay being caused thereby? Suppose it was not there, and not implied, the shipowner would be subject to an action for not arriving in a reasonable time, and the charter would be discharged. Counsel for the defendants says the exception would be implied. How that is it is not necessary to discuss, as the words are there, but, if it is so, it is remarkable as showing what may be implied from the necessity of the case. The words are there, what is their effect? I think that they excuse the shipowner, but give him no right. The charterer has no cause of action, but he is released from the charter. When I say he is, I think that both are. The condition precedent has not been performed, but by default of neither. It is as though the charter were conditional on peace being made between countries A. and B., and it was not; or as though the charter agreed to load a cargo of coals, strike of pitmen excepted. If a strike of probably long duration began, he would be excused from putting the coals on board, and would have no right to call on the shipowner to wait till the strike was over. The shipowner would be excused from keeping his ship waiting, and have no right to call on the charterer to load at a future time.

This seems in accordance with general principles. The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract; but it does not operate to take

away the right the other party would have had if the non-performance had been a breach of contract, to retire from the engagement; and if one party may, so may the other. Thus A. enters the service of B. and is ill and cannot perform his work; no action will lie against him, but B. may hire a fresh servant, and not await his recovery if his illness would put an end, in a business sense, to their business engagement and would frustrate the object of that engagement. A short illness would not suffice, if consistent with the object they had in view. So, if A. engages B. to make a drawing, say of some present event for an illustrated paper, and B. is attacked with blindness which will disable him for six months, it can't be doubted that though A. could maintain no action against B., he might procure some one else to make the drawing. So of an engagement to write a book, and insanity of the intended author. So of the case I have put of an exception of a strike of pitmen.

There is, then, a condition precedent that the vessel shall arrive in a reasonable time. On failure of this, the contract was at an end, and the charterer discharged, though he has no cause of action as the failure arose from an excepted peril. The same result follows then, whether the implied condition is treated as one that the vessel shall arrive in time for that adventure, or one that it shall arrive in reasonable time, that time being in time for the adventure contemplated; and in either case, as in the express cases supposed, and in the analogous cases put, non-arrival and incapacity by that time ends the contract, the principle being that, though non-performance of a condition may be excused, it does not take away the right to rescind from him for whose benefit the condition was introduced. On these grounds I think that in reason, in principle, and for the convenience of both parties, it ought to be held in this case that the charterers were on the finding of the jury discharged.

It remains to examine the authorities. The first in date relied on by the defendants is *Hadley* v. *Clarke* (3). It may safely be said that there the question was wholly different from the present. There was no question in that case as to the performance of a condition precedent to be ready at a certain or within a reasonable time, or such a time that the voyage in question, the adventure, should be accomplished and not frustrated. That condition had been performed; the ship had loaded and sailed in due time—the plaintiff had had a part of the benefit intended—the defendant had in justice earned part of his freight. Had the plaintiff demanded his goods at Falmouth, he ought to have paid something for their carriage there. He could not, therefore, very well have said that he would not go on with the adventure, but undo it. But, if I am right, unless both could, neither could. Further, in that case there was no finding, or anything equivalent to a finding, that the objects of the parties were frustrated. This case is, therefore, in every way distinguishable.

Then there is *Touteng* v. *Hubbard* (2). The opinion there expressed was obiter; of weight, no doubt, but not of the same weight it would have been had it been the ratio decidendi. I cannot think that it would have been so held, had it been necessary to act on it. To hold that a charterer is bound to furnish a cargo of fruit at a time of year when there is no fruit, at a time of year different from what he and the shipowner must have contemplated, the change to that time being no fault of his, but the misfortune at best of the shipowner, is so extravagant when the consequences become apparent that it could not be. Suppose a charter to fetch a cargo of ice from Norway, entered into at such a time that the vessel would reach its destination with reasonable dispatch in February, when there was ice, and bring it back in June when ice was wanted, and by perils of the seas it could not get to Norway till the ice was melted, nor return till after ice was of no value. Can it be that the charterer would be bound to load, that he had agreed in those events to do so?

Another case is *Hurst* v. *Usborne* (4). That is a case of which, if I knew no more than I learn from the books, I should say it did not decide the question we

have before us. It is true that the report in the LAW JOURNAL, says that CRESSWELL, J., said he knew of no time the shipowner was bound to, except to use reasonable dispatch. Still, I cannot see from the reports, that the point now before us was presented to the judges in that case. BLACKBURN, J., who was counsel in the cause, says it was intended to raise this point by the evidence that was rejected at nisi prius. No doubt, therefore, that was so, but I cannot think it was so understood by the court. I see no adjudication on it. Counsel for the plaintiff in the present case pointed out that the charter was for barley or other lawful merchandise; even if for barley only, it does not appear that barley might not have been stored at Limerick, nor that barley from Limerick arriving in England at the time it would, had the defendant loaded, would not have been as valuable as arriving earlier. I cannot but think it was a hasty decision. A rule was refused, and certainly one would think, after the argument we have heard, that the matter was worth discussing. At the same time its tendency is favourable to the defendants. I think it unsatisfactory, and, if a decision on the question now before us, wrong. WILLES, J., did not seem to be of opinion that the law was as he is supposed to have laid it down in that case, see his judgment in *MacAndrew* v. *Chapple* (5), where indeed there had been a breach of contract by the shipowner, but the observations are general. I may also properly refer to the opinions, if not of myself, of my brothers BLACKBURN and BRETT in *Rankin* v. *Potter* (6). They undoubtedly assumed the law to be as the plaintiffs contend.

There is also *Geipel* v. *Smith* (7), nearly, if not quite, in point. The shipowner there was excused, not merely for refusing to take a cargo to a port which became blockaded after the charter, but also in effect for refusing to do so after the blockade was removed. Restraint of princes not only excused, but discharged, him. The same, no doubt, would have been held as to the charterers. Then there are the cases which hold that where the shipowner has not merely broken his contract, but so broken it that the condition precedent is not performed, the charterer is discharged: see *Freeman* v. *Taylor* (8). Why? not merely because the contract was broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence or at a day named is subject to a cross-action only—not arriving in time for the voyage contemplated, but at such a time that it is frustrated, is not only a breach of contract but discharges the charterer; and so it should though he has such an excuse that no action lies. *Taylor* v. *Caldwell* (9), is a strong authority in the same direction.

I cannot but think, then, that the weight of authority, as might be expected, is on the side of reason and convenience. On the other question, viz., whether though the charterer by perils insured against had a right to refuse to load the cargo, there had been a loss of freight by perils of the seas, I am of opinion that there has been. It was argued that the doctrine of causa proxima spectatur non remota, applied, and that the proximate cause of the loss of freight here was the refusal of the charterer to load. But, if I am right, the voyage, the adventure, was frustrated by the perils of the seas, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement; but, even if not, the maxim does not apply. The perils of the seas do not cause something which causes something else. The freight is lost *unless* the charterer chooses to go on. He does not. In the case of goods carried part of the voyage and the ship lost, but goods saved, the shipowner may carry them on if he chooses, but is not bound. Suppose he does not, his freight is lost, so if he does not choose to repair a vessel which remains in specie, but is a constructive total loss. For these reasons I think the judgment should be affirmed. My brothers **BLACKBURN, MELLOR,** and **AMPHLETT,** agree in this judgment as does my brother **LUSH,** who, however, only heard part of the arguments.

CLEASBY, B.—The question in this case on appeal is stated to be whether the plaintiff is entitled to have the verdict entered for him, and, if the court is of opinion that he is so entitled, the judgment is to be entered for £1500, or such sum as the court or an average adjuster appointed by them shall direct. The principal question argued before us was whether the necessary delay caused by the getting the vessel off the rocks and repairing her, which had the effect found by the jury, disentitled the plaintiff to insist upon the performance of the charterparty, by reason of its being an implied term and condition of the charter that the vessel should arrive at Newport within a reasonable time. Another question was also raised by the learned counsel for the defendants, viz., that supposing there was such an implied term and the plaintiffs were disabled by the delay from insisting upon the performance of the charterparty, still the loss of freight was not the immediate consequence of the sea damage, but of the right exercised by the charterer of throwing up the charterparty, which he might or might not have done, and in doing which he was influenced by the exigency of the particular case, and the necessity of getting the rails to San Francisco as soon as possible. It was forcibly argued that if this necessity had not existed, and freights had risen, the charterers would have claimed the performance of the charter, and that the underwriters were only responsible for the necessary consequence of sea damage, and not for the manner in which any option or right is exercised. This view was rejected by the court upon the argument, and, as I thought, upon the ground, that at the time of the alleged loss the plaintiff's interest was the right, under the charterparty, to have the rails loaded, and so to earn the freight, and that as soon as that right was destroyed by sea damage, there was a total loss of his interest by the perils insured against.

If the question had been a new one, I should have thought it followed, from the interest lost being the right under the charterparty to have the executory contract of the freighters performed, that the total loss could be measured by the value of that right, and that the proper course would be not to enter the verdict for £1500, but to resort to the second alternative above referred to, and have the verdict entered for such sum as an average-stater should direct. But the authorities are decisive that where there is a charterparty under which the shipowner will be entitled to certain freight so soon as the voyage under the charter has commenced, the right to the whole freight attaches, and, as I cannot presume to overrule these authorities, so far as the question now under consideration is concerned the verdict is properly entered.

But this was not the principal question raised in the case argued before us. The principal question was one of great interest, because the decision upon it not only decides the case before us, but regulates the conduct of all who enter into charterparties—a very numerous class of persons of many nations who ought to have some known rule to act upon. The question is whether, under the circumstances of the present case, the plaintiff was entitled to repair the vessel (using all proper dispatch in doing so), and to call upon the charterers to fulfil their charter. I agree with the opinion expressed by my brother BRETT at the trial, and adopted by BOVILL, C.J., in the court below, that the findings of the jury are immaterial, and that upon such facts as the present, which are free from question, it was not for the jury to put a construction upon those facts, but for the law to determine the rights of the parties upon them. Indeed, I think the law has already done so by settled principles and decided cases. The settled principle is that when in an agreement a provision is made applicable to a particular subject, that provision forms the agreement on that subject. The rule is expressum facit cessare tacitum. There is no further qualification or limitation to be implied. This is essential to all, certainly in the obligations which persons place themselves under, or the agreement would be the uncertain conclusion of a particular jury, as to what was reasonable or convenient.

In such a case as that under consideration, the charter relates to a voyage

necessarily exposed to disasters causing delay, and the whole enterprise is made subject to the consequences of these disasters; the voyage from Liverpool to Newport, and from Newport to San Francisco, equally so. It must not be read as an agreement the object of which is proceeding from Liverpool to Newport; the object of the agreement is carrying a cargo of rails from Newport to San Francisco. There is no limit to the time occupied in doing so unless it be caused by some breach of duty. If the rails had been taken on board at Newport, and the vessel had got upon a rock the day after leaving Newport, no matter how great the delay the shipowner would have been entitled to repair to earn the freight under the charter by completing the voyage. No one disputes this, and the same thing may happen over and over again in several parts of so long a voyage as from Newport to San Francisco, which in the result may not be completed within a year or even possibly two years. Still the charter would continue in force. If the goods were intended for a particular market or a particular purpose, it would not be a question whether an unreasonable time had been occupied, or whether the commercial speculation of the charter was at an end. So far as the charterer was concerned, his commercial speculation must have been ruined by the delay, and so far as the shipowner was concerned also (except so far as he was indemnified by insurances or possibly by means of valued policies was making a profit of each disaster), but still the agreement would continue because nothing had happened except what was provided for. The agreement for conveying the rails from Newport to San Francisco is as much acted upon by setting sail from Liverpool with the ship equipped for the voyage, and prepared for the cargo of rails, as if the rails had been taken on board, and the same rule of course ought to apply. It cannot properly depend upon the part of the voyage in which the damage is sustained. The preliminary voyage might be a long one to the other extremity of the globe, and the disaster happen towards the end of it, the rule must be the same whether it be to Newport to carry out rails, or to the Chincas to bring home guano.

The principal argument addressed to us was that convenience was so much in favour of the charterparty not continuing in force after a delay of unusual and unreasonable length in proceeding to the port of lading, that a term or condition ought to be implied making the charter no longer obligatory upon the freighter after such delay. I have already pointed out that it is one voyage under the charterparty, and the inconvenience of detention would apply to all parts. It would be extremely inconvenient that the rails which were wanted at San Francisco should be loaded and detained at Monte Video, or Valparaiso, for four or five months, when they might be forwarded at once at any easy freight to San Francisco, and yet this would not affect the charterparty.

But, independently of this, it appears to me that when the matter is properly considered the argument of convenience is entirely against the implication contended for. The rule to be laid down not only settles the rights of parties to such an agreement, but regulates their conduct in a very important matter. The question is: What are the masters of vessels under charter to do when they have sustained damages? They are in a position of trust and great responsibility, belonging to all nations, and ought to have a clear and definite rule of conduct to go by. The rule of conduct which the law has hitherto prescribed is: Repair your vessel and proceed with your charter. But the rule now laid down would place shipowners and freighters in a position of the greatest uncertainty and difficulty. Instead of having a clear course to pursue without delay and independent of collateral considerations, such as I have mentioned, the master of a damaged vessel is to form a conclusion upon a doubtful matter, viz. the time to be consumed in repairs, and then either by himself or with the assistance of others to get at the effect of this, and thus satisfy himself whether the delay is likely to make it unreasonable for the charterers to wait, or in the words of the case whether the delay would put an end in a commercial sense to the

commercial speculation entered into between the shipowner and the charterer. It would be a puzzling question for him to answer if he understood it. The answer would depend upon a variety of circumstances. The shipowner might say: "The commercial speculation which I entered into was and continues to be an excellent one. I had a charter for San Francisco at a high freight, and have from my connections a good expectation of finding a return cargo at San Francisco, and freights have here now fallen." The charterer, if freights had fallen, would say: "This has been a bad commercial speculation for me, and the best thing I can do would be to get out of it, and hire a vessel at once at a lower rate of freight." If, on the other hand, freights had risen the shipowner would wish to get out of the charter and procure a high freight, and the freighter contrariwise.

Thus, while by upholding the charter in its terms you give a rule of conduct which is certain, clear, and not influenced by unfair collateral considerations of interest, by introducing the suggested implication, you make the course of conduct difficult, dependent upon doubtful intervals of time, and results which cannot be ascertained, and expose it to the influences which I have suggested. In short, one rule makes it the duty of both parties under all circumstances to uphold the charter; the other in every case of considerable damage and necessary delay in repairing, gives each party the chance of getting out of the charter according as it is his interest to do so.

As is usual in all arguments founded upon consequences, we were pressed by extreme cases, and it was asked how long a man was to keep a cargo, perhaps a perishable one. Was he to keep it for months, a year? The answer is that, if the cargo is of such a nature, or an early shipment of vital importance, the charterer should have a special clause in the contract; but if he does not, still the contract is not one upon which there can be a claim for a specific performance. As soon as it is plain that the delay will be really serious as regards the condition of the intended cargo or the purpose to which it was destined, the charterer should forward the cargo by another vessel, giving notice at the earliest period to the shipowner of his intention. He will be liable in damages no doubt, but not to the freight, and the amount will depend upon the state of freights. If freights had risen the shipowner would sustain but little damage and the charterer would himself be a loser by forwarding his cargo at a higher rate. If freights had fallen there might be a considerable liability, but the charterer would share the advantage by having his goods forwarded at an easier rate. In the present case, the damages would probably not be heavy, for all the loss of delay and detention would not be the fault of the charterer, but would be caused by perils for which he was not responsible, and the shipowner would be in the same state as he was before he started. The charterparty might, perhaps, be framed so as to make the charterer liable for a specified amount of stipulated damages for a particular default. If this were so, it would be his fault for entering into such a stipulation when the delay by sea perils would be so serious. In the present case, as is usual, the penalty for non-performance would not make the liability greater than the damages sustained. It appears to me, therefore, that too much stress was laid during the argument upon the apparent injustice which would be done in a particular case of extreme delay if the charter was upheld and not sufficient regard had to the general inconvenience which would arise if the charter were defeated in such cases.

So far as the argument from convenience is concerned, it preponderates in favour of a construction which gives a certain, clear, and honest rule of conduct to act by in all cases—upholding a contract—over one which introduces uncertainty and difficulty as to conduct, and admits of reasons for defeating a contract which are to be derived from considerations of interest at the time. Independently, therefore, of authority, I should think the general rule should prevail, of construing the contract as to all matters within its provisions, and not

introducing an additional implied term. I have more fully considered the case upon principle, because although the authorities appear to me to preponderate, and indeed, but for some very recent dicta and decisions, to be conclusive in favour of this view, I do not propose to refer to them in detail, as that has been done by BOVILL, C.J., in his judgment in the court below, with which I entirely agree.

The authorities apply to two distinct conditions of things, viz., one where delay has been caused by a breach of some stipulation by the shipowner, and the other where there has been no such breach. In the former case, except in a few cases where the stipulation is held to be a condition precedent (*Glaholm* v. *Hays* (10); *Ollive* v. *Booker* (11)), the breach is held to give a claim for damages only, and not to defeat the charterparty—such stipulations, for instance, as to sail with the first fair wind, or by a particular day. In such a contract as a charterparty, where so many circumstances may arise at the port of departure to prevent an exact compliance and may still not be excused, it would be most unreasonable to enable the freighter, because the bargain turned out an unprofitable one, to throw up the charter for such a default. Accordingly, if the freighter relies upon the breach of some obligation of the shipowner as an answer to an action for not providing a cargo, he must allege that he has lost all benefits of the voyage by the plaintiff's delay. He may fairly say: "You have broken the contract, and I have lost all the intended benefit by your breach, and I am thus discharged": see *Freeman* v. *Taylor* (8); *Clipsham* v. *Vertue* (12); *Tarrabochia* v. *Hickie* (1); *Wheeler* v. *Bavidge* (13). It should be observed that this loss of benefit to the charterer is a totally different thing from what is set up in the present case, viz., that the delay was unreasonable, and the commercial speculation of the charterparty itself at an end. If there had been any breach by the plaintiff in not setting sail and proceeding with convenient speed from Liverpool, the charterer might have said his object was defeated, and he was discharged, not because the delay was of itself an answer to the charterer, but because the breach was made an answer by the delay. In the present case, the second condition exists, and there is no breach of the terms of the charterparty; but the delay itself is made an answer, and the authorities are, I have said, against it.

I will only refer to three in particular, but the language of the judges in them is so clear, and to the point, that I cannot help referring to it. *Hadley* v. *Clarke* (3) was the case of a charterparty, perils of the sea being the only exception. The vessel was detained on the voyage from Liverpool to Leghorn by an embargo laid at an intermediate port, to which the vessel was driven, for the period of two years. It was contended that the shipowner was excused by this delay, not caused by his default, and no one can doubt, I should think, that the commercial speculation entered into by the shipowner and charterer, so far as I understand the meaning of these terms, had long been defeated by such a misadventure. But the language of LAURENCE, J., has been always referred to as the authority on the subject. He said (8 Term Rep. at p. 267):

> "The counsel for the defendants were driven to the necessity of introducing into the contract other terms than those which it contained. They contended that the defendants were only bound to fulfil their engagement within a reasonable time, and then argued that, as the embargo prevented the completion of the contract within a reasonable time, the defendants were absolved from the engagement altogether. It was incumbent on the defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the plaintiff's goods to Leghorn. They accordingly did express the terms, and absolutely engaged to carry the goods, the dangers of the seas only excepted. That, therefore is the only excuse which they can make for not performing the contract. If they had

A intended that they should be excused from any other cause they should have introduced such an exception into their contract."

There is, no doubt, a distinction of fact between that case and the present one, viz., that in that case the cargo remained on board during the whole period of detention, and was, as it were, during all that time detained subject to the B charterparty; but this does not appear to make any difference in the principle, since the contract had been acted on in the present case, and the vessel had been prepared and had on board all the necessary equipments, and had set sail for the voyage.

In *Touteng* v. *Hubbard* (2) the cargo had not been taken on board, and the action was for not providing a cargo at the port of loading—St. Michaels. The C charter had the exception of restraint of princes, and had proceeded on the voyage from London, but was detained at Ramsgate, by an embargo, for six months, and the charterer refused to load a cargo on the ground that the season for shipping fruit had long passed, and the voyage would be useless and nugatory, which may be construed as having the same meaning as that the commercial speculation was at an end. The case was ultimately decided upon a question of D nationality. The judgment of LORD ALVANLEY is referred to at some length in the judgment of BOVILL, C.J., in the court below. I refer to the following passage (3 Bos. & P. at p. 298), because it bears also upon the authority of *Hadley* v. *Clarke* (3):

"If, then, this had not been the case of a Swedish ship, hired by an E English merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at St. Michaels as soon as she conveniently might after the embargo was taken off, although, by arriving after the fruit season was over, the object of the voyage might be defeated. Such is the doctrine in *Hadley* v. *Clarke* (3) and *Blight* v. *Page* (14). I have no difficulty in subscribing to the doctrine laid down in F *Hadley* v. *Clarke* (3) that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the State, as, if the ship G had been weather bound until the fruit season was over; and yet in that case the merchant would have been bound to fulfil his contract. The principle of *Hadley* v. *Clarke* (3) is, that an embargo is a circumstance which it is equally competent to the parties to provide against as against the dangers of the seas, and, therefore, if they do not provide against it they must abide by the consequences of their contract."

H

I shall only refer to one other case for the purpose of quoting the opinion of WILLES, J., upon the question raised in the present case—*Hurst* v. *Usborne* (4). In that case there had been a detention for 152 days due to perils of the seas, and the charterers refused to load, partly on the ground that the vessel had arrived after the time when the export trade usually took place from the port of loading. I The following is the judgment of WILLES, J. (18 C.B. at p. 155):

"As to the other question, whether the construction of the charterparty can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year, the answer to that I apprehend is, that the charterparty was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she will or not? Why the person who is to ship the goods takes the risk, unless he stipulates that the other party shall take it. Here it is not stipulated that the vessel shall

arrive at Limerick by any particular day, but only that she shall proceed there with all convenient speed. The owner has performed his contract to proceed with all convenient speed when he has done all he could, but has been prevented by danger of the seas."

Hadley v. *Clarke* (3) was decided in 1799, and it and the cases following upon it have been regarded as authorities ever since, and quoted in all the textbooks. They are referred to as authorities by American, as well as English writers. LORD TENTERDEN, in his work on SHIPPING, the first edition of which was published in 1802, devotes a paragraph to it, as giving the law on the subject: ABBOTT ON SHIPPING (5th Edn.), p. 429. For the American textbooks, see PARSONS ON SHIPPING, vol. 1, pp. 318, 330. In the latter passage the learned writer insists upon the authority of *Hadley* v. *Clarke* (3), and, referring to it and other cases in conformity with it in the American courts, he says:

"It is very clear that an embargo, though of an indefinite duration, may suspend the performance of the contract."

KENT also refers to *Hadley* v. *Clarke* (3) as an authority not questioned: COMMENTARIES (10th Edn.), vol. 3, pp. 312, 346. In the latter reference, after referring to matters which put an end to the contract by breaking up the voyage, he adds:

"But a temporary impediment of the voyage does not work a dissolution of the charterparty, and an embargo has been held to be such a temporary restraint, even though it be indefinite as to time. [He here refers to *Hadley* v. *Clarke* (3), and the American cases.] The same construction is given to the legal operation of a hostile blockade or investment of the port of departure, upon the contract. It merely suspends the performance of it, and the voyage must be broken up, or the completion of it become unlawful, before the contract will be dissolved. If the cargo be not of a perishable nature, and can endure the delay, the general principle applies that nothing but occurrences which prevent absolutely the performance of the contract will dissolve it. The parties must wait until those which merely retard its execution are removed."

Such occurrences would cause unreasonable delay, and destroy the commercial speculation of the contract; still it would subsist.

Against this weight of authority there are no doubt, authorities entitled to great consideration. In *Rankin* v. *Potter* (6), in which the judgment really was that a constructive total loss of the ship was of itself a loss of chartered freight, without notice of abandonment, there are dicta of several of the judges, in their opinions delivered to the House of Lords, to the effect that where a vessel under charter was delayed for an unreasonable time, the charterer was not bound to provide a cargo. Venturing, as I do, to differ from the judgment of the court below, I must, of course, venture to differ from those dicta. It may properly be noticed that those dicta are upon a matter which did not necessarily arise upon the question on which the case was decided, and that they did not in the slightest degree enter into any of the opinions of any of the noble Lords who decided the case, and were not noticed by them. Indeed, the opinions given exclude delay from sea damages, as an answer to the obligation of the charterer to load a cargo. The following are the words of LORD CHELMSFORD in relation to the right of the shipowner under the charter, where there has been damage requiring reparation (L.R. 6 H.L. at p. 159):

"If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and

how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight, not by the perils of the sea, but by their election."

The rule given is a simple one: repair the damage, if it can be done at a reasonable expense, and tender your vessel to the charterer. Not a word about the time which it may require. The same remark applies to the opinions of LORD COLONSAY and LORD HATHERLEY (ibid. at pp. 160 and 168). It may also be noticed, with reference to the dicta of the learned judges, that those dicta had reference in the particular case, not to the necessary delay during the time required for the repair of damage, but to the unusual and unnecessary delay arising from the shipowner, instead of repairing the vessel, making use of it and letting it out for months as a store depot for coals, in consequence of the want of funds.

Much reliance was placed in the argument upon *Geipel* v. *Smith* (7), and if that case could be regarded as overruling the authorities referred to, I should have to consider whether I thought myself bound by the earlier authorities or the last one. But that is not the case at all. Not a word is said in that case about overruling any previous authority. On the contrary, my brother BLACKBURN says that very different considerations arose in *Hadley* v. *Clarke* (3). This was undoubtedly so, for *Geipel* v. *Smith* (7) was not a case of detention by embargo or delay from necessary repairs, but was one of the performance of the charter becoming impossible, i.e., impossible without liability of forfeiture of ship and cargo by reason of a duly notified and effective blockade at port of delivery. It had been held in *Medeiros* v. *Hill* (15) that when after the known existence of a blockade a charterparty was made to convey a cargo to the blockaded port (the case being clear from the difficulty which might arise if the object was to run the blockaded port), the existence of the blockade was no answer to the engagement to proceed on the voyage. The object of the merchant in making such a charter was, as stated by the judgment, to be in readiness to enter the port so soon as the blockade was taken off, and so get the advantage of a good market. But in *Geipel* v. *Smith* (7), the blockade, after the making of the charter, interposed the impossibility of completing it. The charter contained the exception of restraints of princes.

According to the law of England, if a person engages absolutely to do something, the fact of its becoming impossible, or attended with penalties, is in general no answer: *Paradine* v. *Jane* (16), so often referred to, and many subsequent cases. But it would, perhaps, be sufficient to say that such a rule could not apply to a contract between the shipowner and the charterer when the consequence of carrying the contract into effect would be to expose the cargo as well as the ship to seizure and forfeiture. I take it the shipowner not only is not bound to run the risk of seizure by attempting to enter the blockaded port, but would not be justified in doing so without the consent of the charterer—I mean as between them. But, independent of that consideration, the rule is founded upon the presumption that where the engagement is absolute, the party takes upon himself the risk of being able to perform the contract. But that presumption is gone when by the contract itself it appears that the party contracting does not take upon himself that risk, and the exception of the restraint of princes in the charter negatives the shipowner having taken upon himself the risk of blockade. That being so, it would indeed have been most unreasonable to hold that the shipowner was bound by such a charter, after the impossibility of completing the contract arose, to load the cargo and carry it to a distant part, and there wait, perhaps, until it was necessary to return home for stores and provisions, more especially under the particular circumstances appearing in the pleadings in that case.

Cases upon the effect of blockade upon a contract of charterparty, are few in our courts; but the question has arisen in America, and the decision there has been that the effect of a blockade of the port of delivery after the contract is to justify the shipowner in throwing up the charter. KENT'S COMMENTARIES (10th Edn.), vol. 3, p. 346, is very clear in the distinction that while embargo at the port of loading is only a temporary impediment, and leaves the contract continuing, a blockade of the port of delivery makes the performance of the contract impossible, and justifies the parties in throwing it up. He refers to two cases, *The Tutela* (17), and *Scott* v. *Libby* (18). In the first case, SIR WILLIAM SCOTT seems to think it clear that a blockade of the port of discharge puts an end to a charter previously made, and in the American case the judgment begins thus, p. 338 :

> "It appears to be conceded by the counsel on both sides, that by the blockade of the port of discharge the charterparty was dissolved, and all right to freight under it gone."

The great loss and inconvenience of equipping and starting upon an enterprise which is at the time impossible, seems a sufficient reason for the distinction. But without saying that our courts would at present go that length, I think I may say that *Geipel* v. *Smith* (7) is no authority that detention for necessary reparation justifies the throwing up the charter, or leaves it in force, according as a jury find that the time taken was reasonable or the reverse.

Other cases were referred to in which implied terms had been introduced in express contracts, but I do not think that they throw any light upon the particular question before us. Indeed it would be impossible to examine all the imperfect analogies which may be put forward. Such, for example, as the implied condition that a person who has contracted to do some piece of work which no one else can do, for instance, painting a picture, shall live long enough to be able to paint it, and similar instances. No doubt when the existence of a particular person or thing, or state of things, can be regarded as the very foundation of a transaction it may be implied that, if the foundation fails, the transaction which is founded upon it ceases to be effectual. But upon this subject I would beg to refer to the clear and comprehensive judgment of my brother BLACKBURN in *Taylor* v. *Caldwell* (9). For the reasons which I have given it appears to me that the charterparty in the present case continued binding upon the charterers, that consequently there was no loss of freight by the perils, and, therefore, the defendants are entitled to judgment, which would be a reversal of the judgment already given.

Appeal dismissed.

Solicitors : *Norris, Allens & Carter; Field, Roscoe & Co.*, for *Bateson & Co.*, Liverpool.

[*Reported by* ETHERINGTON SMITH, ESQ., *Barrister-at-Law.*]

A

HOULDSWORTH *v.* CITY OF GLASGOW BANK

[House of Lords (Earl Cairns, L.C., Lord Hatherley, Lord Selborne and Lord Blackburn), February 16, 17, March 12, 1880]

B [Reported 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677]

Company—Proceedings against—Fraudulent misrepresentation by director or servant—Plaintiff induced to buy stock—Action against company—Action against director or servant—Competency.

The appellant was induced by the fraudulent misrepresentation of the manager and one of the directors of the respondent banking company to purchase shares C in the company. Some months later the company was found to be insolvent and went into liquidation, the appellant was placed on the list of contributories, and he was compelled to pay calls in respect of his shares. After the winding-up had commenced, he brought an action against the company claiming as damages the price paid for the shares and the amount of calls paid and payable by him. D

Held: where a person is induced to buy stock or shares in a company by the fraudulent misrepresentations of a director or servant of the company those misrepresentations can be imputed to the company and the stockholder is entitled, in an action against the company, to rescission of the contract of purchase, but he cannot elect to retain the shares and in an action against the E company recover damages for the misrepresentation, and, therefore, the appellant's action failed.

Semble: An action for deceit could be maintained against the director or official personally.

Notes. Considered: *Re Hull and County Bank, Burgess's Case* (1880), 15 Ch.D. 507; *Re Great Australian Gold Mining Co., Ex parte Appleyard* (1881), 18 Ch.D. F 587. Explained: *Chapleo* v. *Brunswick Permanent Building Society* (1881), 6 Q.B.D. 696. Considered: *Ludgater* v. *Love* (1881), 44 L.T. 694; *Re Addlestone Linoleum Co.* (1887), 37 Ch.D. 191. Applied: *Simson and Mason* v. *New Brunswick Trading Co.* (1888), 5 T.L.R. 148. Considered: *Hambro* v. *Burnand*, [1903] 2 K.B. 399; *Lloyd* v. *Grace, Smith & Co.*, [1911-13] All E.R. Rep. 51. Referred to: *Thorne* v. *Heard*, [1894] 1 Ch. 599; *McKeown* v. *Boudard Peveril Gear Co.* (1896), 65 G L.J.Ch. 446; *Re Railway Time Tables Publishing Co., Welton's Claim* (1898), 79 L.T. 679; *Citizens' Life Assurance Co.* v. *Brown*, [1904-7] All E.R. Rep. 104; *Re Metcalfe (William) & Sons, Ltd.*, [1933] Ch. 148; *Uxbridge Permanent Benefit Building Society* v. *Pickard*, [1939] 1 K.B. 266; *Briess* v. *Woolley*, [1954] 1 All E.R. 909.

As to actions of deceit against a company see 6 Halsbury's Laws (3rd Edn.) H 190-193; as to damages for fraudulent misrepresentation against a company, see ibid. 438; and for cases see 9 Digest (Repl.) 113 et seq., 509 et seq.

Cases referred to:

(1) *Western Bank of Scotland v. Addie*, *Addie* v. *Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 262, *1656*.

I (2) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, *2425*.

(3) *National Exchange Co.* v. *Drew* (1855), 25 L.T.O.S. 223; 2 Macq. 103, H.L.; 9 Digest (Repl.) 260, *1648*.

(4) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest (Repl.) 682, *2428*.

(5) *Swire* v. *Francis* (1877), 3 App. Cas. 106; 47 L.J.P.C. 18; 37 L.T. 554, P.C.; 1 Digest (Repl.) 692, *2474*.

(6) *New Brunswick and Canada Rail. and Land Co.* v. *Conybeare* (1862), 9 H.L.Cas. 711; 31 L.J.Ch. 297; 6 L.T. 109; 8 Jur.N.S. 575; 10 W.R. 305; 11 E.R. 907, H.L.; 1 Digest (Repl.) 686, *2452*.

(7) *Clarke* v. *Dickson* (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur.N.S. 832; 120 E.R. 463; 35 Digest (Repl.) 82, *756*.

(8) *Cole* v. *Bishop*, E.B. & E. 150, n.

(9) *Swift* v. *Winterbotham* (1873), L.R. 8 Q.B. 244; 42 L.J.Q.B. 111; 28 L.T. 339; 21 W.R. 562; on appeal sub nom. *Swift* v. *Jewsbury* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30 L.T. 31; 22 W.R. 319, Ex. Ch.; 26 Digest (Repl.) 33, *202*.

(10) *Stone* v. *City and County Bank*, *Collins* v. *City and County Bank* (1877), 3 C.P.D. 282; 47 L.J.Q.B. 681; 38 L.T. 9, C.A.; 9 Digest (Repl.) 135, *765*.

(11) *Weir* v. *Bell* (1878), 3 Ex.D. 238; 47 L.J.Q.B. 704; sub nom. *Weir* v. *Barnett*, *Bell, etc.*, 38 L.T. 929; 26 W.R. 746, C.A.; 9 Digest (Repl.) 129, *705*.

(12) *Udell* v. *Atherton* (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur.N.S. 777; 1 Digest (Repl.) 683, *2433*.

Also referred to in argument:

Denton v. *Great Northern Rail. Co.* (1856), 5 E. & B. 860; 25 L.J.Q.B. 129; 26 L.T.O.S. 216; 20 J.P. 483; 2 Jur.N.S. 185; 4 W.R. 240; 119 E.R. 701; 35 Digest (Repl.) 26, *181*.

Rawlins v. *Wickham* (1858), 3 De G. & J. 304; 28 L.J.Ch. 188; 5 Jur.N.S. 278; 44 E.R. 1285; sub nom. *Rawlins* v. *Wickham*, *Wickham* v. *Rawlins*, 1 Giff. 355; sub nom. *Rawlins* v. *Wickham*, *Wickham* v. *Bailey*, 32 L.T.O.S. 231; 7 W.R. 145, L.JJ.; 35 Digest (Repl.) 35, *275*.

Appeal by Houldsworth from a decision of the First Division of the Court of Session (the Lord President (Lord Inglis), Lord Deas and Lord Mure, Lord Shand dissenting), affirming a judgment of the Lord Ordinary (Lord Rutherfurd Clark) in favour of the respondents, the Glasgow Bank and its liquidators.

In February, 1877, the appellant, having some money to invest, made inquiries of the manager and of one of the directors of the City of Glasgow Bank as to its position, and was assured personally by them that it was in a perfectly sound and flourishing condition. Acting upon these representations he purchased £4000 stock in the bank from the bank itself, for which he paid £9000. He was registered as a stockholder, drew dividends, and otherwise acted as a stockholder. In October, 1878, the bank stopped payment, and on investigation was found to be hopelessly insolvent. The appellant was placed on the list of contributories by the liquidators, and was compelled to pay large sums in respect of calls on his stock. In December, 1878, after the commencement of the winding-up, he commenced the present action against the bank and the liquidators, alleging that he had been induced to purchase the stock in question by the fraudulent misrepresentations and concealment of the directors, and claiming as damages the amount paid for the shares and the amount of calls already paid and prospective. The Court of Session dismissed the action, holding that the case was governed by the decision in *Western Bank of Scotland* v. *Addie* (1). From this decision the present appeal was brought.

Watson, Q.C., *Herschell, Q.C.*, and *Romer* for the appellant.

Kay, Q.C., *Benjamin, Q.C.*, *Davey, Q.C.*, and *Balfour* (of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

Mar. 1880. The following opinions were read.

EARL CAIRNS, L.C.—In this case the appellant bought from the City of Glasgow Bank £4000 of its stock in February, 1877, paying £9000 for it. He was registered as a shareholder, received dividends, and otherwise acted as a shareholder. When the bank went into liquidation in October, 1878, he was

A entered on the list of contributories, and has since then paid very large sums for calls. On Dec. 21, 1878, he commenced the present action against the liquidators to recover damages in respect of the sum he paid for shares and the moneys he has since paid for calls, founding his right to relief on the ground of fraudulent misrepresentations made by the directors and others connected with the bank, for whose representations he alleges the bank were answerable. Looking at the B question as one of relevancy, I will assume that the allegations of fraudulent misrepresentation were such as that, if the bank had been a going concern, the appellant would have been entitled to rescind his contract, and to have recovered back all sums paid in respect of his shares. The Court of Session were of opinion that, even although the averments amounted to that, still they afforded no ground for an action against the liquidators, and they dismissed the action, C with costs.

In my opinion the court below was right. It is admitted that after the winding-up of the company commenced it was too late for the appellant to repudiate his stock, and that he must remain, as the liquidators found him, a shareholder in the bank and a contributory as such. It is further admitted that if the appellant remaining a shareholder has a right to raise an action for D damages against the liquidators after the winding-up, he must also have had a right before the winding-up to have remained a shareholder, and also then to have brought an action for damages.

It appears to have been contended in the court below that the appellant might have been unable to maintain the present action as a claim in the liquidation to E be satisfied pari passu with other creditors, and yet might be able to maintain it as a claim against the company or the shareholders in the company after all other creditors had been satisfied. In the argument at your Lordships' Bar it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company, and I am satisfied that there was no foundation for it. The Companies Acts have no provisions for the payment of F any claims against the company other than those of creditors. Creditors are supposed to be paid pari passu, and there is no provision after they are paid for opening fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right; but that is quite a different matter.

The question, therefore, mainly argued at your Lordships' Bar, upon which G the decision of the case must depend, was this: Can a man induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he has discovered the fraud elect to retain the shares and to sue the company for damages? There is no doubt that, according to the law of England, a person purchasing a chattel or goods concerning which the vendor made a fraudulent misrepresentation may, on finding out the fraud, H retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud. I will assume that the law of the two countries is the same in the case of a chattel. But does that same rule apply to the case of shares or stock in a company? We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but it certainly is not. The contract which is made is a I contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his chance of past liabilities and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed should be used and applied in a particular way, and no other. Does, then, the principle which in the case of a chattel admits of an action for damages apply to the case of a partnership contract such as I have described? It may go some way to answer this question to observe that.

although during the last quarter of a century actions in every shape and form have been brought, or have been attempted to be brought, arising out of dealings in shares alleged to be fraudulent, no case could be mentioned at the Bar in which an action for damages has been sustained, the plaintiff retaining his position in the company.

I will, however, ask your Lordships to look at the case on principle. A man buys from a banking company shares or stock of such an amount as to become, say, the proprietor of one-hundredth part of the capital of the company. A representation is made to him on behalf of the company that the liabilities of the company are £100,000, and no more. His contract as between himself and those with whom he becomes a partner is that he will be entitled to one-hundredth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them, whatever their amounts may be, and those to be contracted afterwards, and that, if those assets are deficient, the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. That is the contract, and the only contract, made between him and his partners, and it is only through this contract and through the correlative contract of his partners with him that any liability of him or them can be enforced.

It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company—that is to say, these same assets and contributions—should pay the new partner damages for a fraud committed on him by the company in inducing him to enter into the contract, which alone could make them liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would be, not in accordance, but at variance, with the contract into which the new partner had entered. He finds out, however, after he joins the company that the liabilities are not £100,000 but £500,000. He is entitled thereupon, I will assume, to rescind his contract and to leave the company, and to recover any money he has paid or any damage he has sustained; but he prefers to remain in the company and to affirm his contract—that is to say, the contract by which he agreed that the assets of the company should be applied in paying its antecedent debts and liabilities. He then brings an action against the company to recover out of its assets the sum, say £4000 which it would fall to his share to provide for the liabilities over and above what his share would have had to provide had the liabilities been as they were represented to him. If he succeeded in that action this £4000 would be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that those assets and contributions should be applied in payment of the debts and liabilities of the company, against which this £4000 cannot be reckoned. The result is he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide. In other words, he is in substance, if not in form, taking the course which is described as "approbating and reprobating"—a course which is not allowed either in English or Scottish law.

Whatever differences may be pointed out between this case and that of *Western Bank of Scotland* v. *Addie* (1) I think that the ratio decidendi in that case will go far, if it does not go the whole way, to decide the present appeal. I entertain no doubt that on principle, irrespective of authority, the decision of the Court of Session was right. I, therefore, move your Lordships that the appeal be dismissed, with costs.

LORD HATHERLEY.—I think that the following points may be considered as concluded by authority; at all events I shall assume them so to be for the

purposes of the case before the House. First, that an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable, if the representation be false, and the contracting party take proper steps for avoiding it while a restitutio in integrum is possible. Secondly, that a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. Thirdly, that, if there cannot be a restitutio in integrum, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived. It may be assumed for the purpose of the present case that the contract is one which was obtained by fraudulent misrepresentation on the part of an agent or agents of the City of Glasgow Bank, whereby the appellant was led to purchase shares in that bank as though it were a profitable going concern, whereas it was in fact hopelessly insolvent, purchasing the privilege of becoming a shareholder, if it were a privilege, or, rather, as it turned out, acquiring that unfortunate position, for the sum of £9000. In about a year and a quarter after this purchase had been made the bank was in liquidation, and the appellant alleges that he has already contributed £20,000 towards the debts of the company, and also that he is liable to an extent which he puts in his condescendence as being possibly about £200,000 more in respect of the debts of the concern. He asks as a remedy to recover the sum that he paid for his shares, less certain small deductions, and also to be indemnified as to the payment of the £20,000 and the possible future liability. This remedy he asks for as against the company, of which at the time of the bank going into liquidation he was a member or partner, and from which partnership he has never been discharged.

The main point in the case is whether he should be allowed to proceed further in such an action, that is to say, the question arises on relevancy in reference to the remedy which this gentleman seeks to obtain with regard to the injury which he says has been done to him. The Lord Ordinary held that the case was concluded by *Addie's* case (1), and the same view was entertained by three of the judges in the Court of Session. The principal difference between the present case and *Addie's* case (1) is that in *Addie's* case (1) the company was not incorporated at the time of the purchase, but became so before the liquidation, whereas in the present case the company was incorporated before the time when the purchase was made by the appellant, and he became a shareholder. In the view which I take of the case, I do not consider that difference to be one which should render relief possible in this case, if it was proper to withhold it in *Addie's* case (1). It appears to me to be fatal to the appellant's right to the relief he asks that he is still, or was at the date of the liquidation, a shareholder in the company against which he asks it. No case has been cited in which such a remedy as that sought by the appellant in the present case has been allowed to take effect by any court either in Scotland or in England.

What became the position of the appellant when he had paid his money in respect of the transfer of shares into his name? He thereby became, on the one hand, entitled to any profits made by the employment of the capital of the company according to the proportion which his shares bore to all the other shares in the company. At the same time he undertook to bear a like aliquot share of all the debts and liabilities of the company incurred, or to be incurred, in respect of the business which the company was carrying on. Among the debts would be (if the appellant be right) the debt due to himself in respect of the damage sustained by him through the wrongful act of the company in inducing him by misrepresentation to place himself on the list of shareholders. It appears

that he did draw dividends (I think three) of alleged profits out of the concern. Suppose that there should be some ten or twelve other shareholders in a like position with the appellant with regard to purchasing shares under misrepresentation on the part of the company's agents, some of them having purchased shares before him and others after him. Those ten or twelve shareholders would each of them have the same claim in respect of damages against the company (except in each case the party suing) as is now claimed by the appellant. The appellant would by his partnership contract have to bear his aliquot share of the damages that might be claimed by other misled shareholders who had been placed on the list by the same course of misrepresentation as himself. What end would there ever be to the interlacing claims on the part of misled shareholders inter se as to dividends received whereby the fund which might have been applied towards recouping and making good the debts of the company, including the damages claimed by the appellant, was diminished? How could they be retained by the appellant as against his fellow sufferers? He would clearly have to account for them as between himself and his fellow sufferers who would be claiming relief on the same grounds as himself. In truth the appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. Among the various cases which have been brought before the courts in respect of dealings with joint stock companies, no case can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely, one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of representations made by their common agent.

Some clauses in the Companies Act, 1862, were cited in the course of the argument as showing the rights inter se on the part of shareholders of a company by which they were all to be brought into equality one with another when the settlement took place and arrangements for winding-up were made by the liquidators. Those provisions as to liquidation for the purpose of equalizing the contributions of contributories inter se do not appear to me to authorize such a scheme or contrivance as would be necessary in this case to effect the object proposed by the appellant. Having omitted to obtain a rescission of the contract, he would have to make a complicated inquiry such as I have described as between himself and other shareholders who could put themselves in the same position as himself as regards misrepresentation by the common agent; and nothing has been pointed out in the Act which leads to the supposition that any such inquiry as that was contemplated. What has really happened is that the appellant has had the misfortune, together with others in all probability, though that is not in evidence in this case, of being misled by the representations of the agent of the company. If your Lordships were to establish a precedent in his case there would probably be other claimants also, each of whom would have a claim which, it appears to me, could not be dealt with after the time for the rescission of the contract had gone by. If the appellant obtains the relief he has sought, every other shareholder in the same position as himself might come forward to claim a similar relief.

What has really happened is that both he and those other shareholders in a like position, have suffered from the misfortune of having employed a dishonest agent. As between third parties to the company and the appellant, he might well be entitled to rescission of the contract whereby he became a shareholder, but, if time and circumstances have prevented that remedy and he must remain a shareholder, I do not see how he can escape the burden occasioned by the common misfortune of himself and many of the other shareholders in having employed dishonest agents. I, therefore, feel that whatever rights this gentleman may have acquired in the first instance, his case has been rendered hopeless

by what has taken place since, by reason of which it has been placed beyond his power to put things in such a position that his name can be struck off the share list altogether, in which case he would, according to some of the authorities which have been cited, have stood in the position of a stranger with reference to misrepresentations made by agents of the company. I agree with the order which has been proposed to your Lordships by my noble and learned friend.

LORD SELBORNE.—The principle on which *Barwick* v. *English Joint Stock Bank* (2), *Mackay* v. *Commercial Bank of New Brunswick* (4), and *Swire* v. *Francis* (5), relied upon the appellant, were decided, was thus stated by WILLES, J., in the first of those cases and repeated (from his judgment) by the Judicial Committee in the two latter (L.R. 2 Exch. at pp. 265, 266):

> "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit, [because, although the master may not have authorized the particular act], he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

To the principle so stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases.

That principle received full recognition from this House in *National Exchange Co.* v. *Drew* (3) and *New Brunswick and Canada Rail. and Land Co.* v. *Conybeare* (6), and was certainly not meant to be called in question by any one of the learned Lords who decided *Western Bank of Scotland* v. *Addie* (1). It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by WILLES, J., in *Barwick's* case (2),

> "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

It is, of course, assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose. In the greater number, probably, of cases of this kind the question whether the fraud or other wrongful act of an agent could itself properly be imputed to his principal is not material, the liability of the principal to the third party, when properly measured by damages, being practically the same, whether he was privy to the wrongful act or not.

SIR MONTAGUE SMITH in *Mackay* v. *Commercial Bank of New Brunswick* (4), criticised (perhaps justly) some expressions which fell from LORD CRANWORTH in this House in *Conybeare's* case (6) and *Addie's* case (1), particularly in the latter case, in which LORD CRANWORTH said that "an incorporated company cannot, in its corporate character, be called on to answer in an action for deceit." The sequel of LORD CRANWORTH'S words appear to me to show that in using these expressions (perhaps technically inaccurate) he had substance, and not form, in view. In the old forms of common law pleading fictions were not seldom allowed, but not so as in the result to make the rights or remedies of

the parties depend on the fiction rather than on the law applicable to the real facts which were allowed under those forms of pleading to be given in evidence. In *Barwick's* case (2) a corporation was directly charged with fraud upon the pleadings (no mention being made of agency) and an objection taken on that ground was treated by WILLES, J., as technical. He said (L.R. 2 Exch. at p. 266):

> "If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is sought to be made answerable in the action."

All that was laid down by SIR MONTAGUE SMITH in *Mackay's* case (4) itself was, that there might be cases in which to work out the appropriate remedy against a principal who had "profited by the fraud of his agent," the form of action, technically called "an action of deceit," might be either necessary or convenient, that very learned judge saying expressly that "the time had passed when much importance was attached to mere forms of actions," and that "an action of deceit might be maintainable in which the fraud of the agent might be treated, for purposes of pleading, as the fraud of the principal."

In equity, one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as the ground of relief, though the law of agency was administered according to the same rules in equity as at common law, and though in equity, as well as at law, an innocent principal might suffer for the fraud of an agent. KNIGHT BRUCE, V.-C., PARKER, V.-C., and LORD CAMPBELL, L.C. (all very eminent judges), said (as LORD CRANWORTH and LORD CHELMSFORD also said in this House), that the law does not impute the fraud of directors to a company; and the same proposition would, I apprehend, be equally true, in the sense in which they intended it, if the principal whose agent was guilty of fraud were not a corporation but an individual. The real doctrine which LORD CRANWORTH, in *Addie's* case (1), meant (as I understand him) to affirm was one of substance and not of form. He said (L.R. 1 Sc. & Div. at p. 167):

> "An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

The words in this passage "to the extent to which the companies have profited by those frauds" may perhaps require some enlargement or explanation; but, subject to that qualification, I am of opinion that this doctrine is in principle right, and that the present case is one in which (as in *Addie's* case (1)) there would be a miscarriage of justice if the distinction which it involves were not attended to. This is not a case of parties at arm's length with each other, one of whom has suffered a wrong of which damages are the simple and proper measure, and which may be redressed by damages without any unjust or inconsistent consequences. For many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger, except that he may have to contribute, rateably with others, towards the payment of his own claim. But here it is impossible to separate the matter of the pursuer's claim from his status as a corporator, unless that status can be put an

end to by rescinding the contract which brought him into it. His complaint is that by means of the fraud alleged he was induced to take upon himself the liabilities of a shareholder. The loss from which he seeks to be indemnified by damages is really neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company; and if his claim is right in principle I fail to see how the remedy founded on that principle can stop short of going this length. But it is of the essence of the contract between the shareholders (as long as it remains unrescinded) that they should all contribute equally to the payment of all the company's debts and liabilities.

Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the pursuer; it is to throw upon them the pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by LORD CRANWORTH in *Addie's* case (1)) may have come and probably did come into the company after the pursuer had acquired his shares. They are all as innocent of the fraud as the pursuer himself; if it were imputable to them it must, on the same principle, be imputable to pursuer himself as long as he remains a shareholder; and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agent than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is, in my opinion, the only way in which the company could justly be made answerable for a fraud of this kind. But for rescission the appellant is confessedly too late.

I will not enlarge further upon the reasons for this conclusion, which I know will be more fully explained by others of your Lordships. But I must add that I think the Court of Session was right in holding the present question concluded by *Addie's* case (1). The only difference between *Addie's* case (1) and the present is that the Western Bank of Scotland was formed under the Bankers (Scotland) Act, 1826, by which it was enabled to sue, and liable to be sued (upon all causes of action for which the shareholders for the time being were answerable) by its public officer; and it continued in that state till after the alleged frauds had been committed, so as to give a cause of action to the pursuer, Mr. Addie. The subsequent registration, under the Joint Stock Banking Companies Act, 1857, s. 8, was, in my judgment, sufficient to transfer from the unregistered to the registered company all liabilities upon any cause of action whatever for which the unregistered company might have been sued by its public officer immediately before the registration. I do not understand that there was really any difference between LORD CHELMSFORD and LORD CRANWORTH in that case; both appear to me to have founded their judgments upon those views of the law of agency on the one hand, and of fraud on the other, to which I have already referred. One expression, indeed, of LORD CRANWORTH, in that part of his judgment which relates to the question of damages ("He comes too late"), might possibly, if it were not qualified by the subsequent context, have been taken to mean that even if the unregistered company had been liable to be sued for damages, by its public officer, down to the time of registration, that liability would not have been among the "debts and obligations" transferred by the Joint Stock Banking Companies Act, 1857, s. 8, to the registered company. LORD CRANWORTH was, I think, too good a lawyer and too accurate a thinker to have placed any such narrow (I had almost said unreasonable) construction upon such words in such a statute. He made, to my mind, his real meaning plain by what he went on to say; from which it is apparent that if the Western Bank had been incorporated before, and not after, the frauds then in question, the corporation would not, in his opinion, have been liable for those frauds in an action of this kind for damages. That, my Lords, is precisely the present case.

LORD BLACKBURN.—I also have come to the conclusion that the appeal should be dismissed with costs.

The Lord Ordinary based his judgment on this short ground: "The Lord Ordinary thinks that this case is ruled by the decision of the House of Lords in *Western Bank of Scotland* v. *Addie* (1);" and that, if correct, was a sufficient ground for his decision. For when it appears that a case clearly falls within the ratio decidendi of the House of Lords, the highest Court of Appeal, I do not think it competent for even this House to say that the ratio decidendi was wrong. It must, however, in my opinion, always be open to a party to contend that the differences between the facts in the case then under discussion and those in the case on which the decision in the House of Lords proceeded are so material as to prevent his case from falling within the ratio decidendi of the House, even though the opinions of the learned and noble Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion, for unless those differences in fact did exist in the case in this House, or at least the possibility of their existence was prominently brought forward, I think the House cannot be taken to have decided that such differences in fact might not make a material distinction in law. I think, therefore, that it is important to inquire what are the differences of fact between this case and that of *Western Bank of Scotland* v. *Addie* (1), and then to determine whether they do make a material distinction in law.

The Western Bank was a co-partnership carrying on the business of banking in Scotland under the provisions of the Bankers (Scotland) Act, 1826. While this was so, Addie entered into a contract with persons who were, though he did not know it, agents for the Western Bank to purchase shares in that bank. Addie paid to the agents of the bank the agreed consideration, and accepted shares, which in fact belonged to the bank, and in respect of them became a partner on the terms contained in the partnership deed of the Western Bank. Some time elapsed, and the Western Bank, becoming insolvent, stopped payment. Then advantage was taken of the provisions of the Joint Stock Banking Companies Act, 1857, s. 6, and it was resolved by a majority of the shareholders to register the Western Bank as a company, other than a limited company, under the provisions of the Joint Stock Banking Companies Act, 1857. Addie was a party to this resolution. The Western Bank after registration was wound-up. Addie was made a contributory, and he and such of the other contributories as were solvent paid calls, by means of which all the creditors were paid, and some surplus existing had to be returned to the contributories who had paid. Then, and not till then, Addie commenced his action in the Court of Session. The interlocutor appealed against, which was reversed, was that of Feb. 2, 1864: "That the pursuer had stated matter relevant to go to trial."

The following appear to me to be the material statements in the case now before this House. The City of Glasgow Bank was originally, like the Western Bank, a co-partnership carrying on business in Scotland under the provisions of the Bankers (Scotland) Act, 1826. The deed of co-partnery of this bank did not in any material respect differ from that of the Western Bank. But whereas the Western Bank was registered under the provisions of the Joint Stock Banking Companies Act, 1857, after Addie had entered into the contract in respect of which he raised his claim, the City of Glasgow Bank was registered under the Companies Act, 1862, on Nov. 29, 1862, several years before the date of the transactions in respect of which the pursuer raises his claim; the pursuer knew that he was purchasing shares the property of the bank, and dealing with the agents of the bank, while Addie was not aware of these facts, and this action was commenced earlier than that of Addie. It was commenced after the liquidation had begun, but before it was ascertained how much the

solvent contributories would have to pay, or who would be solvent contributories. I do not observe any other differences between the statements in the case now under discussion and the statements in *Western Bank of Scotland* v. *Addie* (1), and as I think that those differences of fact make no distinction in law, and as the interlocutor appealed against in this case seems to me identical in effect with that pronounced by this House, I agree with the Lord Ordinary that this case is ruled by the decision of the House in *Western Bank of Scotland* v. *Addie* (1).

But one very important question was raised by the judgments in the Court of Session, and argued by the counsel at your Lordships' Bar, which, if ever it becomes necessary to decide it, may require much consideration. The contract with a joint stock company to take shares in that company is a very peculiar one. Whether the company be, as the Western Bank was, a banking co-partnership in Scotland under the Bankers (Scotland) Act, 1826, having such a deed of co-partnership as that bank had, or a joint stock company registered under the Companies Act, 1862, the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his co-partners for the time being, contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning. Further, he consents that any one of his co-partners may, by procuring a person to take his shares, get rid (at least inter socios) of his liability, substituting that of the incoming shareholder. I know of no other contract which in these respects resembles this contract. It was with this peculiar kind of contract that the House of Lords had to deal in *Western Bank of Scotland* v. *Addie* (1), and it is with this peculiar kind of contract that your Lordships have now to deal. I do not think the House is called on now to decide whether a difference in the kind of contract induced by the fraud would make a sufficient distinction in law to prevent the decision in *Addie's* case (1) from governing such a case as that.

I do not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or, in the language of the civil law, when there is dolus dans locum contractui, the contract is not void but only voidable. It follows from this that though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind. But though he cannot rescind he may, at least in English law, as against the person actually guilty of the fraud, recover damages, *Clarke* v. *Dickson* (7) and *Cole* v. *Bishop* (8), mentioned in that case by Erle, J. The Lord President in the present case says that the deceived party may rescind if the fraud inducing the contract was that of an agent acting in the principal's business and within the scope of his authority, though the principal was ignorant of the fraud, and free from all moral guilt, or even, being an incorporation, was necessarily incapable of knowing anything except by its agents, and, therefore, free from all moral guilt (if such a phrase can be properly applied to an incorporated body), and so far I think the position is not disputed. But when he proceeds to say that

> "when the result of the fraud is the making of a contract between the party deceiving (not personally but through an agent) and the party deceived, I am not aware that any remedy is open to the latter, except a rescission of the contract, or at least without a rescission of the contract,"

he states a proposition which is much controverted. Lord Shand disputes it on principles and authorities of Scottish law well worthy of consideration, and

then says:

"The whole question has been very carefully considered in recent cases in England, in which it has been settled, on principles which I am satisfied are sound, that an incorporation will be answerable in damages for the fraudulent representations of its agents made in the course of the business entrusted to them: *Barwick* v. *English Joint Stock Bank* (2); *Swift* v. *Winterbotham* (9); *Mackay* v. *Commercial Bank of New Brunswick* (4); *Swire* v. *Francis* (5); *Stone and Collins* v. *City and County Bank* (10); *Weir* v. *Bell* (11). I say nothing of *Udell* v. *Atherton* (12), except that it was the decision of a court equally divided; that it was considered in most, if not all, of the subsequent cases just cited; and that I am not aware of any judgment since its date in which it was spoken of with approval, while it has been more than once referred to as a decision to be explained and accounted for on special grounds."

Barwick v. *English Joint Stock Bank* (2) was decided just before the decision in *Western Bank of Scotland* v. *Addie* (1), and the noble and learned Lords who advised the House were not aware of that decision. I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question. The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud. It is not necessary now to decide whether that was right or wrong as the law stood before the decision in *Western Bank of Scotland* v. *Addie* (1), nor, as I think, whether it is overruled by that decision. *Mackay* v. *Commercial Bank of New Brunswick* (4) was decided after *Western Bank of Scotland* v. *Addie* (1), and was distinguished from it. I do not think your Lordships need now inquire whether successfully or not. But it seems to me that Lord Chelmsford did not lay down any general position as to all contracts. He says (L.R. 1 Sc. & Div. at pp. 157, 158):

"The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such as action cannot be maintained against the company, but only against the directors personally. The action of Mr. Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said that he cannot recover unless he is entitled to rescind the contract."

I cannot say whether Lord Chelmsford meant to confine his observation to the particular kind of contract then before him, without deciding whether the same doctrine would apply to all kinds of contracts, or whether it was only by accident that he confined his language as he did. There are strong reasons given by the noble and learned Lords who have already spoken in this case for holding that when one has been induced by the fraud of the agents of a joint stock company to contract with that company to become a partner in that

company he can bring no action of deceit against the company while he remains a partner in it. There are reasons which would not apply to every case in which a contract has been induced by fraud, as, for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind. LORD CRANWORTH uses language applicable to all contracts; I cannot say whether he meant to apply the doctrine to all kinds of contracts, however different from that with which he was dealing. I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is that, if such a case arises, the consideration of the question whether it is decided by *Western Bank of Scotland* v. *Addie* (1) is not meant to be prejudiced by anything I now say.

Appeal dismissed.

Solicitors: *Simson & Wakeford*, for *Hagart & Burn-Murdoch*, Edinburgh; *Martin & Leslie*, for *Davidson & Syme*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HOLMES AND WIFE *v.* MATHER

[COURT OF EXCHEQUER (Bramwell, Cleasby and Pollock, BB.), June 24, 1875]

[Reported L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 23 W.R. 869]

Trespass to Person—Injury through act of defendant—Need to prove wilfulness or negligence.

To maintain an action for trespass to the person the injurious act relied on must be either wilful or negligent.

The defendant, who kept two horses at a livery stable, being desirous of trying them in double harness, had them put into his carriage and driven by a groom employed at the stable, while he himself sat beside the groom. During the drive the horses were startled by a dog and became unmanageable, to such an extent that the groom could not stop them, though he still retained some control over them. He told the defendant to leave the management of the horses to him, and the defendant, therefore, did not interfere. The groom successfully guided the horses round several corners but, failing to negotiate one, drove on the pavement and knocked down and injured the female plaintiff. In an action for negligence and trespass brought by the plaintiff, against the defendant, the jury found that there was no negligence on anyone's part, and the accident was inevitable.

Held: in the absence of a wilful or negligent act, no cause of action lay in trespass.

Per BRAMWELL, B.: For the convenience of mankind in carrying on the affairs of life, people as they go along public roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid.

Notes. Distinguished: *Sadler* v. *South Staffordshire and Birmingham District Steam Tram Co.* (1889), 23 Q.B.D. 17. Considered: *Stanley* v. *Powell*, [1886-90]

All E.R. Rep. 314; *Manton* v. *Brocklebank*, [1923] All E.R. Rep. 416; *Gayler and Pope, Ltd.* v. *B. Davies & Son, Ltd.*, [1924] All E.R. Rep. 94. Approved: *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd.*, [1951] 2 All E.R. 310. Considered: *Fowler* v. *Lanning*, [1959] 1 All E.R. 290. Referred to: *Dulieu* v. *White & Sons*, [1900-3] All E.R. Rep. 353; *Admiralty Comrs.* v. *Steamship Amerika (Owners), The Amerika*, [1916-17] All E.R. Rep. 177; *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] All E.R. 127; *Morriss* v. *Marsden*, [1952] 1 All E.R. 925; *Esso Petroleum Co.* v. *Southport Corpn.*, [1953] 2 All E.R. 1204.

As to trespass to the person, see 38 HALSBURY'S LAWS (3rd Edn.) 760; and for cases see 43 DIGEST 431 et seq.

Cases referred to:

(1) *M'Laughlin* v. *Pryor* (1842), 4 Man. & G. 48; 4 Scott, N.R. 655; 11 L.J.C.P. 169; 6 Jur. 372; 134 E.R. 21; 43 Digest 376, *42*.

(2) *Leame* v. *Bray* (1803), 3 East, 593; 102 E.R. 724; 43 Digest 420, *429*.

(3) *Sharrod* v. *London and North Western Rail. Co.* (1849), 4 Exch. 580; 7 Dow. & L. 213; 6 Ry. & Can. Cas. 239; 20 L.J.Ex. 185; 14 Jur. 23; 154 E.R. 1345; 34 Digest (Repl.) 171, *1206*.

(4) *Anon.* (1480), Y.B., 20 Ed. 4, fo. 10, pl. 10; 17 C.B.N.S. 251, n.; 34 L.J.C.P. 32, n.; 2 Digest (Repl.) 309, *126*.

Also referred to in argument:

Fletcher v. *Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 12 Jur.N.S. 603; 30 J.P. 436; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

Hammack v. *White* (1862), 11 C.B.N.S. 588; 31 L.J.C.P. 129; 5 L.T. 676; 8 Jur.N.S. 796; 10 W.R. 230; 142 E.R. 926; 36 Digest (Repl.) 143, *754*.

Scott v. *London Dock Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, *772*.

Wakeman v. *Robinson* (1823), 1 Bing. 213; 8 Moore, C.P. 63; 1 L.J.O.S.C.P. 70; 130 E.R. 86; 36 Digest (Repl.) 137, *716*.

Morley v. *Gaisford* (1795), 2 Hy. Bl. 442.

M'Manus v. *Crickett* (1800), 1 East. 106; 102 E.R. 43; 34 Digest (Repl.) 167, *1162*.

Scott v. *Shepherd* (1773), 1 Smith, L.C., [12th Edit.] 513; 2 Wm. Bl. 892; 3 Wils. 403; 96 E.R. 525; 36 Digest (Repl.) 23, *100*.

Gibbons v. *Pepper* (1695), 1 Ld. Raym. 38; 4 Mod. Rep. 404; 2 Salk. 637; 91 E.R. 922; 43 Digest 441, *690*.

Rule Nisi for an order to enter a verdict for the plaintiffs in an action in which they claimed from the defendant damages for (i) negligence on the part of the defendant or his servant as the result of which the female plaintiff suffered injury, and (ii) trespass to the person of the female plaintiff.

The defendant kept two horses at a livery stable in North Shields, and, wishing to try them in double harness for the first time, had them harnessed to his carriage and driven by one of the grooms employed at the livery stable. As they were being thus driven, and while the defendant was sitting on the box close to the groom, the horses were so startled by a dog which suddenly rushed out at them, that they ran away and became so unmanageable that the groom could not stop them, though he was able still to retain sufficient control over them to guide them to a certain extent. The groom, when the horses became thus unmanageable, begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom turned the horses safely round several corners, and at last guided them into Spring Terrace, at right angles to and at the end of which ran Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they reached the end of Spring

A Terrace the horses made a sudden swerve to the right, and the groom then pulled them still more to the right, intending to get them safely, if possible, round the corner. This he was unable to accomplish, and the horses and carriage were dashed against the palisades in front of the shop, and the female plaintiff, who was upon the pavement close to the shop and the palisades, was knocked down and injured.

B On the trial of the action the jury found that there was no negligence in anyone. The plaintiffs' counsel contended that it was unnecessary to prove negligence, as the hand of the groom gave to the horses the direction which brought them and the carriage into collision with the female plaintiff, and that consequently the second count in the declaration, for trespass, was proved. The verdict was entered by the learned judge for the defendant, leave being reserved to the plaintiffs C to move to enter it for them for £50 on the second count, the court to be at liberty to draw inferences of fact, and to make any amendments in the pleadings necessary to enable the defendant to raise any defence that ought to be raised. The plaintiffs obtained a rule nisi, pursuant to the leave reserved on the contention that, upon the facts proved, the plaintiffs were entitled to judgment on the count D of trespass to the person.

C. Russell, *Q.C.*, and *Crompton* for the defendant, showed cause.
Herschell, *Q.C.*, and *Gainsford Bruce* supported the rule.

BRAMWELL, B.—I am inclined to think that the groom and the defendant may be regarded as being in the same position as to liability, but for the purposes E of the present case it is not necessary to decide that question and, therefore I abstain from so doing. For the purposes of the judgment I am about to deliver I shall assume that, if the groom is liable the defendant is equally so, and so assuming, what do we find to be the facts? The groom is absolutely free from blame; he does nothing wrong; on the contrary, he endeavours to do what is, under the circumstances, the best to be done. The misfortune happened through F the horses being so startled by a dog that they ran away with the groom and the defendant. If the plaintiff can under these circumstances maintain an action, I see no reason why she should not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye and so injured it. The fact is that for the convenience of mankind in carrying on the affairs of life, people as they go along public roads must expect, or put up G with, such mischief as reasonable care on the part of others cannot avoid. Upon the facts of the present case there is no cause of action. That is the general view of the case.

I will put it a little more specifically, and address myself to the consideration of the arguments urged by counsel for the plaintiffs. He says, had the driver done nothing, this misfortune would not have happened to the female plaintiff, H but he gave the horses a pull or inclination in the direction of the plaintiff—he drove them in fact on to her. It is true he endeavoured to drive them further away from the place, by getting them to turn to the right, but he did not succeed in doing that. I think the argument is not tenable. In this case, as in most cases, you must look at the immediate act that did the mischief, you must look at what the driver was doing immediately before the mischief happened. I think I the answer to the argument is, that you cannot complain of the man unless he was immediately doing the act which did the mischief to you. The driver did not guide the horses upon the plaintiff, he guided them away from her, so far as he could; they ran away with him upon her, not in consequence of but in spite of his guidance. This is not a case, as I understand the facts, where a person has to make a choice of two evils, and singles the plaintiff out and drives to the spot where she is standing. The driver here was endeavouring to guide the horses, but was taken on to the pavement in spite of himself. The observation made by my brother POLLOCK in the course of the argument is to

my mind irresistible, that if counsel's contention is right, it must come to this, that if I am being run away with, and sit quiet and let the horses run wherever they think fit, I am not liable, because it is they who of themselves run against anyone or anything, but if I do my best to avoid injuring anything or anyone, and guide my horses, as far as I possibly can, so as to avoid doing damage, then it may be said that it is my act of guiding them that brings them to the place where the accident happens, and that I am, therefore, liable for the accident. Surely this is impossible.

As to the cases cited, they are in reality decisions upon a question of pleading merely. They simply decide upon the point whether the plaintiff ought to have declared in trespass, or upon the case. The result of them is that if the act that does an injury is an act of direct force, vi et armis, then trespass is the proper remedy, if any. But in cases such as the present there is no remedy at all where the act is not a wrongful act, that is to say, where the act is neither a wilful act nor yet a negligent act, though if the act were wrongful the proper form of action would be trespass. In *M'Laughlin* v. *Pryor* (1) the defendant was present, and the case was decided on the ground that there was sufficient evidence to show that he was taking part in the management and control of the horses. In *Leame* v. *Bray* (2) there was an act of direct force, vi et armis, and there was negligent driving. *Sharrod* v. *London and North Western Rail. Co.* (3) was a case in which the master was not present. I think I could distinguish the case cited from the Year Book (*Anon.* (4)), but it is enough to say that the defendant there let out animals liable to stray, whether frightened or not, into an unenclosed place, and without anybody to keep them in bounds.

CLEASBY, B.—I would add a word as to a point on which Bramwell, B., has not given any judgment. It is this, that the present is not a case where the act that is done must be justified, as where a man does an act in order to avoid something else, but it is a case where, in order to charge the defendant, it must first be shown that the act complained of was the act of the defendant. I sum up all in these words: the horses were not driven there by the defendant's servant, but went there in spite of him.

There is one other point I wish to mention. In my opinion it is not by any means clear that the act was the act of the master; the master resigned all control to the groom, and ceased to take any share in the management of the horses, so that the case, I think, falls within the principle enunciated by Parke, B., in *Sharrod* v. *London and North Western Rail. Co.* (3). He says (4 Exch. at p. 586):

> "In all cases where a master gives the direction and control over a carriage, or animal, or chattel, to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent—no more."

POLLOCK, B., concurred.

Rule discharged.

Solicitors: *Hoyle*, for *Pybus*, Newcastle; *Johnson*, for *Adamson & Adamson*, North Shields.

CUNNINGHAM *v.* DUNN AND ANOTHER

[COURT OF APPEAL (Bramwell, Brett and Cotton, L.JJ.), February 14, 1878]

[Reported 3 C.P.D. 443; 48 L.J.Q.B. 62; 38 L.T. 631; 3 Asp.M.L.C. 595]

Shipping—Charterparty—Failure to perform—Prevention of both parties by superior power—Capacity of one party to sue—Loading of cargo prevented by foreign law.

Contract—Frustration—Charterparty—Both parties prevented by superior power from performing contract—Capacity of one party to sue—Loading of cargo prevented by foreign law.

By a charterparty it was agreed that the defendants' ship, the R., should, "after loading dead weight at Malta" proceed to a Spanish port to be ordered by the plaintiff, the charterer, to load cargo. At the date of the charterparty the plaintiff knew that the dead weight to be taken on board at Malta was military stores and that no ship carrying such stores would be permitted by Spanish law to load at a Spanish port. The defendants did not know of the Spanish law until after the R. had gone to Malta. On her arrival at Valencia, the port ordered by the plaintiff, the R. was refused permission to load and left immediately. In an action by the plaintiff for breach of the charterparty by the defendants in failing to load,

Held: where neither party to a contract was ready to perform his undertaking because both were prevented by some superior power from fulfilling the contract, neither party could maintain an action against the other; in the present case Spanish law had prevented both parties from performing what, by the charterparty, they had respectively undertaken to do; and, therefore, the plaintiff was not entitled to recover.

Notes. Considered: *The Austin Friars* (1894), 71 L.T. 27. Applied: *Ralli* v. *Compañia Naviera Sota y Aznar*, [1920] All E.R. Rep. 427. Explained: *Cantiera Navale Triestina* v. *Russian Soviet Naptha Export Agency*, [1925] All E.R. Rep. 530. Referred to: *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. and Hungarian General Creditbank*, [1939] 2 K.B. 678; *Compagnie Algerienne de Meunerie* v. *Katana Soc. di Navigatione Marittima S.P.A.*, [1960] 2 All E.R. 55.

As to impossibility of performance, see 8 HALSBURY'S LAWS (3rd Edn.) 178-185; as to legality of contracts, see 7 HALSBURY'S LAWS (3rd Edn.) 78 et seq.; as to delivery and stowage of cargo, see 35 HALSBURY'S LAWS (3rd Edn.) 384 et seq. For cases see 12 DIGEST (Repl.) 436 et seq., 11 DIGEST (Repl.) 440 et seq., and 41 DIGEST 443 et seq.

Cases referred to:

(1) *Ford* v. *Cotesworth* (1868), L.R. 4 Q.B. 127; 9 B. & S. 559; 38 L.J.Q.B. 52; 19 L.T. 634; 17 W.R. 282; 3 Mar.L.C. 190; affirmed (1870), L.R. 5 Q.B. 544; 10 B. & S. 991; 39 L.J.Q.B. 188; 23 L.T. 165; 18 W.R. 1169; 3 Mar.L.C. 468, Ex. Ch.; 41 Digest 532, *3602*.

(2) *Macdonald* v. *Longbottom* (1859), 1 E. & E. 977; 28 L.J.Q.B. 293; 5 Jur.N.S. 1102; 7 W.R. 507; affirmed, 1 E. & E. 987; 29 L.J.Q.B. 256; 6 Jur.N.S. 724; 8 W.R. 614; 120 E.R. 1181, Ex. Ch.; 39 Digest 400, *369*.

Also referred to in argument:

Paradine v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 12 Digest (Repl.) 417, *3236*.

Medeiros v. *Hill* (1832), 8 Bing. 231; 1 Moo. & S. 311; 1 L.J.C.P. 77; 131 E.R. 390; 12 Digest (Repl.) 300, *2310*.

Harris and Taylor v. *Dreesman* (1854), 9 Ex. 485; 2 C.L.R. 498; 23 L.J.Ex. 210; 18 J.P. 458; 41 Digest 456, *2870.*

Stanton v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 21 W.R. 71; 1 Asp.M.L.C. 449; affirmed (1874), L.R. 9 C.P. 390; 43 L.J.C.P. 230; 30 L.T. 643; 22 W.R. 223, Ex. Ch.; affirmed (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp.M.L.C. 23, H.L.; 41 Digest 303, *1651.*

Appeal from a decision of Lord Coleridge, C.J.

By a charterparty dated Oct. 8, 1875, it was agreed between the plaintiff, the charterer, and the defendants, the owners of the steamship *Rainton*, "now on her way to Genoa and Malta," that the *Rainton* should

> "with all convenient speed after loading dead weight at Malta for the owners' benefit, sail and proceed to Messina and one first-class Spanish port in the Mediterranean . . . and there load [the plaintiff's cargo]. . . . By 'first-class' is meant any port that a steamer with cargo from a foreign port can load at by Spanish law, without risk of detention by custom-house authorities."

At the trial before Lord Coleridge, C.J., and a special jury it appeared that the *Rainton*, on her arrival at Malta, took on board military stores the property of the British government pursuant to a contract previously entered into by the defendants. She then sailed to Valencia to load pursuant to the charterparty. On hearing that the *Rainton* had munitions on board, the plaintiff's agent in Valencia informed the plaintiff that by the law of Spain the ship would not be allowed to load and would be liable to confiscation. Thereupon an effort was made through the British Minister at Madrid to induce the Spanish government to permit the *Rainton* to load. This permission was withheld and the *Rainton* sailed for Gibraltar without loading immediately after her arrival at Valencia. This was the breach of the charterparty complained of by the plaintiff. The plaintiff's cargo was shipped by other ships and the plaintiff alleged that he had suffered damage.

In answer to questions left to them by Lord Coleridge, C.J., the jury found the following facts: That the plaintiff did know at the date of the charterparty that the dead weight to be taken by the *Rainton* at Malta was military stores. That he knew it, first, when the charterparty was entered into, and, secondly, when he ordered the *Rainton* to proceed to Valencia; that he knew that this fact would prevent the loading of the other cargo and subject the ship to embargo, and that he knew it when he ordered the ship to Valencia; that the defendant knew these facts only after the *Rainton* had gone to Malta. Lord Coleridge, C.J., gave judgment for the defendants, and the plaintiff appealed.

Murphy, *Q.C.*, and *Bray* for the plaintiff.

Cohen, *Q.C.* (*Gainsford Bruce* with him) for the defendants.

BRAMWELL, L.J.—The judgment ought to be affirmed. I think there was no default by the defendants at Valencia. The case is governed by *Ford* v. *Cotesworth* (1). The plaintiff was willing to put a cargo on board but a power over which neither party had any control prevented the defendants from receiving it. Counsel for the plaintiffs contended that the charterparty contained an implied warranty that the ship should be presented fit to take in cargo at Valencia. I know of no authority for that.

I will deal now with the charterparty. It describes the ship as "now on her way to Genoa and Malta," and goes on to provide that she "shall with all convenient speed, after loading dead weight at Malta for owner's benefit, sail and proceed" to certain ports named, and load cargo for the affreighter. This

provision was introduced to protect the shipowner, by entitling him to load dead weight for himself before he became liable to fulfil his engagement with the charterer, and it does show that the ship is going on a voyage to Malta to load dead weight. There is no restriction as to the nature of the dead weight, and the fair construction is that the ship might take on any kind of dead weight, and there was no general warranty that it should be such as should be deemed lawful by the Spanish government. It may, however, be suggested that supposing there were no general warranty of that sort, the charterer would still be entitled to say to the shipowner, "you have no right to disable yourself from performing your part of the contract."

There is some weight in that contention, but there are two observations to be made in answer to it; first, the defendants did not know that there was an impediment, for there was evidence that they thought what they did could be safely done. It is said they had no right to risk it, but I am not so clear as to that, for I do not think we can put in the words "government stores," which do not appear on the face of the charterparty. Secondly, the plaintiff gave a licence to the defendants before the charterparty was entered into, to do what they did, and although, strictly speaking, evidence of the giving of that licence prior to the charterparty might not be admissible, it was a continuing licence, and the plaintiff knew how matters stood, and sent the ship to the Spanish port without objection.

In my judgment there was a joint inability, there was no refusal by the defendants at Valencia, there was no warranty, and if it can be said that the defendants had no right to disable themselves from performing their part of the contract, the answer is that they did not know they were disabling themselves, and they had a licence from the plaintiff to do what they did. The judgment must be affirmed.

BRETT, L.J.—Under a charterparty in the ordinary form to load at a particular port, the shipowner is bound to have his ship at that port ready to receive the cargo, and if he is prevented by any unforeseen cause, he will fail to perform what he has undertaken, and will be liable to an action at the suit of the charterer. The charterer is bound to have the cargo ready within a certain time, and if he is prevented by any misfortune that is his misfortune, and he is liable to the owner.

What is the condition here? According to the charterparty, the ship was on her voyage to Genoa and Malta, and was to proceed to Messina or some Spanish port to load a cargo for the plaintiff. Then there is an unusual term—"with all convenient speed after loading dead weight at Malta for owner's benefit." The first question is, What is the proper interpretation of this clause? I would go further than BRAMWELL, L.J. For the purpose of applying the terms in the charterparty, we may receive evidence of the facts that were known to the parties, to show that they were negotiating with reference to particular circumstances. The shipowners were under a contract to load military stores at Malta, the parties were negotiating with reference to the fact, that dead weight included military stores, so there is no reason why any words should be put in, except for this purpose, namely to show that as between the plaintiff and the defendants the ship was to be allowed to take military stores on board. No evidence could be given to show that military stores were not dead weight but measurement goods, for that would be to contradict the words of the charterparty. The words include stores, and *Macdonald* v. *Longbottom* (2) is authority for the view I have stated. I, therefore, think that on the charterparty it was agreed that the ship might take military stores on board and carry them to England, that there should be a ship ready to take cargo at Valencia. The defendants did take the ship to Valencia for the purpose of taking cargo on board, and, except for her having the military stores on board, it is admitted that she was ready for cargo.

Up to that time the defendants had done nothing which they were not entitled to do, but by reason of the law of Spain, and the refusal of the Spanish government to permit the ship to load, the defendants were not ready to take the cargo, and by reason of the same law and the same refusal, the plaintiff was not ready to put the cargo on board. It seems to me, therefore, that the parties were prevented by the Spanish government from carrying out the contract into which they had entered. *Ford* v. *Cotesworth* (1) is in point. It establishes that where neither party is ready to perform his undertaking because they are prevented by some superior power neither party can maintain an action against the other. I think, therefore, the judgment should be affirmed.

COTTON, L.J.—We must take it, for the purpose of this argument, that the plaintiff had a cargo which he was ready to put on board if he could when the defendants' ship was brought to Valencia, but that he was subject to a prohibition. The plaintiff was ready to perform his part of the contract, and the ship was there ready for cargo. The Spanish government, however, prevented the owners of the ship, the defendants, from taking the cargo, and prevented the owner of the cargo, the plaintiff, from putting it on board, because there were military stores on board the ship, so that the Spanish government would not allow the cargo to be loaded. If there were nothing in the contract to the contrary. I think that would be a breach, because the defendants prevented themselves from being ready and willing to carry out their undertaking. But we must look at the contract, and I think that parol evidence is admissible, not to explain the meaning of particular words, but because we must learn what the facts of the case are, and say what the true construction of the charterparty, dealing with those facts, is.

The ship was on her way to Malta under a contract to take in cargo, and both parties knew the nature of the cargo to be such that unless the Spanish government consented to the loading of the ship at Valencia, it would be impossible for her to load. The contract was for the whole capacity of the ship, subject to the cargo which was to be taken on board at Malta, and all that the shipowners did which would tend to induce the Spanish government to prevent the loading of the ship was done under the contract, and, therefore, the plaintiff cannot say to the defendants "you are in default so as to be answerable to me for not loading." The act of the Spanish government would excuse both parties, unless either were in default, but the defendants are not in default, and, therefore, they are excused, and are not liable to the plaintiff. The judgment ought to be affirmed.

Appeal dismissed.

Solicitors: *Lowless & Co.; Miller & Smith.*

[*Reported by* P. B. Hutchins, Esq., *Barrister-at-Law.*]

A

WEBSTER *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.

[COURT OF APPEAL (James, Cotton and Thesiger, L.JJ.), June 11, 12, 14, 1880]

B [Reported 15 Ch.D. 169; 49 L.J.Ch. 769; 43 L.T. 229; 28 W.R. 818]

Insurance—Interest on policy money—Life assurance—Deposit of policy as security—No assignment—Death of assured insolvent—Demand by depositee for policy moneys—Liability of insurer to pay interest.

C In 1874 A. deposited a policy of assurance on his life with B. as security for a loan. In 1874 A. died insolvent without executing an assignment of the policy to B. and his will was never proved. In 1875 B., having proved A.'s death to the satisfaction of the insurance company, the defendants, demanded payment of the policy moneys. The defendants refused to pay him without the consent of A.'s legal personal representative. In 1878 B. died and his executors claimed a D declaration that they were entitled to the policy moneys and interest thereon from the date when payment was demanded by B.

Held: interest being no part of the moneys stipulated by the policy to be paid could be only in the nature of damages; the defendants were not in default in refusing to pay the policy moneys in the absence of A.'s legal personal representative; and, therefore, they were not under any obligation to pay interest to the E plaintiffs.

Notes. Sections 28 and 29 of the Civil Procedure Act, 1833, have been repealed by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (2); see 18 HALSBURY'S STATUTES (2nd Edn.) 526. The Chancery Amendment Act, 1852, has been repealed, see ibid. p. 349.

F Considered: *Curtius* v. *Caledonian Fire and Life Assurance Co.* (1881), 19 Ch.D. 534; *Riches* v. *Westminster Bank, Ltd.*, [1947] 1 All E.R. 469. Referred to: *London, Chatham and Dover Rail. Co.* v. *South Eastern Rail. Co.*, [1892] 1 Ch. 120; *Re Drax, Savile* v. *Drax*, [1903] 1 Ch. 781.

As to payment of claims under policies, see 22 HALSBURY'S LAWS (3rd Edn.) 258-260; and for cases see 29 DIGEST (Repl.) 423-427.

G

Cases referred to:

(1) *Crossley* v. *City of Glasgow Life Assurance Co.* (1876), 4 Ch.D. 421; 46 L.J.Ch. 65; 36 L.T. 285; 25 W.R. 264; 29 Digest (Repl.) 407, *3048*.

(2) *Cameron* v. *Smith* (1819), 2 B. & Ald. 305; 106 E.R. 378; 35 Digest (Repl.) H 203, *106*.

(3) *Lowndes* v. *Collens* (1810), 17 Ves. 27; 34 E.R. 11; 35 Digest (Repl.) 213, *188*.

(4) *Upton* v. *Lord Ferrers* (1801), 5 Ves. 801; 31 E.R. 866; 35 Digest (Repl.) 213, *187*.

(5) *Parker* v. *Hutchinson* (1796), 3 Ves. 133.

(6) *Wolfe* v. *Findlay* (1847), 6 Hare, 66; 16 L.J.Ch. 241; 8 L.T.O.S. 408; 11 Jur. I 82; 67 E.R. 1085; 1 Digest (Repl.) 520, *1538*.

(7) *Caledonian Rail. Co.* v. *Carmichael* (1870), L.R. 2 Sc. & Div. 56; 35 Digest (Repl.) 217, *219*.

Also referred to in argument:

Matthew v. *Northern Assurance Co.* (1878), 9 Ch.D. 80; 47 L.J.Ch. 562; 38 L.T. 468; 27 W.R. 51; 29 Digest (Repl.) 426, *3175*.

Bushnan v. *Morgan* (1833), 5 Sim. 635; 58 E.R. 478; 29 Digest (Repl.) 423, *3154*.

Higgins v. *Sargent* (1823), 2 B. & C. 348; 3 Dow. & Ry. K.B. 613; 2 L.J.O.S.K.B. 33; 107 E.R. 414; 29 Digest (Repl.) 426, *3181*.

Bahre v. *Murrieta*, [1871] W.N. 147, L.C.
Turner v. *Burkinshaw* (1867), 2 Ch. App. 488; 17 L.T. 83; 15 W.R. 753, L.C.; 1 Digest (Repl.) 520, *1540*.
Cook v. *Fowler* (1874), L.R. 7 H.L. 27; 43 L.J.Ch. 855, H.L.; 35 Digest (Repl.) 203, *101*.
A.-G. v. *Ludlow Corpn.* (1849), 1 H. & Tw. 216; 47 E.R. 1390; 35 Digest (Repl.) 217, *218*.
De Havilland v. *Bowerbank* (1807), 1 Camp. 50; 170 E.R. 872, N.P.; 35 Digest (Repl.) 206, *131*.
Kingston v. *M'Intosh* (1808), 1 Camp. 518, N.P.
Powell v. *Martyr* (1803), 8 Ves. 146; 32 E.R. 309; 40 Digest (Repl.) 213, *1731*.
Kershaw v. *Kershaw* (1869), L.R. 9 Eq. 56; 21 L.T. 651; 18 W.R. 477; 40 Digest (Repl.) 214, *1742*.
Winter v. *Blades* (1825), 2 Sim. & St. 393; 4 L.J.O.S.Ch. 81; 57 E.R. 396; 40 Digest (Repl.) 214, *1741*.
Re Roberts, Goodchap v. *Roberts* (1880), 14 Ch.D. 49; 42 L.T. 666; 28 W.R. 870, C.A.; 35 Digest (Repl.) 225, *287*.

Appeal from a decision of Sir George Jessel, M.R.

Robert Brown insured his life with the defendant company for £500, and in March, 1847, deposited the policy with his brother William Brown as security for £435 advanced to him. The policy provided that the funds and property of the defendant company should be subject and liable to pay, within two calendar months next after satisfactory proof of the death of Robert, unto his executors, administrators, or assigns, the sum of £500 thereby assured, and all bonuses and additions thereto. In 1848 Robert ceased to pay the premiums on the policy, and William, in order to keep the policy on foot, was compelled to pay the premiums from November, 1848 to December, 1874, when Robert died. The premiums so paid by William amounted to the sum of £578 10s. No written assignment of the policy to William was ever executed by Robert, and shortly after his death notice of the deposit of the policy was given by William to the defendant company. Satisfactory proof of the death of Robert was given to the defendant company on Jan. 28, 1875, and, according to the rule of the defendant company, the sum of £500, together with bonuses to the amount of £197 10s. 5d., became payable on Mar. 28, 1875. Payment of these sums was shortly afterwards demanded by William, but the defendant company declined to pay the same, except to or by the consent of a duly constituted legal personal representative of Robert. Robert having died insolvent, his executrix refused to prove his will, and thereupon William took steps with a view to proving the will himself, but died in October, 1878, without having done so. The plaintiffs were the executors of William, and being unwilling to prove Robert's will, commenced this action, claiming a declaration that they were entitled to the moneys payable under the policy, interest on the same at 4 per cent. per annum from Mar. 28, 1875, and that the action might proceed in the absence of Robert's legal personal representative.

The defence alleged that the defendant company had ever since the death of Robert Brown been and were desirous to pay over the amounts due under the policy, upon having a proper discharge for the same; that they had been obliged to keep and had kept the amount due on the policy at call and immediately available, and submitted that interest was not properly payable by them.

Sir George Jessel, M.R., following his decision in *Crossley* v. *City of Glasgow Life Assurance Co.* (1), dispensed with the presence of a legal personal representative of Robert, under the power given to the court by the Chancery Amendment Act, 1852, s. 44, ordered payment to the plaintiffs of the policy moneys with interest as claimed, but allowed the defendants to retain out of the funds in their hands their taxed costs as between solicitor and client.

A The defendants appealed against the order to pay interest.

Davey, Q.C., and *F. C. Millar, Q.C.*, for the defendants.
Ince, Q.C., and *Bramwell Davis* for the plaintiffs.

JAMES, L.J.—I am of opinion that we must differ from the conclusion at which the Master of the Rolls has arrived. A policy of assurance does not bear B interest. That is conceded upon all hands. In itself there is neither an express nor an implied contract to pay interest on the amount payable. Under the Civil Procedure Act, 1833, whether it comes within any common law principle or not, anything in the nature of interest can only be given as damages for the wrongful detention of money which ought to have been paid. In this case I cannot see C the slightest ground for imputing any wrong whatever to the assurance office. The assurance office were always ready and willing to pay, upon receiving a valid discharge, and upon being reasonably satisfied that there was a person capable of receiving the money so as to give them a valid discharge. They were guilty of no default and they were guilty of no delay whatever. The plaintiff was guilty of default and neglect, if it is to be called guilt, because he did not choose to do D that which was open to him, or open to the person in whose right he is suing to do, namely, at any time to clothe himself with the legal representation which was required to complete his title. He was not bound to incur the expense of taking out administration or making himself responsible as an administrator, and he was not minded to do so, and, therefore, he did not clothe himself with a legal title. It would be a monstrous thing to say that the assurance office E brought themselves within any ground whatever on which the court would give damages.

It has been suggested that the assurance company had the money, and that they made a certain use of it. There is no evidence given by the plaintiff and no interrogatories have been addressed to the defendants tending to prove that any use was made of the money. On the other hand, so far as we have evidence F at all, it is precise that they have always expected to be called upon some day to pay the money, that they always expected the title would be completed, and that, upon its being completed, they would have to pay the money, and that consequently they had the money ready at their bankers. They had the money to meet this demand and other demands which had ripened into claims. Assurance companies do prepare themselves, and they do keep a balance at their bankers, G with reference to the deaths of which due notice has been given to them, and as to which, in the ordinary course of things, they may be called upon to pay at any particular hour. After proof of death had been given, there would be nothing for them to wait for but the production of the proper legal authority to receive the money, and they would be ready to hand it over the next day. Assurance offices do not take any time after the title is proved in paying the H money. There is no reasonable or just ground to make this assurance company pay interest for the nonpayment of the money, the delay in paying which has been entirely due to the neglect of the plaintiff to clothe himself with a legal title.

I **COTTON, L.J.**—The question we have to consider in this case is, whether interest has been properly given as against the defendants. The instrument sued upon was a policy of assurance in which there was no stipulation whatever that the company should, under any circumstances, pay interest. Interest, therefore, is no part of the debt, or of the sum, stipulated by the contract to be paid. If it can be recovered it must be in the nature of damages. I say so, because, whether interest is claimed under s. 29 of the Civil Procedure Act, 1833, where it is clearly, if granted at all, in the nature of damages, or under s. 28, where the language is different, it comes as damages, and is referable to the principles upon which damages can be given. In the case of a policy of assurance sub-

sequent to the Act, as much as in a case before the Act, as regards other instruments, where no stipulation appears for payment of interest, but where it was left to the jury that they might grant interest or not as they thought fit, they would grant it by way of damages.

I will refer to what was said by BAYLEY, J., in *Cameron* v. *Smith* (2), which was an action upon a promissory note—one of the instruments where there was no stipulation for interest, but where, nevertheless, the jury gave interest by way of damages, or gave damages calculated according to the rate of interest. BAYLEY, J., says (2 B. & Ald. at p. 308):

> "Although by the usage of trade interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount, and it is competent for them either to allow 5 per cent. or 4 per cent. according to their judgment of the value of money, or they may even allow nothing in case they are of opinion that the delay of payment has been occasioned by the default of the holder."

In another case, which was referred to in the course of the argument, damages were said to be given for the detention, that is, for the wrongful detention, of the money, and, of course, it would be hardly necessary to mention that the only damages, as a rule, given for the improper detention or refusal to pay money, are interest; loss of interest being the damage which the law supposes a man suffers, whatever the real wrong may be, except under special circumstances, for nonpayment of money to him. What we have to consider, therefore, is whether there is anything to justify the finding of the Master of the Rolls that there was any default or neglect to pay the money on behalf of the defendant company. If there was not, then the principle on which interest should be granted, that is, by way of damages, fails.

We have the principle laid down in a similar case, which I understood the Master of the Rolls thought decided this case on many points. I refer to *Crossley* v. *City of Glasgow Life Assurance Co.* (1). There the facts were very simple. In that case, as he has done here, he gave the assurance office all their costs as between solicitor and client on the ground that they were justified in declining to pay the money without the decree of the court. In the present case it has not been questioned before us that the decree of the court below gives a complete exoneration or discharge to the assurance office. It must not be assumed that we decide that that will be so. That question is not before us, but the question may hereafter arise. The Master of the Rolls in that case, as in this, decided that the indemnity of the court would be a complete indemnity to the assurance company, upon the ground that, although there was no legal personal representative to give a discharge to the office, yet he had the power to dispense with the presence of the legal personal representative, and his decree, therefore, made in the absence of the legal personal representative under that power would be a good discharge to the defendant company. That is, in fact, a decision that until the decree they could not reasonably be called upon to pay. Although no doubt it is the fact that the plaintiff had a title established by the decree, yet the Master of the Rolls' decision in that case as to costs shows, and the whole grounds of his judgment are, that the defendants were justified in coming here to get what they otherwise could not get, namely, a good discharge. That being so, he, in fact, decides that they are in no default; and if they are in no default, on what ground can damages be given to the plaintiff?

Damages must be given in consequence of the defendants withholding something to which the plaintiff is legally entitled; but, if he is not legally entitled to receive this money, and if the defendants are not bound to pay it, because he cannot give a good discharge until the decree of the court, how can there be any default on the part of the defendants? At once that brings it near to what I read from

the judgment of BAYLEY, J.; and if that is so, there was default on the part of the plaintiff in not taking an assignment, which would have enabled him to have given a good discharge, in not bringing the action sooner, or in not taking out letters of administration to the deceased. Thus there is no default at all on the part of the defendants. There was neglect or default on the part of the plaintiff, who comes here seeking to recover his money and to whom the Master of the Rolls has granted interest by way of damages. In my opinion that cannot be supported. Although it is within the discretion of the jury what damages they are to give, or whether they should give damages at all, yet, if the facts in evidence before them were not such as to lay a foundation for damage, or if the facts in evidence before the judge below were not such as to justify the exercise of the discretion which he has assumed to exercise, that is a case in which the Court of Appeal may, and, in my opinion, is bound to act upon its own view of what the legal result of the fact in evidence is. In my opinion, therefore, we must discharge so much of the judgment of the Master of the Rolls as gives interest to the plaintiff.

THESIGER, L.J.—I am of the same opinion. The Master of the Rolls has assumed, and properly assumed, that in this case there was no default on the part of the defendants. He has stated (and I am of the same opinion) that, in this case, the plaintiff had no power to give a legal discharge to the defendants until the judgment was obtained from the Master of the Rolls. The Master of the Rolls acted upon that statement and upon the assumption to which I have referred, by giving to the defendants all the costs of the action. That being so, upon what principle does the plaintiff rest his right to obtain interest from the defendants?

He rests it, first of all, upon the Civil Procedure Act, 1833, or upon the analogy of that Act. The sections of that Act which have to be dealt with are ss. 28 and 29. In considering what is the meaning and what is the effect of those sections, it is not unimportant to see how the matter as regards interest stood, both at common law and in equity, before that statute was passed. As regards the matters which are dealt with by s. 28 of the Act, it appears to me, although perhaps it is not necessary to give a definite opinion upon the point, that that section is only declaratory of what the law was before that statute was passed. I find it laid down by SIR WILLIAM GRANT, M.R., in *Lowndes* v. *Collens* (3) (17 Ves. at p. 28), that:

> "wherever there is a written contract for a sum of money payable upon demand, or upon a day certain, interest is payable from the time of the demand made, or from the fixed period of payment, and there is no difference whether that contract is contained in a promissory note or any other instrument. It would be very inconvenient that a different rule should prevail at law and in equity, with regard to that question. It came often before LORD ALVANLEY, who had occasion to consider it in many other cases besides *Upton* v. *Lord Ferrers* (4), particularly in *Parker* v. *Hutchinson* (5), where he states the practice at law, as to notes payable at a day certain or a written undertaking to give interest."

SIR WILLIAM GRANT there uses the expression "payable," but it is obvious, from the cases which have been cited before us, that interest was not absolutely payable under those circumstances, but only payable where there was default by the person who had to pay the principal sum.

That was stated by BAYLEY, J., very clearly in *Cameron* v. *Smith* (2), in reference to bills of exchange, which, although they may have been dealt with under the common law, yet would be dealt with in the same manner in which other matters would be dealt with under ss. 28 and 29 of the Act. The proposition is stated in equally clear terms in equity in *Wolfe* v. *Findlay* (6). That being so,

and although contracts contained in written instruments payable after demand, or contracts under written instruments payable at a fixed day, carried interest where there had been default in payment, it appears to have been the opinion of judges at common law that no interest was payable in respect of a policy of life assurance. The statute appears to have had reference, therefore, both as to what existed at common law and in respect of a matter of life assurance. However, whether one dealt with s. 28 or s. 29, this much is clear, that the principles as to allowance of interest which existed before the statute are carried out by the legislature under the statute. There is no power, on the part of a jury, or rather, a jury would be recommended by the judge not, to give interest in a case where there had been no default on the part of the person against whom interest was claimed. That is clearly the case in a court of common law, under the terms of the statute, and it appears to me that it must be equally clearly so in an action in a court of equity, founded upon the analogy of the statute.

As to this case, the matter comes within the principle laid down by Lord Westbury in *Caledonian Rail. Co.* v. *Carmichael* (7), as follows:

> "Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid."

Here there is clearly no contract to pay interest, and here it is equally clear that the money has not been wrongfully withheld.

There is only one other matter remaining. I am of opinion that even if in this case it had been shown that interest had been received upon the money, there would have been no obligation on the part of the defendants to pay interest. In point of fact, however, upon the affidavit it appears that interest has not been made by the defendants, and I take it that, as a general rule, assurance companies would not make interest under circumstances such as exist in the present case. We all know that even the largest assurance companies have to keep moneys ready in hand for the purpose of paying claims which will, from time to time, be made upon them, and the amount which from time to time they keep in hand is regulated by them, at all events to a considerable extent, by the number and the amount of the claims which are likely to be about to be made against them. Therefore, whether one looks at the justice of the case generally, or to the facts of this particular case, or at the general law, it appears that no claim for interest can properly be made. Inasmuch as the Master of the Rolls, in dealing with this case, has exercised a judicial discretion upon the facts before him, and has decided upon an erroneous principle, this court ought to interfere with and override his discretion, if it can be called a discretion.

JAMES, L.J.—I am a little surprised at the decree being made at all, in the absence of the legal personal representative. I should have thought it very doubtful. It might be convenient to the assurance office, but I should hesitate before I dispensed with the legal personal representative in this case.

Solicitors: *Watson, Sons & Room; O. B. Wooler.*

[*Reported by* Frank Evans, Esq., *Barrister-at-Law.*]

A

RENALS AND OTHERS *v.* COWLISHAW AND OTHERS

[Chancery Division (Sir Charles Hall, V.-C.), April 10, 1878]

[Reported 9 Ch.D. 125; 48 L.J.Ch. 33; 38 L.T. 503; 26 W.R. 754]

B [Court of Appeal (James, Baggallay and Thesiger, L.JJ.), June 30, 1879]

[Reported 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 28 W.R. 9]

Sale of Land—Restrictive covenant—Benefit—Conveyance of land without reference to covenant—Right of purchaser to benefit of covenant.

C The fee simple owners of a residential estate and adjoining lands sold part of the adjoining lands to the defendants' predecessors in title who, on behalf of themselves, their heirs and assigns, entered into covenants with the vendors, their heirs and assigns, restricting their right to build on and use the land so purchased. The same vendors later sold the residential estate to the plaintiffs' predecessors in title. The conveyance contained no reference to the restrictive D covenants and no contract was entered into and no representation was made that the purchasers were to have the benefit of the covenants. The plaintiffs claimed an injunction restraining the defendants, who had purchased the land with notice of the covenants, from building on and using the land in breach of the covenants.

Held: to enable a purchaser as an assign to claim the benefit of a restrictive E covenant it must appear that he acquired the property with the benefit of the covenant, i.e., that the benefit of the covenant was part of the subject-matter of the purchase, and, therefore, the plaintiffs were not entitled to the benefit of the covenants.

Notes. Distinguished: *Nicoll* v. *Fenning*, [1881-5] All E.R. Rep. 161. Con- F sidered: *Brown* v. *Inskip* (1884), Cab. & El. 231. Applied: *Sheppard* v. *Gilmore*, [1886-90] All E.R. Rep. 1049. Approved: *Spicer* v. *Martin*, [1886-90] All E.R. Rep. 461. Considered: *Mackenzie* v. *Childers* (1889), 43 Ch.D. 265; *Davis* v. *Leicester Corpn.*, [1894] 2 Ch. 208. Applied: *Hudson* v. *Cripps*, [1896] 1 Ch. 265. Considered: *Nalder and Collyer's Brewery Co.* v. *Harman* (1900), 82 L.T. 594; *Rogers* v. *Hosegood*, [1900-3] All E.R. Rep. 915; *Osborne* v. *Bradley*, [1900-3] All E.R. G Rep. 541. Applied: *Elliston* v. *Reacher*, [1908] 2 Ch. 374; *Reid* v. *Bickerstaff*, [1908-10] All E.R. Rep. 298; *Ives* v. *Brown*, [1919] 2 Ch. 314; *Lord Northbourne* v. *Johnston & Sons*, [1922] All E.R. Rep. 144. Considered: *Torbay Hotel* v. *Jenkins*, [1927] 2 Ch. 225. Applied: *Re Sunnyfield*, [1931] All E.R. Rep. 837. Considered: *Re Union of London and Smith's Bank Ltd.'s Conveyance*, *Miles* v. *Easter*, [1933] All E.R. Rep 355; *Drake* v. *Gray*, [1936] 1 All E.R. 363; *Lawrence* v. *South* H *County Freeholds, Ltd.*, [1939] 2 All E.R. 503. Applied: *Newton Abbot Co-operative Society, Ltd.* v. *Williamson and Treadgold, Ltd.*, [1952] 1 All E.R. 279. Referred to: *Nottingham Patent Brick and Tile Co.* v. *Butler*, [1886-90] All E.R. Rep. 1075; *Clegg* v. *Hands* (1890), 44 Ch.D. 503; *Goddard* v. *Midland Rail. Co.* (1891), 8 T.L.R. 126; *Everett* v. *Remington*, [1892] 3 Ch. 148; *Jaeger* v. *Mansions Consolidated, Ltd.*, [1900-3] All E.R. Rep. 533; *Willé* v. *St. John* (1910), 79 I L.J.Ch. 239; *Wilkes* v. *Spooner*, [1911] 2 K.B. 473; *L.C.C.* v. *Allen*, [1914-15] All E.R. Rep. 1008; *Chambers* v. *Randall*, [1922] All E.R. Rep. 565; *Kelly* v. *Barrett*, [1924] All E.R. Rep. 503; *Alfred Leney & Co.* v. *Whelan* (1936), 20 Tax Cas. 321; *Newman* v. *Real Estate Debenture Corpn., Ltd. and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131; *Kelly* v. *Battershell*, [1949] 2 All E.R. 830; *Re Pinewood Estate, Farnborough, New Ideal Homesteads, Ltd.* v. *Levack*, [1957] 2 All E.R. 517; *Marten* v. *Flight Refuelling, Ltd.*, [1961] 2 All E.R. 696.

As to restrictive covenants, see 14 Halsbury's Laws (3rd Edn.) 559 et seq.; and for cases see 40 Digest (Repl.) 339 et seq.

Cases referred to : A

(1) *Keates* v. *Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.JJ.; 40 Digest (Repl.) 343, *2780.*

(2) *Child* v. *Douglas* (1854), Kay, 560; 23 L.T.O.S. 140; 2 W.R. 461; 69 E.R. 237; on appeal, 5 De G. M. & G. 739; 23 L.T.O.S. 283; 2 W.R. 701, L.JJ.; subsequent proceedings (1856), 2 Jur.N.S. 950; 40 Digest (Repl.) 339, *2766.*

(3) *Master* v. *Hansard* (1876), 4 Ch.D. 718; 46 L.J.Ch. 505; 36 L.T. 535; 41 J.P. 373; 25 W.R. 570, C.A.; 31 Digest (Repl.) 189, *3207.* B

(4) *Mann* v. *Stephens* (1846), 15 Sim. 377; 10 Jur. 650; 60 E.R. 665, L.C.; 40 Digest (Repl.) 344, *2784.*

(5) *Western* v. *MacDermott* (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, *2886.*

(6) *Coles* v. *Sims* (1853), Kay, 56; 23 L.J.Ch. 37; 22 L.T.O.S. 132; 2 W.R. 48; 69 E.R. 25; affirmed (1854), 5 De G. M. & G. 1; 2 Eq. Rep. 951; 23 L.J.Ch. 258; 22 L.T.O.S. 277; 18 Jur. 683; 2 W.R. 151; 43 E.R. 768, L.JJ.; 40 Digest (Repl.) 351, *2830.* C

Also referred to in argument :

Richards v. *Revitt* (1877), 7 Ch.D. 224; 47 L.J.Ch. 472; 37 L.T. 632; 26 W.R. 166; 40 Digest (Repl.) 361, *2890.* D

Appeal from a decision of HALL, V.-C., in an action for an injunction to restrain what the plaintiffs alleged to be a breach of covenant.

By an indenture dated Sept. 29, 1845, Hody, Winterbotham, and Russell who, as trustees for sale under the will of Ann Swinburne, deceased, were the fee simple owners of the Mill Hill Estate, a residential estate and adjoining lands, conveyed two pieces of adjoining land to Francis Shaw in fee. This indenture contained a covenant by Shaw, for himself, his heirs, executors, administrators, and assigns, with the said trustees, their heirs, executors, administrators and assigns, that he would not erect any buildings within eight yards of the centre of a certain road leading to the mansion house on the Mill Hill estate; that the garden walls of any houses which he might build along such road should stand back six yards from the centre of the road; that every house to be erected on the land adjoining the road should be of the value of £300, and of a certain specified elevation; and that no trade or business should be carried on in any such houses, which were to be used as private dwelling-houses only. Similar covenants were contained in the conveyances of other parcels of land sold by the trustees at about the same time, their object being to secure the residential character of the neighbourhood. E F G

By an indenture dated Aug. 15, 1867, Shaw's devisee conveyed the land comprised in the deed of Sept. 29, 1845, to John Gadsby, who entered into a restrictive covenant with his vendor substantially identical with the covenant above mentioned. Subsequently this land became vested in the defendants as tenants in common in fee. The defendants, when this land was conveyed to them, had notice of the existence of the restrictive covenant. By an indenture dated Dec. 5, 1854, the trustees had sold and conveyed the Mill Hill estate to T. P. Bainbrigge, whose devisees, by an indenture dated Sept. 29, 1870, sold and conveyed the same to the plaintiffs as tenants in common in fee. These indentures contained no mention of, or reference to the conveyance to Shaw or the restrictive covenant contained in it. H I

The defendants had now begun to erect a large chimney and other buildings, and to carry on the trade of wheelwrights, smiths, and timber merchants upon the land conveyed by the indenture of Sept. 29, 1845. The plaintiffs brought this action claiming an injunction to restrain the defendants from so doing, and from otherwise contravening the restrictive covenant contained in that indenture. From the pleadings and evidence given it did not appear that either on the

A purchase by Bainbrigge or by the plaintiffs from Bainbrigge's devisees, any representations had been made, or contracts entered into that the purchasers were to have the benefit of the restrictive covenant. The point for decision was whether the plaintiffs were entitled to sue on the covenant.

Dickinson, *Q.C.*, and *W. Renshaw* for the plaintiff.

B *W. Pearson*, *Q.C.*, and *Bury* for the defendants.

SIR CHARLES HALL, V.-C.—I think that this case is governed by *Keates* v. *Lyon* (1), by *Child* v. *Douglas* (2), as ultimately decided by WOOD, V.-C., after he had granted an interlocutory injunction in the first instance, but at the hearing refused an injunction in favour of the plaintiff, and by *Master* v. C *Hansard* (3).

The law as to the benefit and burden of covenants has not been in a very satisfactory state. It is, however, now well settled that the burden of a covenant entered into by the grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time D being, in equity, having notice thereof. The matter always depends on the question of notice. Who is entitled to the benefit of the covenant? From *Mann* v. *Stephens* (4), *Western* v. *MacDermott* (5), and *Coles* v. *Sims* (6), and cases of that class, this court had got so far as to hold that anybody was entitled to the benefit of the covenant who had acquired his property in the form of a lot upon the laying out of land in lots for sale, where the covenants E were entered into by the several parties, whether put into the form of a deed to which they were all parties or whether, without that, on the facts the court was satisfied, either by the contents of the different conveyances to the different purchasers, or aliunde as by contract entered into that satisfied each of several persons was intended to be bound by a certain covenant, and was at the same time intended to have the benefit of this covenant as against the others. F There may be cases, and there no doubt are, in which the same rule would be applied with a view to showing that the vendor on a sale, having himself the benefit of a restrictive covenant, had made representations to a subsequent purchaser that that purchaser was to have the benefit of those covenants.

The plaintiffs here rely upon their being assigns of this particular estate, and they say that, as the vendors were the owners of that estate when they G sold the parcels of land adjoining it to Shaw, the covenant entered into by the purchaser of those parcels must be taken to have been entered into with them for the purpose of protecting the estate which they retained. That being so, the benefit of that covenant goes to any assign of any portion of the estate, independent of any representations that there was such a covenant entered into by the H purchaser of that portion and without any bargain or contract that that purchaser should have the benefit of that covenant as part of his purchase. They say further, that that extends to everyone of the assigns, not only without any such representation, but it may be also without the purchaser even knowing of its existence.

It seems to me that, on the three cases to which I am referred, it must be I taken that that is not the law of this court, and that in order to claim the benefit of the covenant as an assign, this at least must appear, that the assign acquired the property with the benefit of that covenant, and that that was part of the subject-matter of the purchase. This I consider was the view expressed in *Master* v. *Hansard* (3), where BRAMWELL, L.J., says (4 Ch. D. at p. 724):

> "The restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained, and it seems to me that they have not precluded themselves from allowing these buildings to be erected."

That is to say, use might have been made of this restrictive covenant at subsequent sales, if for instance in selling to Bainbrigge, the trustees had put into the conveyance a clause to the effect that there was such a restrictive covenant, and that Bainbrigge was to have the benefit of it. However, there being in the conveyance to Bainbrigge no such reference whatever to the existence of any such covenant, and Bainbrigge's representatives selling that property to these plaintiffs without there being any reference whatever in the conveyance to part of the estate having been sold off subject to such a restrictive covenant, and there being no reference to the existence of such a burden of which the purchasers, the plaintiffs, were to have the benefit, these plaintiffs, being assigns, cannot be treated as entitled to the benefit of that covenant. The result is that I can only dismiss the action with costs.

The plaintiffs appealed.

Graham Hastings, *Q.C.*, and *Renshaw* for the plaintiffs.
W. Pearson, *Q.C.*, and *Bury* for the defendants.

JAMES, L.J.—It is impossible for us to differ from the decision which HALL, V.-C., has come to or to distinguish this case from the cases referred to by him, *Keates* v. *Lyon* (1) and *Child* v. *Douglas* (2). To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I was framing the deed afresh, I should not have the remotest idea what the property was which was intended to be protected, and within what limits.

I do not think it necessary to add anything more except that I entirely concur with every word of the judgment of HALL, V.-C.

BAGGALLAY, L.J.—I am of the same opinion with the lord justice. I adopt entirely the language of the Vice-Chancellor in his judgment.

THESIGER, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Sachell & Chapple*, for *J. Gadsby*, Derby; *R. Wastell.*

LOWTHER *v.* BENTINCK

[ROLLS COURT (Sir George Jessel, M.R.), December 19, 1874]

[Reported L.R. 19 Eq. 166; 44 L.J.Ch. 197; 31 L.T. 719; 23 W.R. 156]

Administration of Estates—Advancement—"Preferment or advancement or otherwise for his benefit"—Payment of debts.

Under the trusts of the testator's will L. was entitled to the income of the trust fund for life, the trustees being empowered to apply one moiety of the capital for the "preferment or advancement" of L. "or otherwise for his benefit" as they in their discretion should think fit. L. had contracted large debts which the trustees wanted to pay out of capital. Those entitled in remainder filed a bill to restrain the trustees from so applying capital and the trustees entered a demurrer.

Held: the words "or otherwise for his benefit" were very wide and showed that it was not intended to confine the trustees' powers to the literal meaning of the primary object "preferment and advancement" and, therefore, the trustees had power under the instrument to apply capital in the payment of L.'s debts.

Notes. Considered: *Re Breed's Will* (1875), 1 Ch.D. 226; *Molyneux* v. *Fletcher*, [1898] 1 Q.B. 648. Applied: *Re Livesay's Settlement Trusts*, *Livesay* v. *Livesay*, [1953] 2 All E.R. 723. Considered: *Re Pilkington's Will Trusts*, [1961] 2 All E.R. 330. Referred to: *Re Brittlebank*, *Coates* v. *Brittlebank* (1881), 30 W.R. 99; *Re Price* (1887), 34 Ch.D. 603; *Re Stanger*, *Moorsom* v. *Tate* (1891), 60 L.J.Ch. 326; *Re Halsted's Will Trusts*, *Halsted* v. *Halsted*, [1937] 2 All E.R. 570.

As to construction of an instrument in its ordinary sense, see 11 HALSBURY'S LAWS (3rd Edn.) 384 et seq.; and for cases see 17 DIGEST (Repl.) 278 et seq. As to extent of power of advancement, see 21 HALSBURY'S LAWS (3rd Edn.) 177; and for cases see 37 DIGEST 498.

Cases referred to in argument:

Re Kershaw's Trusts (1868), L.R. 6 Eq. 322; 37 L.J.Ch. 751; 18 L.T. 899; 16 W.R. 963; 37 Digest 499, *916*.

Talbot v. *Marshfield* (1868), 3 Ch. App. 622; 37 L.J.Ch. 52; 19 L.T. 223; 32 J.P. 725, L.JJ.; 37 Digest 499, *917*.

Demurrer by the defendants, the trustees and the cestui que trust to a bill filed by the plaintiffs, the three infant children of Francis William Lowther, who submitted that the application of any of the capital of the trust legacies for the purpose of paying the debts of Francis William Lowther, was altogether unauthorised and beyond the powers of the trustees; and for an injunction to restrain the trustees from selling or from applying any part of the capital or corpus of the trust legacies in payment or discharge of the debts.

The Earl of Lonsdale, by his will dated Feb. 18, 1871, bequeathed the sum of £100,000 to trustees upon trusts for investment, and to pay the annual income thereof, to Francis William Lowther, one of the defendants, or his assigns, during his life, and after his death to stand possessed of the trust fund, for such trusts as he should appoint, and in default of appointment in trust for his children, as therein mentioned; and the testator thereby declared that it should be lawful for his trustees at any time or times during the life of Francis William Lowther, to levy and raise any part or parts of the trust fund, not exceeding in the whole one moiety thereof, in or towards the "preferment or advancement" of the defendant Francis William Lowther, or otherwise for his benefit in such manner as the defendants, the trustees, should in their discretion think fit.

On Mar. 4, 1872, the testator died, without having revoked or altered his will except that by a codicil the trust fund was increased by £25,000.

Francis William Lowther had contracted large debts, amounting to upwards of £60,000. He was about thirty years of age, and was married, having three infant children. With the exception of an annual sum of about £500, to which he was entitled under his marriage settlement, he had no annual income, except what was derived from the trust fund, the subject of the present suit. Under these circumstances Francis William Lowther had applied to the trustees to raise £62,000 out of the fund, and to apply the same in payment of his debts and liabilities.

To the plaintiffs' bill the defendants demurred.

Montague Cookson for the plaintiffs.
Horace Davey for the defendants.

SIR GEORGE JESSEL, M.R.—The point raised by this bill is one of much importance, as it involves the meaning of a common form which is much used in

wills and settlements. The words the meaning of which I have to interpret are these:

> "It shall be lawful for my said trustees at any time or times during the life of the defendant, Francis William Lowther, to levy and raise any part or parts of the said trust moneys, stocks, funds, or securities, not exceeding in the whole one moiety thereof and to pay and apply the same in or towards the preferment or advancement of the said Francis William Lowther, or otherwise for his benefit in such manner [as the trustees should] in their discretion think fit."

The question is whether the trustees are authorised by these words to advance a part, not exceeding one-half, of the corpus of the trust fund, in the payment of the debts of Francis William Lowther. The proper rule of construction in construing instruments of this sort is to follow the literal construction of the words, unless there is something in the context to show that that could not have been the intention of the testator. The words used here, "or otherwise for his benefit," are very wide, and if these words are to be treated as ejusdem generis, as has been suggested by counsel for the defendants, why did not the will stop at the words, "preferment or advancement?" These words must have some meaning attached to them. It is often the custom to point out the primary object of a trust, when the subsequent words show that it was not intended to bind down the trustees to that primary object. I shall decide the case simply on the words as they stand, for there can be nobody to deny that the payment would confer a great benefit on Francis William Lowther and hold that payment of his debts is within the powers of the trustees.

Judgment for plaintiffs.

Solicitors: *Ellis & Ellis.*

[*Reported by* S. H. S. Lofthouse, Esq., *Barrister-at-Law.*]

WILLIAMS AND ANOTHER *v.* HEALES

[Court of Common Pleas (Keating, Brett, Denman and Honyman, JJ.), January 26, 1874]

[Reported L.R. 9 C.P. 177; 43 L.J.C.P. 80; 30 L.T. 20; 22 W.R. 317]

Executor—Executor de son tort of—Executor of executor de son tort—Continuance in possession—Assignee of lease liable on covenants.

Landlord and Tenant—Lease—Assignee—Executor of executor de son tort continuing in possession—Liability on covenants.

The executor of an executor de son tort may himself become executor de son tort in respect of the estate of the original intestate. Where, therefore, a father was executor de son tort with regard to a lease and on his death his son acted as agent to his mother till her death and then continued in possession of the lease for the benefit of himself and the other children, **held** that he became assignee of the lease and so liable on the covenants.

A **Notes.** Distinguished: *Stratford-upon-Avon Corpn.* v. *Parker*, [1914-15] All E.R. Rep. 275. Considered: *Official Trustee of Charity Lands* v. *Ferriman Trusts, Ltd.*, [1937] 3 All E.R. 85. Referred to: *Justice* v. *James* (1898), 14 T.L.R. 385.

As to the executor de son tort, see 16 HALSBURY'S LAWS (3rd Edn.) 145 et seq.; and for cases see 23 DIGEST (Repl.) 62 et seq.

B Cases referred to:

(1) *Paull* v. *Simpson* (1846), 9 Q.B. 365; 15 L.J.Q.B. 382; 11 Jur. 13; 115 E.R. 1313; 23 Digest (Repl.) 69, *620.*

(2) *Buckworth* v. *Simpson* (1835), 1 Cr. M. & R. 834; 5 Tyr. 344; 1 Gale, 38; 4 L.J.Ex. 104; 149 E.R. 1317; 24 Digest (Repl.) 695, *6807.*

C Also referred to in argument:

Norwich Corpn. v. *Johnson* (1686), 3 Mod. Rep. 90; Comb. 7; 3 Lev. 35; 2 Show. 457; 87 E.R. 58; 23 Digest (Repl.) 68, *598.*

Hill v. *Curtis* (1865), L.R. 1 Eq. 90; 35 L.J.Ch. 133; 13 L.T. 584; 12 Jur.N.S. 4; 14 W.R. 125; 23 Digest (Repl.) 69, *621.*

Anon. (1678), 2 Mod. Rep. 293; 86 E.R. 1080, Ex. Ch.; 23 Digest (Repl.) 75, *704.*

D **Action** on a covenant in a lease for non-payment of rent, and for non-repair of the premises.

The plaintiffs were trustees of the estate of the lessor of certain premises, which were demised to Henry Godden by a lease dated Aug. 29, 1810, and the defendant was sued as assignee of the lease for two quarters' rent due and unpaid E at the expiration of the term, and for giving up the premises in a bad state of repair. It was agreed that the damages for the non-repair should be £60 if the defendant should be held liable on the covenants in the lease, and the question came before the court in the form of a Special Case, to decide whether, upon the facts set out, he was so liable; the court to be at liberty to draw inferences of fact.

F Henry Godden, the original lessee, died intestate, and his widow took out letters of administration and administered his estate, and became assignee of the lease. She died in 1843, leaving two daughters, one of whom died unmarried shortly afterwards, and the other was already married to G. S. Heales, the father of the defendant. On Mrs. Godden's death, G. S. Heales took possession of the premises demised by the lease, sublet them to various tenants and took G the profits and rents, paying the ground rent duly to the plaintiffs until his death in 1856. Then the defendant entered, received the rents, and managed the property, handing over to his mother the balance, after paying the ground rent to the plaintiffs. On her death he still continued to receive the rents, and the net profits he divided among his sisters and himself, the tenants attorning to him, and being described in the case as "his tenants." This state of affairs H lasted till the expiration of the term, when the premises were given up in a very bad state of repair, and with two quarters' rent unpaid.

Udall (*Parry*, Serjt. with him) for the plaintiffs.

Prentice, *Q.C.*, and *Francis* for the defendant.

I **KEATING, J.,** stated the facts, and continued: The defendant is now charged as assignee of the lease, as liable to the performance of the covenants in it. I am of opinion that he is rightly charged. An executor de son tort may certainly be charged as assignee, where he is executor de son tort in respect of a lease. It has been argued that the defendant did not become so in his mother's lifetime, and perhaps *Paull* v. *Simpson* (1) may be held to justify that contention, viz., that the defendant did not become executor de son tort during his mother's lifetime, but in distinguishing that case from the present it must be noticed that there the executrix de son tort was living, and that the defendant did not take the lease, or deal with it as executor. Here, however,

on the death of the mother, the defendant continued to receive the rents, and, therefore, he became in his turn executor de son tort, and so the effect was at once to charge him as assignee of the lease, in which position he remained until the expiration of the term, and is properly charged for repairs, and unpaid rents under the covenants. To hold otherwise would be very unfair to the landlord, and I have no hesitation in saying that he was rightly charged.

BRETT, J.—The defendant here is charged that he has put himself in such a position that he cannot deny that he is assignee of this lease. With reference to the question of the proof of his position it must be remembered that it is not an action by the defendant, so as to compel him to make out his title affirmatively; but against him, so that he has to disprove the allegation satisfactorily, to entitle him to escape from the liability which it involves. [His Lordship stated the facts, and continued:] G. S. Heales became not only executor de son tort generally but specifically with regard to this lease, and then the defendant assumed apparently just the same position in respect of it, and it is for him to show that he did not in reality do so. If he acted merely as the agent of his mother then undoubtedly she became for the time assignee of the lease. But I think that even during the mother's lifetime there is evidence that the defendant did not act merely as agent, but took possession for himself: because the premises were let in his name to tenants, and he made himself to all intents and purposes sublessor. But, however that may be, after her death he did take possession and deal with the property on his own account, and it is impossible to deny that he held from the assignees of the lessor, that is from the plaintiffs, on the terms of this lease. It is contended that he cannot be liable, because his father and mother were both liable—that there cannot be a continual succession of executor de son tort; but the same facts, which would have made a stranger liable, will make him so.

DENMAN, J.—It does not matter for our judgment, whether the defendant was executor de son tort or not. He was assignee of the lease, and was estopped from denying the plaintiff's title. On the authority of *Buckworth* v. *Simpson* (2), he became personally liable, having entered and continued to occupy under the lease. But that he may rightly be charged as executor de son tort is supported by a passage in Williams on Executors (1st Edn. 1832) at p. 264 [now 14th Edn. 1960, at p. 33]:

> "A man who possesses himself of the effects of the deceased, under the authority of and as agent for the rightful executor, cannot be charged as an executor de son tort, yet if he continues to act after death of such executor he may be charged as executor de son tort."

HONYMAN, J.—The defendant is here charged as assignee of the term demised to Godden. In consequence of the manner in which the case is left to us, we may draw inferences of fact, and I, therefore, think that as a jury we may upon the facts found infer an actual assignment of the lease to the defendant.

Judgment for plaintiffs.

Solicitors: *Thomas; J. L. Dale.*

IN THE GOODS OF MADDOCK

[Court of Probate (Sir James Hannen), April 21, May 5, 1874]

Reported L.R. 3 P. & D. 169; 43 L.J.P. & M. 29; 30 L.T. 696; 38 J.P. 631; 22 W.R. 741]

Will—Attestation—Witness—Signature incomplete—Intention to subscribe full name—Abbreviated christian name.

The testatrix executed her will by making her mark in the presence of two witnesses. The first witness signed his name, but the second, being old and infirm, was only able to write "Saml.," which was the abbreviation of his christian name, and did not sign his surname.

Held: the act which the witness intended to perform was to subscribe his full name, and, as this had not been done, the will had not been duly attested.

Notes. The statutory requirements of a valid will are dealt with in s. 9 of the Wills Act, 1837; see 26 Halsbury's Statutes (2nd Edn.) 1332.

Distinguished: *Re Chalcraft, Chalcraft* v. *Giles*, [1948] 1 All E.R. 700. Referred to: *Re Selby-Bigge*, [1950] 1 All E.R. 1009.

As to attestation of will, see 39 Halsbury's Laws (3rd Edn.) 880 et seq.; and for cases see 44 Digest 272.

Cases referred to:

(1) *Playne* v. *Scriven* (1849), 1 Rob. Eccl. 772; 7 Notes of Cases, 122; 13 L.T.O.S. 405; 13 Jur. 712; 163 E.R. 1209; 44 Digest 272, *1033*.

(2) *Hindmarsh* v. *Charlton* (1861), 8 H.L.Cas. 160; 4 L.T. 125; 25 J.P. 339; 7 Jur.N.S. 611; 9 W.R. 521; 11 E.R. 38; sub nom. *Charlton* v. *Hindmarsh*, 1 Sw. & Tr. 433, H.L.; 44 Digest 261, *882*.

(3) *In the Goods of Sperling* (1863), 3 Sw. & Tr. 272; 33 L.J.P.M. & A. 25; 9 L.T. 348; 29 J.P. 777; 9 Jur.N.S. 1205; 12 W.R. 354; 44 Digest 272, *1029*.

Probate Motion made ex parte by the executors for probate of the will to be granted to them.

The testatrix, Elizabeth Maddock, of Castle Northwich, in the county of Chester, made and executed her will, dated June 16, 1871. It was read over to her, and she signed it by making her mark at the foot in the presence of Joseph Clare and Samuel Birtwistle. Joseph Clare signed his name as attesting witness, and Samuel Birtwistle then proceeded to subscribe his name. He wrote the word "Saml.," but being old and infirm he was unable to complete his signature. Joseph Clare, being of the opinion that what had been done was useless, struck out the word "Saml." Thereupon, Joseph Birtwistle signed his name as a witness. The deceased made her mark over again with a pen and ink, and Joseph Clare traced his name with a dry pen.

Bayford for the executors.

Cur. adv. vult.

May 5, 1874. **SIR JAMES HANNEN.**—The question in this case is one of execution. The deceased having signed her will by making her mark, it was attested by one witness in the proper form, and then another witness began to sign. He was an old man, and his writing was not good, and having got as far as "Saml." he could get no further, and did not sign his surname. Thereupon the other witness struck out the word "Saml." and it was determined to send for another witness, but on his being called in, the first witness, instead of re-writing his name, merely went over his signature with a dry pen. It is clear from the authorities that that is not sufficient: *Playne* v. *Scriven* (1).

The second execution was, therefore, invalid, and the question is whether I am entitled to take the writing of the letters "Saml." of the witness on the first occasion as a sufficient subscription.

I take it that the rule of law is that if a witness makes any mark with the intention thereby to subscribe that is sufficient. The common case of a mark is a familiar illustration; but I think it is essential to due subscription that the act intended by the party as his subscription should be completed. If it be not completed, it will fail to do the thing which he intended as an evidence of his subscription and attestation. In *Hindmarsh* v. *Charlton* (2) a somewhat similar question arose. There the witness having written his name, and it being necessary by reason of the imperfect attestation on the first occasion to have a second execution, instead of re-writing his name he made a cross in the letter T so as to make it F, the first letter of his Christian name, and he also added the date, by way of adopting the signature, but it was held that that was insufficient. Lord Campbell, L.C., there said:

> "I will lay down this as my notion of the law: that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name. But on this occasion the name was not written, nor do I think that there was anything written that was meant to represent the name. The horizontal stroke made by the witness was merely intended to perfect the letter 'F.,' in the same manner as if he had perfected the letter 'i,' by putting a dot over it, which he had not dotted in the morning. How can that be considered as amounting to a subscription? It was an acknowledgment by him of his former signature, written in the morning, but it is not a new subscription. It has been solemnly determined that an acknowledgment by a witness of his signature is not sufficient."

Lord Cranworth's judgment was to the same effect, and so was Lord Chelmsford's, all of them with great regret, from the circumstances of the case, holding that the subscription was insufficient. By way of illustration, Lord Chelmsford put a case like the present one. He said:

> "If Mr. Wilson in the morning had left his signature incomplete by the omission, for instance, of his surname, which he had added in the afternoon, that would have been a subscription which would have satisfied the requisitions of the Act. For there would really have been only one complete subscription. But the omission of the cross to the 'F' in his christian name did not make the signature imperfect."

That shows that Lord Chelmsford was of opinion that there would only have been a complete subscription when the witness had put his surname to that which he had left incomplete before.

I come to the conclusion, therefore, that I must reject this application, being of opinion that the witness did not put the letters "Saml.," representing an abbreviation of the word "Samuel," with the intention thereby of subscribing the will. He began to write his name, but he broke off before he completed it. If he had intended the word "Saml." to be a complete subscription that would have been sufficient, as in *In the Goods of Sperling* (3), where the witness subscribed "servant to Mr. Sperling," without any name; but in this case the act intended as his subscription by the witness not having been completed, I hold it, though with great regret, to be insufficient.

Grant of probate refused.

Solicitor: *Ayrton.*

[*Reported by* W. Leycester, Esq., *Barrister-at-Law.*]

ANCONA *v.* ROGERS

[Court of Appeal (Cockburn, C.J., Mellish, L.J., Baggallay, J.A., Mellor and Grove, JJ.), February 21, May 18, 1876]

[Reported 1 Ex.D. 285; 46 L.J.Q.B. 121; 35 L.T. 115; 24 W.R. 1000]

Bankruptcy—Property available for distribution—Bill of sale—Unregistered—Goods in "apparent possession" of grantor—Goods placed in rooms belonging to third person—Rooms locked and keys kept by agent of grantor—Possession of goods demanded by grantee—Bankruptcy of grantor—Right of grantee as against trustee—Bills of Sale Act, 1854 (17 & 18 *Vict.*, *c.* 36), *s.* 1.

In September, 1874, Mrs. C. B. H. executed a bill of sale as security for certain sums of money lent to her by the plaintiff. She kept possession of the goods, but the plaintiff was entitled to take possession under the bill of sale if the money was not repaid within 24 hours of demand. The bill of sale was not registered. In October, 1874, Mrs. C. B. H. delivered possession of the goods to one B. to convey them to the home of Mr. D. H. H., where she intended to reside. In the absence of Mr. D. H. H., B. was allowed to place the goods in four rooms, which he locked, taking away the keys. The plaintiff subsequently demanded the payment of the money owing to him. The money was not paid, and the plaintiff claimed possession of the goods from Mr. D. H. H., and gave notice of his title. Mr. D. H. H. refused to let him take possession. In November, 1874, Mrs. C. B. H. presented her petition in bankruptcy.

Held: the trustee in bankruptcy was entitled to the goods as against the plaintiff claiming under the bill of sale because (i) there was no bailment of the goods to Mr. D. H. H. and the goods remained in the possession of Mrs. C. B. H. within the meaning of the Bills of Sale Act, 1854, while they were locked in the rooms; (ii) the fact that the plaintiff became entitled to the goods and attempted to obtain actual possession of them did not take them out of the possession of Mrs. C. B. H.

Per Curiam: If Mr. D. H. H. had held the goods on account of Mrs. C. B. H. as bailee they would still have remained in her possession within the meaning of the Act.

Notes. The Bills of Sale Act, 1854, was repealed by the Bills of Sale Act, 1878. For apparent possession and unregistered bills of sale, see ss. 4 and 8 of the 1878 Act.

Considered: *Lincoln Waggon and Engine Co.* v. *Mumford* (1879), 41 L.T. 655; *U.S.A.* v. *Dollfus Mieg et Compagnie S.A.*, [1952] 1 All E.R. 572. Referred to: *Re Henley, Ex parte Fletcher* (1877), 5 Ch.D. 809; *Towers & Co., Ltd.* v. *Gray*, [1961] 2 All E.R. 68.

As to apparent possession, see 3 Halsbury's Laws (3rd Edn.) 309; and for cases see 7 Digest (Repl.) 114 et seq. For the Bills of Sale Act, 1878, ss. 4, 8, see 2 Halsbury's Statutes (2nd Edn.) 559, 565.

Case referred to:

(1) *Re Blenkhorn, Ex parte Jay* (1874), 9 Ch. App. 697; 43 L.J.Bcy. 122; 31 L.T. 260; 38 J.P. 821; 22 W.R. 907, L.JJ.; 7 Digest (Repl.) 115, *679*.

Also referred to in argument:

Robinson v. *Briggs* (1870), L.R. 6 Exch. 1; 40 L.J.Ex. 17; 23 L.T. 395; 7 Digest (Repl.) 116, *690*.

Gough v. *Everard* (1863), 2 H. & C. 1; 2 New Rep. 169; 32 L.J.Ex. 210; 8 L.T. 363; 11 W.R. 702; 159 E.R. 1; 7 Digest (Repl.) 116, *689*.

Balut v. *Hartley* (1872), L.R. 7 Q.B. 594; 41 L.J.Q.B. 273; 26 L.T. 968; 20 W.R. 899; 1 Asp.M.L.C. 337; 3 Digest (Repl.) 123, *416*.

Re Henderson, Ex parte Lewis (1871), 6 Ch. App. 626; 24 L.T. 785; 19 W.R. 835, L.JJ.; 3 Digest (Repl.) 115, *678*.

Appeal from a decision of the Exchequer Division (KELLY, C.B., BRAMWELL and CLEASBY, BB.), in an interpleader action in favour of the plaintiff who claimed possession of goods under an unregistered bill of sale.

M'Intyre, *Q.C.*, and *Paterson* for the defendant.
Philbrick, *Q.C.*, and *R. E. Webster* for the plaintiff.

Cur. adv. vult.

May 18, 1876. **MELLISH, L.J.**, read the following judgment of the court.— This was an appeal from a judgment of the Exchequer Division on an interpleader issue directed to try the question whether certain furniture and other goods were the property of the plaintiff, J. S. Ancona, as against W. B. Rogers, the trustee of the estate of Charlotte Bridget Hewitt, a liquidating debtor. The plaintiff claimed under a bill of sale executed by the debtor. The defendant disputed the validity of the bill of sale under the Bills of Sale Act, 1854, on the ground that on the day when the debtor presented her petition the goods were still in her possession.

Mrs. Hewitt borrowed various sums from the plaintiff between April, 1874, and July, 1874, and on Sept. 10, 1874, she executed a bill of sale of the furniture and goods in question, as a security for the money, with interest. By the terms of the bill of sale Mrs. Hewitt was allowed to retain possession of the goods until payment of the money was demanded; but if she did not repay the money, with interest, within twenty-four hours after demand, the plaintiff was entitled to take possession of the goods. The bill of sale was never registered. Mrs. Hewitt having given up her house at Gatwick, and intending to go and reside at the house of Mr. D. H. W. Horlock, at Ogbeare Hall, Holsworthy, in the county of Cornwall, in a portion of his house to be afterwards arranged between them, delivered possession of the goods to one Bishop, to keep for her for some time, and then to convey them to Ogbeare Hall. On Oct. 12, 1874, the goods were brought by Bishop to Ogbeare Hall. Mr. Horlock was not at home, but Mrs. Horlock allowed the goods to be placed in four rooms, and Bishop, without any objection on the part of anybody, locked the doors of the four rooms, and took away the key with him. On Oct. 23, 1874, the plaintiff served Mrs. Hewitt with a written demand for the payment of the money owing to him. The money not having been paid, the plaintiff, on Oct. 27, 1874, went to Ogbeare Hall and demanded possession of the goods both from Mr. Horlock's bailiff and Mr. Horlock himself. He gave notice to Mr. Horlock of his title to the goods, and threatened to take them by force. Mr. Horlock, however, refused to allow him to enter the house, or to take possession of the goods. On Nov. 4, 1874, Mrs. Hewitt presented her petition for liquidation.

Under these circumstances it has been held by the Exchequer Division that Mrs. Hewitt was not in possession of the goods at the time she presented her petition within the Bills of Sale Act, 1854, and the court, on that ground, ordered the verdict found for the defendant at the trial to be set aside, and a verdict to be entered for the plaintiff. From this decision the defendant has appealed. It seems necessary to consider, first, who was in possession of the goods after they were locked up in the rooms at Ogbeare Hall, and, secondly, what was the effect of the plaintiff having become entitled to the possession of the goods by demanding the money, and of his attempt to obtain actual possession of them. There can be no doubt that the goods were delivered by Mrs. Hewitt to Bishop, and that Bishop took possession of them as her bailee; but we are of opinion that the bailment to Bishop terminated when the goods

were placed in the rooms at Ogbeare Hall. It is true that Bishop locked them up and took away the key, but he held that key as agent to Mrs. Hewitt, who was herself at Launceston; nor does it appear, and there is nothing to prove, that Bishop was intended to exercise any further dominion over them.

We will next consider whether the goods came into the possession of Mr. Horlock, and this depends upon the question whether what took place at Ogbeare Hall amounted to a delivery of the possession of the goods by Mrs. Hewitt to Mr. Horlock as bailee to hold for her, or to a delivery of the possession of the rooms by Mr. Horlock to Mrs. Hewitt. This is a question of considerable nicety, but we are of opinion that what took place had the effect of a delivery of the possession of the rooms to Mrs. Hewitt, for the purpose of keeping her goods in them.

The delivery of a key is an ordinary symbol used to notify a change in the possession of the premises to which the key gives the means of entrance. The possession of premises cannot be changed solely by the delivery of a key; but where the delivery of a key is accompanied by an act which may amount to a change in the possession of the premises, the delivery of the key is strong evidence that it was the intention of the parties that the possession of the premises to which the key gives the means of entrance should be changed. It is true that in this case the key was not delivered to Bishop, but taken by him; but the rooms were appropriated by Mrs. Horlock to the reception and custody of the goods, and no objection was made then or afterwards to the key being taken by Bishop, who was acting in the matter as the agent of Mrs. Hewitt. On the contrary, Mr. Horlock, on returning home, assented entirely to what had been done in his absence. Mr. Horlock was under no obligation to give Mrs. Hewitt possession of those rooms, and if he had dissented from what was done in his absence, and had opened the doors of the rooms either forcibly or by another key, we think he would have re-obtained possession of his own rooms, and at the same time obtained possession of Mrs. Hewitt's goods as bailee. There is, however, no evidence that he ever did open the doors prior to Nov. 4, 1874, and it is quite possible that he may have preferred to allow Mrs. Hewitt to have the use of his rooms to keep the goods in rather than to take upon himself the responsibility of being the bailee of them.

We are of opinion, therefore, that Mrs. Hewitt was the only person who was in possession of the goods, while they remained locked up in the rooms at Ogbeare Hall. If this conclusion is correct, the only other point which it is necessary to determine is whether the fact of the plaintiff having become entitled to the possession of the goods, and having, although unsuccessfully, endeavoured to obtain possession of them, takes the case out of the provisions of the Bills of Sale Act, 1854. If the case depended upon the Bankrupt Act there is no doubt that the endeavours of the plaintiff to obtain possession would afford abundant evidence that the goods did not remain in the possession of Mrs. Hewitt with his consent, but, as was observed in *Ex parte Jay* (1), there is a material distinction between the provisions of the Bills of Sale Act, 1854 and those of the Bankruptcy Act, 1869. In the Bills of Sale Act, 1854, the words, "with the consent of the true owner," have been purposely omitted, and the Act is applicable, if at the time the grantor of the bill of sale becomes bankrupt the goods are in his possession, whether with the consent of the true owner or not. We think it was intended that if a man chooses to lend money on a bill of sale, and does not register it, he should run the risk arising from his not being able to obtain possession of the goods before the grantor of the bill of sale commits an act of bankruptcy.

Although these observations are sufficient to dispose of the case, it may be desirable shortly to consider what would be the result if we are wrong in supposing that the goods were not delivered to Mr. Horlock as bailee. If the goods were delivered to Mr. Horlock as bailee, there would be two questions

to be considered: First, are goods in the possession of a bailee to hold on account of the bailor still in the possession of the bailor within the meaning of the Bills of Sale Act, 1854; and, secondly, if they are, were the goods taken out of the possession of Mrs. Hewitt, by the plaintiff having required Mr. Horlock to allow him to take possession of them, and by Mr. Horlock having wrongfully refused to deliver possession of them. With reference to the first question, there is no doubt that a bailor, who has delivered goods to a bailee, to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods, and that in the Bills of Sale Act, 1854, the word "possession" was used in a popular sense, and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would, in a popular sense as well as in a legal sense, be said to be still in his possession, and we see no valid ground for holding that they are not still in his possession within the meaning of the Bills of Sale Act, 1854. As long as the person who has parted with goods by a secret bill of sale is having the goods kept for him, and is exercising dominion over them, the case seems within the mischief against which the Act is directed.

Lastly we have to consider whether the demand made by the plaintiff requiring Mr. Horlock to deliver up the goods, and the refusal by Mr. Horlock to deliver up the possession of the goods, assuming Mr. Horlock to be the bailee of the goods, had the effect of taking the possession of the goods out of Mrs. Hewitt. It was admitted in the argument before us, as it was impossible to help admitting, that this demand and refusal had not the effect of putting the plaintiff into possession of the goods. It was argued, however, that though the plaintiff never obtained possession of the goods, yet that the demand once refused had the effect of taking the goods out of the possession of Mrs. Hewitt. We cannot understand how, if the plaintiff never obtained possession of the goods, the possession could be changed at all by the demand and refusal to deliver them up. Mr. Horlock had no title to the goods of his own of any kind, and if he held the goods on Mrs. Hewitt's account before he refused to deliver them up, it seems to us he still held them on her account after he refused to deliver them up. There is no evidence that he either attorned to the title of the plaintiff, or set up any title of his own as against that of Mrs. Hewitt, prior to Nov. 4, 1874. We think, therefore, that if the goods were ever delivered to Mr. Horlock, as the bailee of Mrs. Hewitt, he still continued to hold them as her bailee on Nov. 4, 1874. On the whole, we are of opinion, that the judgment of the Exchequer Division ought to be reversed, and the rule to enter a verdict for the plaintiff discharged.

Appeal allowed.

Solicitors: *Pattison, Wigg & Co.; Duignan & Smiles.*

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

A

SMITH AND ANOTHER *v.* SEGHILL OVERSEERS

[QUEEN'S BENCH DIVISION (Mellor, Lush and Quain, JJ.), June 7, 1875]

[Reported L.R. 10 Q.B. 422; 44 L.J.M.C. 114; 32 L.T. 859;
B 40 J.P. 228; 23 W.R. 745]

Rates—"Occupier"—Employees living rent free in houses provided by employers —Occupation not in performance of duties—Poor Rate Assessment and Collection Act, 1869 (32 & 33 *Vict., c.* 41), *s.* 19.

The owners of a colliery provided houses for their employees to live in rent
C free. Preference for these houses was given to married employees, and, if there were no houses available, these employees received an allowance for rent. No allowance was paid to single employees. A married employee could be called on to go into a house when one was vacant, and, if he did not do so, he would forfeit his allowance. Notice to quit the work was notice to quit the house. It was not necessary to live in a house to perform the work. The
D owners did not compound for their rates under the Poor Rate Assessment and Collection Act, 1869, but paid the full amount.

Held: the employees were occupiers of the houses within the meaning of s. 19 of the Poor Rate Assessment and Collection Act, 1869, and were entitled to have their names entered in the occupiers' column of the ratebook.

Hughes v. *Chatham Overseers* (1) (1843), 5 Man. & G. 54, applied.

E *Cross* v. *Alsop* (2) (1870), L.R. 6 C.P. 315, distinguished, and dicta in that case disapproved.

Notes. The Poor Rate Assessment and Collection Act, 1869, s. 19, was re-enacted by s. 11 (7) of the Rating and Valuation Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 121), for the purposes of that section. In s. 19 of the 1869 Act, the words from
F the beginning of the section to "aforesaid and" were repealed by the Rating and Valuation Act, 1961, s. 29 (2), Sched. 5, Pt. III, consequent upon the abolition of rate-books by s. 14 of that Act.

Followed: *Barton* v. *Birmingham Town Clerk* (1878), 2 Hop. & Colt. 393. Applied: *Dover* v. *Prosser*, [1904] 1 K.B. 84. Referred to: *A.-G.* v. *Croydon Corpn.* (1889), 42 Ch.D. 178; *Oxford University* v. *Oxford Corpn. (No. 1)* (1902),
G Ryde & K. Rat. App. 87; *Reed* v. *Cattermole*, [1936] 2 All E.R. 467; *Gray* v. *Holmes* (1949), 30 Tax Cas. 467.

As to rateable occupation by servant or agent, see 32 HALSBURY'S LAWS (3rd Edn.) 20; and for cases see 38 DIGEST (Repl.) 509, 510. For the Poor Rate Assessment and Collection Act, 1869, s. 19, see 20 HALSBURY'S STATUTES (2nd Edn.) 60; and
H for the Rating and Valuation Act, 1961, ss. 14, 29 (2), Sched. 5, Pt. III, see ibid., vol. 41, pp. 957, 973, 988.

Cases referred to:

(1) *Hughes* v. *Chatham Overseers, Burton's Case* (1843), 5 Man. & G. 54, 77; Bar. & Arn. 61; Cox & Atk. 14; 1 Lut. Reg. Cas. 51; Pig. & R. 35; 7 Scott, N.R. 581; 13 L.J.C.P. 44; 2 L.T.O.S. 149, 189; 8 J.P. 89; 7 Jur. 1136; 134
I E.R. 479, 488; 30 Digest (Repl.) 548, *1820*.

(2) *Cross* v. *Alsop* (1870), L.R. 6 C.P. 315; 1 Hop. & Colt. 444; 40 L.J.C.P. 53; 23 L.T. 589; 35 J.P. 153; 19 W.R. 131; 38 Digest (Repl.) 604, *808*.

(3) *Dobson* v. *Jones* (1844), 5 Man. & G. 112; Bar. & Arn. 243; Cox & Atk. 25; 1 Lut. Reg. Cas. 105; Pig. & R. 65; 8 Scott, N.R. 80; 13 L.J.C.P. 126; 2 L.T.O.S. 149; 3 L.T.O.S. 77; 8 Jur. 451; 134 E.R. 502; 30 Digest (Repl.) 548, *1821*.

(4) *Fox* v. *Dalby* (1874), 2 Hop. & Colt. 261; L.R. 10 C.P. 285; 44 L.J.C.P. 42; 31 L.T. 478; 23 W.R. 244.

Also referred to in argument:

R. v. *Minster* (*Inhabitants*) (1814), 3 M. & S. 276.

R. v. *Kelstern* (*Inhabitants*) (1816), 5 M. & S. 136.

R. v. *Cheshunt* (*Inhabitants*) (1818), 1 B. & Ald. 473; 106 E.R. 174; 30 Digest (Repl.) 548, *1816.*

Bertie v. *Beaumont* (1812), 16 East, 33; 104 E.R. 1001; 30 Digest (Repl.) 547, *1811.*

R. v. *Brown* (1787), 2 Leach, 1018, n.; 2 East, P.C. 501; 15 Digest (Repl.) 1132, *11,343.*

R. v. *Spurrell* (1865), L.R. 1 Q.B. 72; 35 L.J.M.C. 74; 13 L.T. 364; 30 J.P. 196; 12 Jur.N.S. 208; 14 W.R. 81; 30 Digest (Repl.) 547, *1814.*

Case Stated by a justice.

An information was laid against the respondents for negligently, wilfully, and without reasonable cause omitting and refusing to enter the names of the appellants in the occupiers' column of the rate-book of Seghill, contrary to the provisions of the Poor Rate Assessment and Collection Act, 1869, s. 19. The justice dismissed the complaint.

The owners of Seghill colliery had about 340 houses at Seghill, which they filled with their workmen at their discretion, giving preference to married men. A workman could not go into a house without the owner's concurrence. Some of the workmen were single men, and no house was given to them; they got the same wages as the other workmen, but no allowance for rent. If there were not sufficient houses an allowance was made to the married men to assist them in paying their rent. If a house became vacant the owners could call upon a married man to go into it, and, if he did not go, his allowance would cease. It was not necessary for a workman to live in a house to perform his work. The owners of the colliery did not compound for their rates under the Poor Rate Assessment and Collection Act, 1869, but paid upon the full amount, and were entered in the rate-book as the occupiers of the houses. The appellants resided in houses belonging to their employers, the owners of the colliery; they received no notice to quit, nor did they claim to be entitled to any; the occupation of these houses ceased at the moment when their service ceased, and the notice to quit their work was a notice to quit their houses.

The questions for the opinion of the court were whether the appellants were or were not the occupiers within the meaning of the Poor Rate Assessment and Collection Act, 1869, s. 19. And whether they were or were not entitled to be entered in the occupiers' column of the rate-book for the township of Seghill. And whether the occupation was that of a servant, and incidental and subsidiary thereto, and incidental to the service.

By the Poor Rate Assessment and Collection Act, 1869, s. 19:

> "The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any rateable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall, for every such omission or misstatement, be liable on summary conviction to a penalty not exceeding two pounds. Provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted."

Herschell, Q.C. (*C. F. Jemmett* with him), for the appellants.
Littler, Q.C. (*John Mellor* with him), for the respondent.

MELLOR, J.—In this case we are all agreed that the magistrate has arrived at a wrong decision. By the Poor Rate Assessment and Collection Act, 1869, s. 19, the occupiers of rateable hereditaments are entitled to have their names entered in the occupiers' column of the rate-book, and a penalty is imposed upon the overseers if they negligently, or wilfully and without reasonable cause, omit the name of any such occupier from the rate.

The question is whether the appellants here are occupiers. There have been many nice distinctions drawn in the cases, both in those as to settlement and in those relating to the franchise, and the cases are not all strictly reconcilable with one another. I think that we must be governed by the principle of *Hughes* v. *Chatham Overseers* (1), which is shown by the expressions used in the judgment. In the present state of the authorities we must extract the governing principle from that case. It appears that where a servant has a house which he resides in, and which he is required to reside in for the purpose of performing his services, he is not to be considered as an occupier, but in the case of the master ropemaker the decision was the other way, because there he occupied in the capacity of tenant. That seems to be the governing principle. It is true that the appellants in the present case occupied in one sense for the purpose of their service, because their masters were the owners of the cottages, and naturally desired that the workmen whom they employed should reside in them. In that sense they were required to reside, but that is not the sense in which the word "required" is used in the judgment in *Hughes* v. *Chatham Overseers* (1), for there it was held that the residence must be necessary to the performance of the servant's duties in order to make it such a residence as would prevent him from being an occupier. If it is only by an arbitrary rule, that he is compelled to reside in a certain place, that does not prevent him from still being occupier as tenant at will, though he has not a fixed term. It has been contended that, because, if a married man did not go into a vacant house when called upon, he would be deprived of his allowance, the workmen were required to live in these houses. It is true that the masters preferred they should live there, but this does not change the relation between the parties, nor convert an occupier into a mere servant who resides for the purposes of his special duty.

As to the other matter I had at first some difficulty, but on the whole I am satisfied that the opinions expressed by the judges of the Court of Common Pleas on the construction of the Poor Rate Assessment and Collection Act, 1869, s. 19, in *Cross* v. *Alsop* (2) were unnecessary to the decision of the case. It was enough there to say that a separate rating was necessary, and that, the appellant being rated jointly as occupier, this was not sufficient within the meaning of the Representation of the People Act, 1867, s. 61. We do not wish to interfere with the principle which was necessary for the decision of that case, but we cannot arrive at the conclusion there adopted as to the construction of s. 19. The section is an enfranchising one, and the words "in every case" are so general and so large that I think the construction put upon the section by the Court of Common Pleas was too narrow. We ought not to limit the words of the section, but ought to give it its full effect.

On these grounds, although there is no doubt a difficulty in drawing the line, I think that the magistrate ought to have decided that the appellants were occupiers, and, therefore, entitled to have their names entered in the occupiers' column of the rate-book.

LUSH, J.—The first question is in what character the appellants occupied. The Poor Rate Assessment and Collection Act, 1869, s. 19, provides that the

overseers shall, in every case, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise, and a penalty is inflicted in case of omission to enter the names. From the facts as stated it appears that these were houses belonging to the owners of the colliery, which the workmen were permitted to occupy, and in certain cases were called upon to occupy, being liable in case of refusal to forfeit the allowance which was made to them for rent in case there was no house for them to occupy. There was nothing further than this to compel them, and they were not obliged to occupy if they preferred to live at their own expense elsewhere. I think that this is within the cases in which it has been held that the house was held not in the capacity of a servant, but as occupier.

In *Hughes* v. *Chatham Overseers* (1) TINDAL, C.J., says (5 Man. & G. at p. 78):

> "There is no inconsistency in the relation of the master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will or for any other estate or interest; and if he do so the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases cited in argument, established and proceeded on this distinction."

That is exactly applicable to the case here. The workmen were not required to occupy the houses, and the occupation was no part of their service, and was not indispensable to the work which they had to do; this brings it within the class of cases where it has been held that the occupation was not an occupation as a servant. It is true there was no fixed term, but still during the continuance of the service the workmen would be occupiers of the houses. The case of the surgeon, *Dobson* v. *Jones* (3), and that of the staff-serjeant in the militia *Fox* v. *Dalby* (4) proceeded on exactly the same principle. In the latter case the respondent occupied as a servant, because he was required to live where he did to take care of the stores. LORD COLERIDGE, C.J., there says, after quoting the authorities (L.R. 10 C.P. at p. 294):

> "It appears that the voter here is ordered by his commanding officer to reside in the house in question in order to perform the duties which are imposed upon him; and it is manifest that it is a convenient thing that he should reside near to the stores which he has to look after. . . . I am of opinion that the occupation in this case has no one of the incidents of an occupation either as owner or as tenant."

That case is entirely consistent with *Hughes* v. *Chatham Overseers* (1), and our decision in this case is in accordance with both. The appellants do not occupy in the performance of their duty, and are not required to occupy.

As to the second point, whether the overseers are liable, no question has been made about the omission having been made negligently or wilfully and without reasonable cause, but it has been contended that s. 19 is confined to cases within ss. 3 and 4. I confess I cannot follow the reasoning of some of the Court of Common Pleas in *Cross* v. *Alsop* (2) on the construction of s. 19, but the meaning of the earlier part of the section was not then before them, for there the person who claimed to be entitled to the franchise only occupied part of a house, and the question really was whether that could be cured by anything in

A s. 19; this turned upon the proviso at the end of the section, for the name there had not been omitted. Although there were some strong observations made as to the scope of s. 19, they were not necessary for the purposes of the decision, and there could be no appeal. We are bound to form our own judgment here, and to say what we think is the proper construction. Sections 3 and 4 apply only to cases where the owner is rateable instead of the occupier, B but some of the other sections go far beyond these. There is nothing in the earlier sections about any agreement, and nothing in s. 7 as to any term. The words of s. 19, which include every case whether the rate is collected from the owner or occupier, and whether the owner or occupier is liable for the rate, so far from being limited, apply to every case. The object of the section is to secure that voters shall not be in jeopardy of being deprived of the franchise by C the negligence of the overseers.

QUAIN, J.—I am of the same opinion. I think that the appellants here were occupiers within the meaning of s. 19, and not, as was contended, that they resided in these houses as servants. The governing facts are these: The men are paid by piece work, and their occupation of the houses has nothing to do D with their wages; they are not required to occupy as one of the conditions of their service, but married men are permitted to occupy, and the inducement held out to them to do so is that they reside rent free, or, if there is no house in which they can so reside, they receive an allowance for rent, but it is no necessary part of their service that they should live in the houses. The case is E clearly distinguishable from that of a coachman or gardener, or the case of a surgeon which has been cited: *Dobson* v. *Jones* (3), where TINDAL, C.J., distinguishes between cases where officers or servants are permitted to occupy houses as part remuneration for their services, and those where they are required to occupy with a view to the more efficient performance of duties or services imposed upon them. Here the workmen were clearly not required to occupy, F and the occupation was not essential or necessary to their service, but only convenient. It appears to me that the facts of this case come within the first part of the distinction drawn by TINDAL, C.J., and the case appears to be within *Hughes* v. *Chatham Overseers* (1), and not within *Dobson* v. *Jones* (3). I am, therefore, of opinion, that the appellants are occupiers.

As to the second question, the decision in *Cross* v. *Alsop* (2) has no bearing on G the present case. No doubt the opinions there expressed must be understood as going far enough to support the respondents' contention here, but they were not necessary for the decision of the case. There the court had to decide under the Representation of the People Act, 1867, whether the occupier was distinctly and separately rated. Then it was tried to bring the case within the proviso at the end of s. 19 of the Poor Rate Assessment and Collection H Act, 1869. To that contention it was clearly a sufficient answer that the appellant's name was put in as a joint occupier, and therefore, the case was not within the proviso. But I cannot read s. 19 as confined to cases where there is an agreement under s. 3 or an order of the vestry under s. 4, for I think it applies to the simple case of an occupier. It applies whether the rate is collected from the owner or occupier or whether the owner is liable instead I of the occupier, which includes this very case within the express terms of the section. For these reasons I am of opinion that the magistrate was wrong.

Case remitted to justices.

Solicitors: *Bell, Brodrick & Gray; John Tucker*, for *W. S. Daglish*, Newcastle-upon-Tyne.

Re MUIRHEAD. Ex parte MUIRHEAD

[Court of Appeal (Cockburn, C.J., Sir George Jessel, M.R., Mellish, L.J., and Baggallay, J.A.), January 20, 21, 1876]

[Reported 2 Ch.D. 22; 45 L.J.Bcy. 65; 34 L.T. 303; 24 W.R. 351]

Bankruptcy—Proof—Debts provable—Damages awarded to petitioner against co-respondent—Petitioner directed to pay sum received into court.

The jury having given damages against the co-respondent in a suit for divorce, the Divorce Court ordered the co-respondent to pay the damages to the husband, the latter undertaking that he would immediately on receipt thereof pay it into the registry of the court to abide the further orders of the court.

Held: there was not a good debt to support a petition in bankruptcy by the husband against the co-respondent.

Per Curiam: Even though the debt was not a good petitioning creditor's debt, it might be one which would be provable in bankruptcy.

It is doubtful whether the Divorce Court has power to order a co-respondent to pay damages to a person in order to enable the latter to prove for the amount in the bankruptcy of the co-respondent.

Patterson v. *Patterson and Graham* (1) (1870), L.R. 2 P. & D. 189, doubted.

Notes. For the conditions on which a creditor may petition, see the Bankruptcy Act, 1914, s. 4, replacing with amendments the Bankruptcy Act, 1869, s. 6, and the Bankruptcy Act, 1883, s. 6. The statutory provisions relating to damages, formerly contained in the Matrimonial Causes Act, 1857, s. 33, have been repealed and are replaced by the Matrimonial Causes Act, 1950, s. 30. The question left open in this case, namely whether the debt would have been provable in bankruptcy, was answered affirmatively in *Re O'Gorman, Ex parte Bale*, [1895-9] All E.R. Rep. 1049.

Distinguished: *Re Lewis, Ex parte Harris* (1876), 2 Ch.D. 423; *Re Rayner, Ex parte Rayner* (1877), 37 L.T. 38. Followed: *Re Fryer, Ex parte Fryer* (1886), 17 Q.B.D. 718; *Re Sacker, Ex parte Sacker* (1888), 22 Q.B.D. 179. Considered: *Re O'Gorman, Ex parte Bale*, [1895-9] All E.R. Rep. 1049; *Re A Debtor (No. 76 of 1929)*, [1929] All E.R. Rep. 401. Distinguished: *Re Debtor (No. 975 of 1937)*, *Debtor* v. *Petitioning Creditor and Official Receiver*, [1938] 2 All E.R. 530. Referred to: *Re Debtors (No. 669 of 1926)*, [1926] All E.R. Rep. 456; *Mason* v. *Mason and Cottrell*, [1933] All E.R. Rep. 859; *Re McGreavy, Ex parte McGreavy* v. *Benfleet Urban District Council and Another*, [1950] 1 All E.R. 442; *Shelley* v. *Shelley (No. 1)*, [1952] P. 107; *Re Debtor (No. 20 of 1953)*, *Ex parte Debtor* v. *Scott*, [1954] 3 All E.R. 74.

As to petitions by receivers, see 2 Halsbury's Laws (3rd Edn.) 288; as to the amount and nature of petitioning creditor's debt, see ibid. 292 et seq.; and for cases see 4 Digest (Repl.) 133-134, 362-365. For the Bankruptcy Act, 1914, s. 4, see 2 Halsbury's Statutes (2nd Edn.) 330; and for the Matrimonial Causes Act, 1950, s. 30, see 29 Halsbury's Statutes (2nd Edn.) 416.

Case referred to:

(1) *Patterson* v. *Patterson and Graham* (1870), L.R. 2 P. & D. 189; 40 L.J.P. & M. 5; 23 L.T. 568; 19 W.R. 232; 27 Digest (Repl.) 558, *5096*.

Also referred to in argument:

Clarke v. *Clarke* (1873), L.R. 3 P. & D. 57; 42 L.J.P. & M. 72; 28 L.T. 911; 21 W.R. 776; 21 Digest (Repl.) 753, *2386*.

Williams v. *Harding* (1866), L.R. 1 H.L. 9; 35 L.J.Bcy. 25; 14 L.T. 139; 12 Jur.N.S. 457; 14 W.R. 503, H.L.; 4 Digest (Repl.) 119, *1052*.

Guthrie v. *Fisk* (1824), 3 B. & C. 178; 5 Dow. & Ry. K.B. 24; 107 E.R. 700; 4 Digest (Repl.) 119, *1057*.

Pritchard v. *Pritchard and Bean* (1870), L.R. 2 P. & D. 53; 39 L.J.P. & M. 46; 22 L.T. 629; 27 Digest (Repl.) 558, *5095*.
Re Graham, Ex parte Langridge (1871), 19 W.R. 951; 4 Digest (Repl.) 344, *3118*.

Appeal by Mr. R. D. S. Muirhead from a decision of Mr. Registrar MURRAY sitting as Chief Judge in bankruptcy, whereby the appellant was adjudicated bankrupt on a petition presented by Mr. C. A. Otway, the respondent to this appeal.

In December, 1872, Mr. Cecil Alfred Otway (whose name was at that time Hughes) commenced a suit in the Divorce Court for the dissolution of his marriage with his wife, on the ground that she had committed adultery with Mr. R. D. S. Muirhead; and he also prayed for damages against Muirhead, who was made co-respondent. On July 23, 1874, a decree nisi for a divorce was made, and the jury by their verdict gave the petitioner £5000 damages, and the order of the court directed that Muirhead should pay the £5000 into the registry of the court. On Feb. 2, 1875, the decree nisi was made absolute. On June 1, 1875, the order of July 23, 1874, was rescinded so far as it directed the £5000 to be paid into the registry of the court, and an order was made that Muirhead should pay the £5000 to the petitioner, the latter undertaking that he would immediately on the receipt thereof pay it into the registry of the court, to abide the further orders of the court. On July 1, 1875, this order was served on Muirhead at Boulogne, where he was then residing with the divorced wife, whom he had married in March, 1875. The damages not having been paid, Otway filed a petition in bankruptcy against Muirhead, and the latter was on Dec. 3 adjudicated a bankrupt by the registrar. From this order Muirhead appealed.

By the Matrimonial Causes Act, 1857, s. 33:

"Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense with such service, or direct some other service to be substituted; and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law; and all the enactments herein contained with reference to the hearing and decision of petitions to the court shall, so far as may be necessary, be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear; and after the verdict has been given the court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife."

By the Bankruptcy Act, 1869, s. 6, so far as material:

"... the debt of the petitioning creditor must be a liquidated sum due at law or in equity ..."

Benjamin, Q.C., and *Finlay Knight* for Muirhead.
Davey, Q.C., and *Lumley Smith* for the petitioner.

COCKBURN, C.J.—On the first point, which is the only one we have thought it necessary to have argued before us, namely, whether there was a good

petitioning creditor's debt, I am of opinion that the order for adjudication made in this case in the Court of Bankruptcy, upon the debt of Captain Otway, was made in error and ought to be reversed.

The facts are that a suit has been instituted by Captain Otway against Mr. Muirhead by reason of his adultery with his wife, a judgment for divorce has been pronounced, and by the verdict of the jury the damages have been assessed at £5000. In respect of that £5000 an order was first made that the money should be paid into court by the co-respondent. That is an order quite in conformity with the usual practice of the court, but it so happened that Mr. Muirhead, the co-respondent, was living abroad, and out of the jurisdiction of the court, and consequently there were no means by which Mr. Muirhead could be compelled by the process issuing out of the court to pay the amount, and recourse was had to bankruptcy. I do not at all blame the petitioner, or those who advised him, for pursuing this form of remedy if it could be made effectual to the obtaining of the damages. They had a perfect right to adopt it, but the only question is whether that particular form of procedure could be resorted to with success. I am of opinion that it could not. An order has been made, but that order has not created a sufficiently good petitioning creditor's debt. It is quite clear that the award of damages by the jury, without an order of the court giving effect to the verdict of the jury, would not of itself form a ground of action, or constitute a good petitioning creditor's debt, but it is said that, this order having been made, it has the effect of a judgment, and that it converts that which would not otherwise be one into a good petitioning creditor's debt.

In order to constitute a good petitioning creditor's debt you must have that which may be the immediate subject of an action at law, or you must have a judgment which is capable of being enforced by execution. You must have a present enforceable interest in the creditor to constitute the debt of the creditor a good petitioning creditor's debt. What have we here? Nothing that Captain Otway could immediately enforce. It would be necessary, if the co-respondent were to pay him the amount, to pay it into the registry of the court to be dealt with as the court should direct. It was not the intention of the order or the effect of the order that the money should be presently paid as compensation to the petitioner, Captain Otway. He is merely to receive the money and pay it into court, and he can take no process for the purpose of enforcing the payment for his own benefit. The only process which the court could award him, if it could get the defendant within the jurisdiction, would be a process to compel the defendant to pay him the money for the purpose of its being paid into court, there to be made available as the court should direct.

Under those circumstances I think the expression used by counsel for Muirhead is a very good one, and a very apt one. He is simply the conduit pipe of the court, or to use an expression still better adapted to the circumstances of the case, and which was applied to it yesterday by the Master of the Rolls, he is in the position of a receiver. If the court has the power—upon which point I must not be understood as expressing any opinion—instead of ordering the money to be paid in accordance with the usual practice of the court into the registry, to order it to be paid to a third person or to any party for the purpose of its being brought into the registry, as to which I see no difference between the position of the plaintiff in the suit and that of any person whom the court might employ for the purpose, it is clear that such a person is only a receiver, and could not apply the money to his own use, but would be bound to bring it within the power of the court in order that the court might exercise its functions with respect to it. That being so, it appears to me that this is not a good petitioning creditor's debt. To my mind it certainly is not at law a good petitioning creditor's debt, and, so far as I can understand it, neither is it in equity. It is nothing more than this: an order to bring the

money into court, and when it is brought into court, non constat that the plaintiff, who up to the time of getting the verdict was dominus litis, will get any of it. It is in the power of the court to say that the whole amount shall be applied for the maintenance of the wife and children. It is impossible to say, under those circumstances, if a man has not a present or certain interest in the debt, that he has such a debt as can be made the foundation of a proceeding of this nature.

I was a little impressed at first with *Patterson* v. *Patterson* (1), which has been referred to, but I confess I look upon that case not without considerable doubt as to the power of the court to make such an order as was there made. I say this with the most profound respect, which I always have, for the very sound judgments of SIR JAMES HANNEN. As I understand the law, it is impossible to say that a person can be made the organ or the instrument for receiving the money to be brought into court, and that that can constitute him a person capable of proving for the debt. But passing that by, it is sufficient, I think, to say that that case does not in any way meet the present, because that was a case in which all that was done was to enable the party to prove. Whether that ought not to have been done in the Court of Bankruptcy, if done at all, is, I think, a very serious question. I entertain considerable doubt whether the Divorce Court had the power which it assumed to exercise in that case. That is not, however the present case. There the order was wanted merely for the purpose of proof. That is very different from constituting a person a good petitioning creditor. A person may be appointed to prove who is not in the position of a petitioning creditor. I think this gentleman was not in that position, that he had no present interest which he could enforce for his own benefit, that he was only the officer of the court, and that there was not enough to constitute him a good petitioning creditor.

SIR GEORGE JESSEL, M.R., concurred.

MELLISH, L.J.—I am of the same opinion. It is admitted that if the second order had not been made, and only the first order had been made, then there would have been no sufficient petitioning creditor's debt; and for this very obvious reason, that, although the order would make the sum certainly payable, it would leave it entirely uncertain for whose benefit the sum would be ultimately received; and, therefore, it would not be a liquidated debt due either at law or in equity to any particular person, that is to say, not to Captain Otway more than to his solicitor.

The question is: Does the second order alter the case? I have a great deal of difficulty in seeing how it does. There is no real difference in this case between the right at law and the right in equity. The right is given by the statute, and the court, whether it be a court of law or a court of equity, must determine the meaning of the statute; and after the second order was made the sum still remained in the same position as it was under the first order, that is to say, it remained a sum of which neither the whole nor any fixed portion is certain to be received by Captain Otway. Neither in my opinion is he a trustee. I quite agree that if a sum is due at law to a person as a trustee, and he is acting in accordance with his trust in presenting a petition in bankruptcy, he may present that petition, and there would be in that case a good petitioning creditor's debt; but here I cannot see that any sum is due at law more than it is due in equity. It appears to me that the court, whether at law or in equity, must look at the terms of the Matrimonial Causes Act, and looking at the terms of the Matrimonial Causes Act, I cannot help seeing that there is no certain sum due to Captain Otway.

I do not mean at all to express any dissent, or any decided opinion, as to the effect of such an order for the purpose of enabling a proof to be made.

As at present advised, I should think that, there being a sum presently payable and an order to pay, it would in some shape be provable in bankruptcy, and that the mere uncertainty as to who was to receive it ultimately, and for whose benefit it was ultimately to be applied, would not prevent its being a debt which could be provable in bankruptcy, although, in my opinion, it would prevent any particular person being a good petitioning creditor for the purpose of presenting a petition in bankruptcy, because, in order that there may be a good petitioning creditor's debt, the sum must be a certain sum due and certainly payable to the person who presents the petition.

BAGGALLAY, J.A., concurred.

Solicitors: *Linklater, Hackwood, Addison & Brown; Ellis & Ellis.*

WEATHERALL *v.* THORNBURGH

[COURT OF APPEAL (James, Cotton and Thesiger, L.JJ.), March 9, 11, 1878]

[Reported 8 Ch.D. 261; 47 L.J.Ch. 658; 39 L.T. 9; 26 W.R. 593]

Accumulation—Accumulation beyond permitted period—Gift of annuity with direction to accumulate surplus income from certain property until death of annuitant—No general residuary gift—Disposition of surplus income until death of annuitant.

A testator gave freehold and leasehold property to trustees upon trust for his wife for her life or until her second marriage, and, in case she should marry again, upon the trusts thereinafter mentioned, and after the death of his wife, in trust for G. absolutely. He then gave personal estate to the same trustees, and directed them to pay the income thereof to his wife during her widowhood, but, if she should marry again, then from and after such marriage all the bequests thereinbefore contained in her favour were to cease, and in lieu thereof they were to pay her out of the rents and income an annuity of £500, and to invest the surplus. After her death the testator directed the trust moneys, surplus rents (if any), and accumulations to be disposed of by his trustees in paying certain legacies, and he gave the residue of the trust moneys, surplus rents (if any), and accumulations to T. absolutely. The testator died in 1852. His widow married again in 1854, and lived for twenty-one years from the testator's death, beyond which period the Accumulations Act, 1800 (the Thellusson Act) prohibited accumulations.

Held: the will did not appoint T. to be residuary legatee, but appointed him merely a legatee of the fund directed to be accumulated in remainder after the widow's death; and, accordingly, the income which arose from the end of twenty-one years from the testator's death until the death of his widow did not pass to T., but was undisposed of by the will.

Notes. The Accumulations Act, 1800 (the Thellusson Act) was repealed by the Laws of Property Act, 1925, s. 207 and Sched. 7, and replaced with amendments by s. 164 of that Act.

Applied: *Re Parry, Powell* v. *Parry* (1889), 60 L.T. 489; *Re Travis, Frost* v. *Greatorex*, [1900] 2 Ch. 541. Considered: *Re O'Hagan, O'Hagan* v. *Lloyds Bank, Ltd.*, [1932] W.N. 188; *Re Oliver, Watkins* v. *Fitton*, [1947] 2 All E.R. 162. Referred to: *Re Deloitte, Griffiths* v. *Deloitte*, [1925] All E.R. Rep. 118; *Re Tong,*

Hilton v. *Bradbury*, [1930] 2 Ch. 400; *Re Gillett's Will Trusts, Barclays Bank, Ltd.* v. *Gillett*, [1949] 2 All E.R. 893; *Re Wragg, Hollinsworth* v. *Wragg*, [1959] 2 All E.R. 717.

As to application of surplus accumulations, see 29 HALSBURY'S LAWS (3rd Edn.) 349-352; and for cases see 37 DIGEST 146 et seq. For the Law of Property Act, 1925, s. 164, see 20 HALSBURY'S STATUTES (2nd Edn.) 771.

Cases referred to:

(1) *Saunders* v. *Vautier* (1841), Cr. & Ph. 240; 4 Beav. 115; 10 L.J.Ch. 354; 41 E.R. 482, L.C.; 23 Digest (Repl.) 403, *4745*.

(2) *Hodgson* v. *Bective* (1863), 1 Hem. & M. 376; 2 New Rep. 233; 32 L.J.Ch. 489; on appeal sub nom. *Bective* v. *Hodgson* (1864), 10 H.L.Cas. 656; 3 New Rep. 654; 33 L.J.Ch. 601; 10 L.T. 202; 10 Jur.N.S. 373; 12 W.R. 625; 11 E.R. 1181, H.L.; 37 Digest 132, *621*.

(3) *Ellis* v. *Maxwell* (1841), 3 Beav. 587; 10 L.J.Ch. 266; 49 E.R. 231; subsequent proceedings (1849), 12 Beav. 104; 13 L.T.O.S. 398; 50 E.R. 1000; 37 Digest 136, *650*.

(4) *Eyre* v. *Marsden* (1838), 2 Keen, 564; 7 L.J.Ch. 220; 2 Jur. 583; 48 E.R. 744; affirmed (1839), 4 My. & Cr. 231, L.C.; 37 Digest 141, *681*.

(5) *Talbot* v. *Jevers* (1875), L.R. 20 Eq. 255; 44 L.J.Ch. 646; 23 W.R. 741; 37 Digest 150, *756*.

Also referred to in argument:

Josselyn v. *Josselyn* (1837), 9 Sim. 63; 59 E.R. 281; 44 Digest 1089, *9404*.

Gosling v. *Gosling* (1859), John. 265; 5 Jur.N.S. 910; 70 E.R. 423; 44 Digest 445, *2693*.

Coventry v. *Coventry* (1865), 2 Drew. & Sm. 470; 34 Beav. 572; 13 L.T. 83; 13 W.R. 985; 62 E.R. 699; 44 Digest 763, *6228*.

Re Clulow's Trust (1859), 1 John. & H. 639; 28 L.J.Ch. 696; 33 L.T.O.S. 359; 5 Jur.N.S. 1002; 7 W.R. 594; 70 E.R. 900; 37 Digest 142, *688*.

Harbin v. *Masterman* (1871), L.R. 12 Eq. 559; 40 L.J.Ch. 760; 25 L.T. 200; 19 W.R. 1053; on appeal, [1894] 2 Ch. 184; 63 L.J.Ch. 388; 70 L.T. 357, C.A.; affirmed sub nom. *Wharton* v. *Masterman*, [1895-9] All E.R. Rep. 687; [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 43 W.R. 449; 11 T.L.R. 301; 11 R. 169, H.L.; 37 Digest 146, *721*.

Ackroyd v. *Smithson* (1780), 1 Bro. C.C. 503; 28 E.R. 1262; sub nom. *Akeroid* v. *Smithson*, 2 Dick, 566; 3 P. Wms. 22, n., L.C.; 44 Digest 423, *2536*.

Oddie v. *Brown* (1859), 4 De G. & J. 179; 28 L.J.Ch. 542; 33 L.T.O.S. 174; 5 Jur.N.S. 635; 7 W.R. 472; 45 E.R. 70, L.C. & L.JJ.; 37 Digest 92, *285*.

Wildes v. *Davies* (1853), 1 Sm. & G. 475; 22 L.J.Ch. 495; 21 L.T.O.S. 206; 1 W.R. 253; 65 E.R. 208; 37 Digest 142, *687*.

Green v. *Gascoyne* (1865), 4 De G. J. & Sm. 565; 5 New Rep. 227; 34 L.J.Ch. 268; 12 L.T. 35; 11 Jur.N.S. 145; 13 W.R. 371; 46 E.R. 1038, L.C.; 37 Digest 146, *715*.

Appeal by the personal representative of Thomas Messiter from a decision of SIR CHARLES HALL, V.-C., holding that he was not entitled to the surplus income arising during the period commencing twenty-one years after the death of a testator and ending with the death of the testator's widow, which income the testator had directed to be accumulated, and that such income was not effectually disposed of by the testator's will.

Thomas Hurd, by his will dated April 14, 1852, after certain pecuniary and other bequests, as to certain freehold and leasehold hereditaments therein particularly mentioned, and all other his freehold and leasehold estate situate elsewhere in the county of Somerset, gave and bequeathed the same unto Thomas Messiter and Edward Weatherall upon trust for his wife during her life, or until her

next marriage, which should first happen, and in case his said wife should marry again, then from and after that event during the remainder of her life in trust to receive the rents, issues, and profits of the said real and leasehold hereditaments in the county of Somerset, and to hold the same during the then residue of the life of his said wife upon the trusts therein mentioned concerning the same, and from and immediately after the death of his said wife, then as to all and every his last-mentioned real estate to the use of George Messiter, of East Hill, in the county of Somerset, solicitor, his heirs and assigns for ever; and as to all and every his said last-mentioned leasehold estate, to the use of the said George Messiter, his executors and administrators, for the then residue of the term or terms therein, for his and their own absolute use and benefit. And as to the stocks in the public funds, goods, chattels, and all other his personal estate and effects not thereinbefore by him particularly disposed of, and except any personal estate which might be vested in him as trustee or mortgagee, he gave and bequeathed the same to the said Thomas Messiter and Edward Weatherall, their executors, administrators, and assigns, upon trusts for sale and conversion, with the consent of his said wife, and for payment of debts, legacies, and costs of proving and carrying into execution his said will. And as to all the residue and remainder of the said moneys, stocks, funds and securities, upon trusts for investment, and to pay the interest, dividends, and annual produce thereof to his said wife during her widowhood; but if she should marry again, then from and after such marriage he directed that all and every the bequests thereinbefore contained in her favour and for her benefit (except specific and pecuniary bequests), should cease and become of no effect, and in lieu thereof he directed the said Thomas Messiter and Edward Weatherall, and the survivor of them, and the executors, administrators, and assigns of such survivor, out of the rents and profits of his said freehold and leasehold hereditaments in the county of Somerset, and out of the interest and dividends of the stocks, funds, and securities of his said residuary estate, to pay to his said wife an annuity or clear yearly sum of £500 by equal half-yearly payments in each year, the first of such half-yearly payments to be made at the expiration of six calendar months from such marriage of his said wife. And he directed his trustees to invest the surplus rents and profits of his estate as in the said will mentioned, and that the payment of the said annuity to his wife should not be by way of anticipation; and that in case his said wife, while sole and discovert, should attempt to alien or charge the said annuity or any part thereof, the same should wholly cease; and from and after her decease he directed that the said trust moneys, surplus rents (if any), stocks, funds, and securities, and the accumulations of interest thereon (if any) should be disposed of by his said trustees in manner in the said will mentioned, being (in effect) upon trusts for certain charitable and other legacies, and upon trust as to £4000 as his said wife should by will (notwithstanding any coverture) appoint; and with respect to the residue of the said trust moneys, surplus rents (if any), stocks, funds and securities, and the accumulations of interest thereon (if any), he bequeathed the same to the said Thomas Messiter absolutely.

The testator died in April, 1852. In October, 1854, his widow intermarried with the defendant Francis Thornburgh. Thomas Messiter died in December, 1874. The plaintiff was the surviving trustee of the will. The question for the decision of the court was, who were the persons entitled to such parts of the accumulated fund as arose since April 16, 1873, the expiration of twenty-one years from the testator's death, and to the future surplus rents and income of the said estates which should accrue during the life of the defendant, Hannah Thornburgh. The plaintiff was unable to ascertain who were the testator's next of kin.

The Vice-Chancellor held that the trusts for accumulation ceased on April 16, 1873, being the expiration of twenty-one years from the testator's death; and

that the surplus income from that date down to the decease of the widow was not effectually disposed of by the will.

The minutes of order were as follows:

"Declare, that as between the persons entitled to the residuary real and personal estate, the annuity given by the will to the widow is payable rateably out of the income of the real and personal estate: That the trusts for accumulation directed by the will, of the surplus income of the testator's residuary real and personal estate, ceased upon April 16, 1873, being the expiration of twenty-one years from the testator's death; and, that the surplus income of the testator's residuary real and personal estate from April 16, 1873, down to the decease of the widow are not effectually disposed of by his will, and that the defendant, the widow, is entitled to one equal moiety of such part of the surplus income so undisposed of, as has arisen or shall arise from the personal estate; and that the Crown is entitled to the other moiety of such surplus of the personal estate, and the entirety of the surplus income as has arisen, or shall arise from the rent etc. of the real estate; and let the costs be paid out of the fund in court."

From this decision the personal representative of Thomas Messiter appealed.

By the Accumulations Act, 1800, s. 1:

"No person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof, shall be wholly or partially accumulated for any longer term than the life or lives of such grantor or grantors, settler or settlers; or the term of twenty-one years after the death of such grantor, settler, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living, or in ventre sa mère at the time of the death of such grantor, devisor, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, and profits, or the interest, dividends, or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Hemming, *Q.C.*, and *E. C. Batten* for the personal representative of Thomas Messiter.

Rigby for the Crown.

Dickenson, *Q.C.*, and *Henderson* for the widow.

W. Pearson, *Q.C.*, and *Hamilton Humphreys* for the plaintiff.

JAMES, L.J.—I am of opinion that the decision of the Vice-Chancellor in this case must be affirmed. The will must first be considered independently of the Thellusson Act, and then the Thellusson Act must be applied to the state of things so determined. The Thellusson Act provides that

"where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

The first question, therefore, is, if the accumulations had only lasted for twenty-one years, to whom would the income after the expiration of twenty-one years have gone, independently of the Thellusson Act? This question must be decided in the same way as if the testator had said in a codicil, "Since the making of my will I have been reminded that my wife may live more than twenty-one years after my death. I therefore direct that the accumulation which I have directed by my will shall stop at the end of twenty-one years." What would have been the result of such a direction? The effect would have been that after the twenty-one years there would have been a gap. He directs that the capital and the accumulations shall not be divided till the death of his wife, so that if he made no distribution of the surplus income after the twenty-one years, and his wife was still alive, there would have been a gap as to the surplus of the intermediate income till the death of his wife. Who, then, would be entitled to that income? I am of opinion that Thomas Messiter is not the residuary legatee under the will; he is only residuary cestui que trust of the particular fund in remainder after the death of the wife, and there is nothing in the Thellusson Act to give the accumulations to him. There is no gift of the surplus income to any person whatever until the death of the wife. The testator has divided the enjoyment of his property into two parts, something to be enjoyed before and something to be enjoyed after the death of his wife. Accumulations which fail under the Thellusson Act must be treated in the same way as a gift which fails under the Charitable Uses Act, 1735. It has never been held that property that is set free by the operation of the Charitable Uses Act, 1735, will accrue for the benefit of the persons entitled in remainder. It is the same as if the testator had only directed accumulation for twenty-one years, and had said nothing as to the income after that time till the death of his wife.

In *Saunders* v. *Vautier* (1) the bequest was quite different. There was an absolute gift to begin with, and then a direction to accumulate the income until the legatee attained twenty-five; and the court acted on the established principle that where there is an absolute gift to an adult male, any direction to restrain his enjoyment of it is absolutely idle, unless there is a defeasance. In such a case a direction to accumulate the income is only a mode of preventing the person entitled from enjoying the property, which can have no effect.

It was said that this case is within the principle of *Hodgson* v. *Bective* (2), which decided that where there is a gift of personal property to a man at a future time, it carries the intermediate income. But that is because in such a case there is a clear indication of the testator's wish that the legatee should have the income; it goes, by way of accretion, to the person absolutely entitled to the capital. That does not apply to a case where the testator has said what is to be done with the income till the particular period arrives. The order of the Vice-Chancellor must, therefore, be affirmed.

COTTON, L.J.—The first question is this. As soon as a sufficient sum has been accumulated to meet the charges on the fund, has the person ultimately entitled to the residue of the fund a right to come to the court and claim to have the residue of the fund paid at once to him? This is not like *Saunders* v. *Vautier* (1). That case simply decided that if property is given to a person of full age any restriction on his enjoyment of it is inconsistent with his absolute interest. But here it is conceded that until the accumulated fund has become sufficient to pay the legacies the direction to accumulate was for an object which was legal, and which ought to have effect given to it. Then it happens in this case that the legacies cannot be paid till the death of the widow; therefore, it is not like dealing with a case where there are no legacies charged on the fund. That being so, can the personal representative of Thomas Messiter say that he is entitled to the residue of the fund as soon

as there is sufficient to pay the legacies? He cannot be entitled of right, because if from any accident to the investment it should become insufficient, the legatees would have a claim upon him. Perhaps the court, having due regard to the security of the legacies, would, if it thought there was no reasonable probability of any loss occurring, pay out of the residue to the person entitled. But it is a matter of indulgence and discretion in the court. A trustee could not without risk pay over the fund; if he did, he would be liable in case the fund proved insufficient. It would be otherwise if it was a matter of right. All that can be said is, that it is in the discretion of the court whether, under peculiar circumstances, it shall keep the person entitled to the residue of the fund any longer out of the enjoyment of his property; but of right he cannot claim it. Therefore I am of opinion that in this case the personal representative could not have come when the fund was sufficient for payment of the legatees and stopped the accumulations by claiming the residue of the fund.

Then comes the question as to the effect of the Thellusson Act. Is the personal representative "the person who would have been entitled to the surplus income if the accumulation had not been directed?" It is argued that he is the residuary legatee under the will, and, therefore, that he would have been entitled to the income if the accumulation had not been directed, and *Ellis* v. *Maxwell* (3) was referred to. But that case was very different from the present. There the testator made his wife by a separate clause his residuary legatee of anything which he might not have disposed of. Of course that would carry the property comprised in every gift which failed for illegality. Here the personal representative is not appointed residuary legatee by an independent clause; he is only a legatee in remainder of the accumulated fund, and there is a gap between the expiration of the period of twenty-one years and the time when he will become entitled to it. The testator gave him the accumulated fund as the legatee of that fund, and not as residuary legatee. During the lifetime of the widow he could claim nothing; he was only legatee in remainder, after the death of the widow, of a fund already constituted.

THESIGER, L.J.—I also agree that the decision of the Vice-Chancellor must be affirmed. The principle on which the court construes a bequest of accumulations which has become void under the Thellusson Act is laid down in *Eyre* v. *Marsden* (4). LORD LANGDALE, M.R., there says (2 Keen, at p. 574):

> "The statute, as it appears to me, was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before, and all the other directions of the will as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute."

Following out this principle, it was held in *Green* v. *Gascoyne* that the effect of the statute is not to accelerate the enjoyment of any interest under the will. Therefore, the only question is whether the personal representative has such an absolute interest as would entitle him to stop the accumulation, as in *Saunders* v. *Vautier* (1). If this be the true question, the decision in *Talbot* v. *Jevers* (5) is in point. In that case the testator by the words of his will created a gap between the period when the accumulation was to cease and the death of the surviving annuitant, and the court held that there was an intestacy with respect to the intermediate income, and refused to stop the accumulations and to pay the fund, subject to provision for the annuities, to the person ultimately entitled to the fund. In the present case the gap is caused by the statute, and it appears to me that the statute places it on the same footing as if it had been directed by the will. It was not denied that, but for the distinction to which I have referred, *Talbot* v. *Jevers* (5) and the

present case are indistinguishable. I will only add that the will does not constitute the personal representative residuary legatee, but a legatee of a particular fund after the death of the widow, and, therefore, his interest is one which does not take effect until after her death. With respect to the surplus rents of the real estate, the claim of the personal representative for them has been abandoned.

Appeal dismissed.

Solicitors: *W. J. Moon; Hare & Fell; J. Watson*, for *J. R. Bramble*, Bristol; *Wedlake & Letts*, for *H. B. Batten*, Yeovil.

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

Re CONDON. Ex parte JAMES

[Court of Appeal in Chancery (James and Mellish, L.JJ.), July 10, 1874]

[Reported 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937]

Bankruptcy—Property available for distribution—Money paid to trustee under mistake of law—Obligation to repay.

Mistake—Mistake of law—Payment to officer of court—Trustee in bankruptcy—Obligation to repay.

The principle that money paid voluntarily with a knowledge of the facts, but under a mistake of law, cannot be recovered does not apply to a trustee in bankruptcy, who is an officer of the court. Thus, where a creditor who has levied execution pays over the proceeds to the trustee in bankruptcy of the debtor under a mistake of law, the money can be recovered.

Notes. The Bankruptcy Act, 1869, s. 87, has been repealed; see now the Bankruptcy Act, 1914, ss. 40-41.

Distinguished: *Re Shackleton, Ex parte Whittaker* (1875), 10 Ch. App. 447, n. Considered: *Crew* v. *Terry* (1877), 2 C.P.D. 403; *Re McHenry, Ex parte McHenry* (1883), 24 Ch.D. 35. Followed: *Re Carnac, Ex parte Simmonds* (1885), 16 Q.B.D. 308. Applied: *Re Brown, Dixon* v. *Brown* (1886), 32 Ch.D. 597. Considered: *Re Opera*, [1891] 2 Ch. 154. Explained: *Mercer* v. *Vans Colina* (1897), 4 Mans. 363. Applied: *Re Rhoades, Ex parte Rhoades*, [1895-9] All E.R. Rep. 333. Considered: *Hand* v. *Blow*, [1901] 2 Ch. 721. Distinguished: *Griffiths Cycle Corpn.* v. *Dunlop Pneumatic Cycle Corpn.* (1901), 85 L.T. 875. Applied: *Re Tyler, Ex parte Official Receiver*, [1904-7] All E.R. Rep. 181. Distinguished: *Re Hall, Ex parte Official Receiver*, [1907] 1 K.B. 875. Considered: *Tapster* v. *Ward* (1909), 101 L.T. 25; *Wells* v. *Wells*, [1914] P. 157; *Re Craig, Ex parte Hinchcliffe*, [1916] 2 K.B. 497; *Re Thellusson, Ex parte Abdy* v. *Official Receiver*, [1918-19] All E.R. Rep. 729; *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; *Scranton's Trustee* v. *Pearse*, [1922] All E.R. Rep. 764. Distinguished: *Re Wilson, Ex parte Salaman, The Trustee* v. *Keith, Prowse & Co.* (1925), 133 L.T. 814. Applied: *Re Regent Finance and Guarantee Corpn.* (1930), 69 L.Jo. 283. Considered: *Re Sandiford (No. 2), Italo-Canadian Corpn., Ltd.* v. *Sandiford*, [1935] All E.R. Rep. 364. Distinguished: *Re Gozzett, Ex parte Messenger & Co.* v. *Trustee*, [1936] 1 All E.R. 79. Referred to: *Re Ash*, [1911-13] All E.R. Rep. 775; *Re London County Commercial Reinsurance Office*, [1922] 2 Ch. 67; *Re Wait (Trading as Wait and James), The Trustee* v.

Humphries and Bobbett, [1926] All E.R. Rep. 433; *Re Samuel, Ex parte Trustee* v. *Kerman*, [1945] 2 All E.R. 71; *Kitchen's Trustee* v. *Madders*, [1950] Ch. 134; *Government of India* v. *Taylor*, [1955] 1 All E.R. 292.

As to duties of a trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 382 et seq.; as to effect of bankruptcy on antecedent executions, see ibid. 541 et seq.; as to recovery of money paid under a mistake of law, see 26 HALSBURY'S LAWS (3rd Edn.) 926; and for cases see 4 DIGEST (Repl.) 226-229; 35 DIGEST (Repl.) 172 et seq. For the Bankruptcy Act, 1914, ss. 40, 41, see 2 HALSBURY'S STATUTES (2nd Edn.) 376, 377.

Case referred to:

(1) *Re Rogers, Ex parte Villars* (1874), 9 Ch. App. 432, 439; 43 L.J.Bcy. 76; 30 L.T. 104, 348; 38 J.P. 533; 22 W.R. 397, 603, L.C. & L.JJ.; 5 Digest (Repl.) 887, *7384*.

Also referred to in argument:

Re Skinner, Ex parte Key (1870), L.R. 10 Eq. 432; 39 L.J.Bcy. 28; 25 L.T. 315; 18 W.R. 918; 5 Digest (Repl.) 887, *7381*.

Re Morrisy, Ex parte Taylor (1874), L.R. 18 Eq. 256; 43 L.J.Bcy. 103; 30 L.T. 473; 22 W.R. 613; 5 Digest (Repl.) 1261, *10121*.

Re Jones (1870), 22 L.T. 107.

Re Sedley, Ex parte Cobb (1873), 8 Ch. App. 727; 42 L.J.Bcy. 63; 29 L.T. 123; 21 W.R. 777, L.JJ.; 5 Digest (Repl.) 1139, *9190*.

Brisbane v. *Dacres* (1813), 5 Taunt. 143; 128 E.R. 641; 35 Digest (Repl.) 172, *571*.

Steele v. *Williams* (1853), 8 Exch. 625; 22 L.J.Ex. 225; 21 L.T.O.S. 106; 17 J.P. 378; 17 Jur. 464; 1 C.L.R. 258; 155 E.R. 1502; 12 Digest (Repl.) 628, *4851*.

Re Bissell, Ex parte Duignan (1871), 6 Ch. App. 605; 40 L.J.Bcy. 68; 25 L.T. 286; 19 W.R. 1127, L.C. & L.JJ.; 5 Digest (Repl.) 895, *7443*.

Re Jecks, Ex parte Bailey (1871), L.R. 13 Eq. 314; 41 L.J.Bcy. 1; 25 L.T. 918; 20 W.R. 76; 5 Digest (Repl.) 868, *7290*.

Re Saxon Life Assurance Society (1862), 2 John. & H. 408; 32 L.J.Ch. 206; 7 L.T. 22; 10 W.R. 724; 70 E.R. 1117; on appeal sub nom. *Re Saxon Life Assurance Co., Era Life and Fire Assurance Co.'s Case*, 1 De G. J. & Sm. 29, L.JJ.; 35 Digest (Repl.) 97, *24*.

Stone v. *Godfrey* (1854), 5 De G. M. & G. 76; 2 Eq. Rep. 866; 23 L.J.Ch. 769; 23 L.T.O.S. 289; 18 Jur. 524; 43 E.R. 798, L.JJ.; 97 Digest (Repl.) 97, *22*.

Appeal by the trustee in bankruptcy of John Condon from a decision of Mr. Registrar ROCHE ordering him to repay to the respondent Harry Bradshaw £142 15s. 6d. which sum had been paid to the trustee under a mistake of law.

On Nov. 14, 1873, judgment for £274 odd was signed by Bradshaw against Condon, who carried on business as a coal merchant at Millwall. On the following day execution was issued, and on Nov. 17 the sheriff seized Condon's goods. On Nov. 18 Condon filed a petition for liquidation of his affairs by arrangement. On Nov. 22 the sheriff sold the goods, the proceeds of which amounted to the sum of £142 15s. 6d. On Dec. 3 notice of the filing of the liquidation petition was served upon the sheriff. On Dec. 5 the first meeting of the creditors was held, and resolutions were passed in favour of liquidation by arrangement. On Dec. 16 the second meeting of the creditors was held, but, the debtor not being present, the creditors separated without passing any resolutions. On Dec. 17 the sheriff paid over the proceeds of the sale to the execution creditor. On Dec. 19 a bankruptcy petition was presented against Condon, the act of bankruptcy on which it was founded, being the filing of the petition for liquidation, and on the same day notice of the bankruptcy petition was given to the sheriff and to the execution creditor. On Jan. 10, 1874, Condon was adjudicated a bankrupt. On Feb. 23 the execution creditor paid over the proceeds of the sale to the trustee in the bankruptcy, being advised that he was obliged to do so,

owing to the decision of MELLISH, L.J., delivered on Feb. 20 in *Re Rogers, Ex parte Villars* (1). The decision of MELLISH, L.J., in *Re Rogers, Ex parte Villars* (1) having been afterwards reversed on a re-hearing by the full court of Appeal the execution creditor claimed to have the proceeds of the sale returned to him. The registrar held that he was entitled to the money, and ordered the trustee to repay it to him. From this order the trustee appealed.

By the Bankruptcy Act, 1869, s. 87:

> "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds and sold, the sheriff, or in the case of a sale under the direction of the county court, the high bailiff or other officer of the county court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

Thesiger, Q.C., and *E. Cooper Willis* for the trustee.
De Gex, Q.C., and *Finlay Knight* for the respondent.

JAMES, L.J.—I am of opinion that the order of the registrar should be affirmed. I adhere to the opinion which I expressed in *Re Rogers, Ex parte Villars* (1), that the legal rights of the execution creditor should be respected, except so far as they are interfered with by the provisions of the Bankruptcy Act, 1869. The onus is clearly thrown on the person who says that the execution creditor is not to take the fruits of his execution.

In this case, looking at s. 87 of the Act, and at the rules, I think it is impossible to say that the adjudication of bankruptcy was made on the petition for liquidation of which the sheriff had notice before he paid away the money. It might be different if the proceedings were still pending in the liquidation and a bankruptcy petition had been presented before they failed. But in this case the liquidation proceedings had totally failed before the bankruptcy petition was filed. The result of what occurred at the meeting of the creditors on Dec. 16 was that the whole thing came to an end. There was nothing in the nature of a resolution, nothing which could result in the appointment of a trustee. Any of the creditors might have filed a bankruptcy petition within the fourteen days, but as no petition was presented within that time the sheriff was clearly justified in paying over the proceeds of the sale to the execution creditor.

As to the other point the principle that money paid voluntarily with a knowledge of the facts, but under a mistake of law, cannot be recovered, must not be pressed too far. A trustee in bankruptcy is in truth an officer of the court. The moneys in his hands are trust moneys, and when the court finds that certain moneys in his hands really belong in equity to some one else, the court ought to do equity just as anyone else would be bound to do, and to order the money to be paid to the persons entitled to it. The appeal must, therefore, be dismissed, but without costs.

MELLISH, L.J.—I am of the same opinion. I think this case cannot in principle be distinguished from *Re Rogers, Ex parte Villars* (1).

The sheriff, having received notice of the filing of the petition for liquidation,

was no doubt bound to retain the proceeds of the sale until he knew whether the proceedings on the petition had come to an end or not. The sheriff is bound by s. 87 of the Bankruptcy Act, 1869, to retain the proceeds of sale for fourteen days, and if no notice of a petition having been presented be served on him within that period, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt, then the sheriff may deal with the proceeds of the sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him. [HIS LORDSHIP then stated that as a result of s. 87 and of the Bankruptcy Rules, 1870 rr. 266 and 267 (revoked), as soon as it became impossible that a trustee should be appointed under the liquidation petition, as it did on Dec. 16 when the creditors separated without passing any resolution, the sheriff was authorised to pay over the proceeds to the execution creditor, the period of fourteen days having by that time expired.]

I also entirely agree with what the lord justice has said as to the other point.

Solicitors: *Chorley & Crawford; Ravenscroft & Hills.*

[*Reported by* E. STEWART ROCHE, ESQ., and H. PEAT, ESQ., *Barristers-at-Law*]

CLARK *v.* LONDON SCHOOL BOARD

[COURT OF APPEAL IN CHANCERY (Lord Selborne, L.C., Mellish and James, L.JJ.), January 14, 15, 1874]

[Reported 9 Ch. App. 120; 43 L.J.Ch. 421; 29 L.T. 903; 38 J.P. 101; 22 W.R. 354]

Compulsory Purchase—Easement—Interference—Need for notice.

Under the Education Act, 1870, which incorporated the Lands Clauses Consolidation Act, 1845, the defendants were given power to purchase land and any right over land for certain purposes. In exercise of this power, the defendants acquired land adjoining that owned by the plaintiff, and then, without serving a notice to purchase the plaintiff's right of light, began to build so as to obstruct it. In an action by the plaintiff for an injunction,

Held: (i) under the Lands Clauses Consolidation Act, 1845, where land was taken, notice must be given, and if an attempt was made to enter without notice an injunction might be granted, but an interference with a right of light did not constitute taking land, and in such a case notice need not be served, and the appropriate remedy was, not an injunction, but compensation; (ii) this general principle in the 1845 Act was applicable to the present case, even though the Education Act, 1870, contained an express power to purchase any right over land.

Notes. The Education Act, 1870, ss. 18-20, have been repealed. See now the Education Act, 1944, s. 90, as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946, ss. 6, 10, and Fourth and Sixth Schedules.

Considered: *Duke of Bedford* v. *Dawson* (1875), L.R. 20 Eq. 353; *Swainston* v. *Finn and Metropolitan Board of Works* (1883), 48 L.T. 634; *Wigram* v. *Fryer* (1887), 36 Ch.D. 87; *Barlow* v. *Ross* (1890), 59 L.J.Q.B. 183; *Kirby* v. *Harrogate School Board*, [1896] 1 Ch. 437. Applied: *Anderson* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Anderson* (1898), 78 L.T. 251; *Barnard* v. *Great Western Rail. Co.* (1902), 86 L.T. 798. Referred to:

London School Board v. *Smith*, [1895] W.N. 37; *Oppenheimer* v. *Minister of Transport*, [1941] 3 All E.R. 485; *National Trust for Places of Historic Interest or Natural Beauty* v. *Midlands Electricity Board*, [1952] 1 All E.R. 298; *Marten* v. *Flight Refuelling, Ltd.*, [1961] 2 All E.R. 696.

As to notice to treat, see 10 HALSBURY'S LAWS (3rd Edn.) 60 et seq.; as to entry before completion, see ibid. 73 et seq.; as to compensation for interference with easements, see ibid. 158-159; and for cases see 11 DIGEST (Repl.) 145-147. For the Lands Clauses Consolidation Act, 1845, ss. 18, 21, 68 and 84, see 3 HALSBURY'S STATUTES (2nd Edn.) 902, 904, 919, 930. For the Education Act, 1946, s. 90 (as amended), see 8 HALSBURY'S STATUTES (2nd Edn.) 219.

Case referred to:

(1) *Macey* v. *Metropolitan Board of Works* (1864), 3 New Rep. 669; 33 L.J.Ch. 377; 10 L.T. 66; 10 Jur.N.S. 333; 12 W.R. 619; 11 Digest (Repl.) 153, *290*.

Also referred to in argument:

Hutton v. *London and South Western Rail. Co.* (1849), 7 Hare, 259; 18 L.J.Ch. 345; 13 L.T.O.S. 135; 13 Jur. 486; 68 E.R. 106; 11 Digest (Repl.) 140, *214*.

Dawson v. *Paver* (1845), 4 Ry. & Can. Cas. 81.

Leader v. *Moxon* (1773), 3 Wils. 461; 2 Wm. Bl. 924; 95 E.R. 1157; 26 Digest (Repl.) 624, *2741*.

R. v. *St. Luke's* (1871), L.R. 7 Q.B. 148, Ex. Ch.; 11 Digest (Repl.) 141, *218*.

Simpson v. *South Staffordshire Waterworks Co.* (1865), 4 De G.J. & Sm. 679; 6 New Rep. 184; 34 L.J.Ch. 380; 12 L.T. 360; 11 Jur.N.S. 453; 13 W.R. 729; 46 E.R. 1082, L.C.; 11 Digest (Repl.) 106, *27*.

Broadbent v. *Imperial Gas Co.* (1857), 7 De G.M. & G. 436; 26 L.J.Ch. 276; 3 Jur.N.S. 221, L.C.; affirmed sub nom. *Imperial Gas Light and Coke Co.* (1859), 7 H.L.Cas. 600; 29 L.J.Ch. 377; 34 L.T.O.S. 1; 23 J.P. 675; 5 Jur.N.S. 1319; 11 E.R. 239, H.L.; 11 Digest (Repl.) 142, *221*.

Hutton v. *London and South Western Rail. Co.* (1849), 7 Hare, 259; 18 L.J.Ch. 345; 13 L.T.O.S. 135; 13 Jur. 486; 68 E.R. 106; 11 Digest (Repl.) 140, *214*.

Lister v. *Lobley* (1837), 7 Ad. & El. 124; 2 Har. & W. 12; 6 Nev. & M.K.B. 340; 6 L.J.K.B. 200; 1 J.P. 309; 1 Jur. 526; 112 E.R. 417; 11 Digest (Repl.) 290, *1956*.

Appeal from a decision of SIR RICHARD MALINS, V.-C., granting the plaintiff an injunction to restrain the defendants from interfering with his right of light.

The plaintiff was the lessee of some houses in Winchester Court, Pentonville. The School Board for London, under their statutory powers, took some land to the north of Winchester Court, and in May, 1873, they commenced building a school house on this land; and part of the wall of this school house being within four feet of the windows of some of the plaintiff's houses, the plaintiff filed his bill to restrain the board from so building as to interfere with his ancient lights. Before the bill was filed, the board had purchased the fee of the houses in question, subject to the plaintiff's lease, and had endeavoured to come to terms with the plaintiff for the purchase of his interest, but he asked too high a price, and they were unable to agree. SIR RICHARD MALINS, V.-C., granted the injunction prayed for, and the board appealed.

On the appeal motion coming on for hearing before the lords justices in July last, it was arranged that the plaintiff should give notice of motion for decree, and that it should be heard by the full Court of Appeal. The case now came on for hearing. The board had, since the case came last before the court, obtained power to acquire the plaintiff's interest compulsorily, so that the only question remaining between the parties was, which of them was to pay the costs of the suit, but this involved the question which of them was originally in the right. The question turned on the construction of the following sections of the Elementary Education Act, 1870: Section 18 provided that

A "the school board shall maintain and keep efficient every school provided by such board, and shall from time to time provide such additional school accommodation as is, in their opinion, necessary in order to supply a sufficient amount of public school accommodation for their district."

Section 19 of the Act provided that

B "Every school board, for the purpose of providing sufficient public school accommodation for their district, . . . may provide, by building or otherwise, school houses properly fitted up, and improve, enlarge, and fit up any school house provided by them, and supply school apparatus and everything necessary for the efficiency of the schools provided by them, and purchase and take on lease any land, and any right over land, or may exercise any C of such powers."

By s. 20 of the Act:

"with respect to the purchase of land by school boards for the purposes of this Act, the following provisions shall have effect (that is to say), (1) The Lands Clauses Consolidation Act, 1845, and the Acts amending the D same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section, the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the school board, and land shall be construed to include any right over land."

E Then follow provisions that the board must give certain notices as to the land they propose to take, and that, having done so, they cannot take the land until they have obtained from the Education Department an order authorising them to put in force their powers under the Act, which order is not to be of any validity unless it has been confirmed by an Act of Parliament, which confirmation the Education Department are authorised to obtain.

F The sections of the Lands Clauses Consolidation Act, 1845, upon which the decision of the present case turned, were s. 18, by which the promoters of an undertaking were required to give notice to all the parties interested in any lands which they proposed to take; s. 21 and the following sections, by which provision was made for ascertaining, in case of dispute, the amount of compensation to be paid for the different interests in the land so taken; s. 68, by G which provision was made for settling the amount of the compensation to be paid to any party who was entitled to compensation "in respect of any lands, or any interest therein, which shall have been taken for or injuriously affected by the execution of the works"; and s. 84, which provided that

"the promoters of the undertaking shall not, except by the consent of the H owners or occupiers, enter upon any lands which shall be required to be purchased, or permanently used for the purposes, and under the powers of this or the special Act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein."

I *Glasse*, *Q.C.*, and *F. A. Lewin* for the plaintiff.
Cotton, *Q.C.*, and *Speed* for the defendants.

LORD SELBORNE, L.C.—The question which has been argued here is one of some importance, and, therefore, we think it right to express our opinion upon it.

It seems to me that the legislature, in authorising school boards for important public purposes to exercise these large powers, subject to the supervision and authority of the Department of the Privy Council for Education, meant to

give them a discretion suitable to the nature and importance of the duties to be discharged by them. That discretion required that the persons entrusted with it should provide what in their honest judgment was the proper and suitable accommodation for the instruction of the children to be educated in the buildings to be erected by them upon the lands so acquired. It appears to me that it is reasonable to understand that when compulsory powers to take lands for these public purposes are given, it is not absolutely left to their decision, because if they did not provide what a higher authority considered sufficient school accommodation, they could be required to provide more. I cannot but think that the legislature meant by that, that the school board should have the full benefit of all the provisions connected with the compulsory powers in the Lands Clauses Consolidation Act, 1845, to enable them to erect, according to their judgment and discretion, acting bona fide, such buildings, on such a space of ground, of such magnitude, and situated on such lands acquired by them, as they might think proper for the public purposes with which they have been charged.

That that view is confirmed, not only by the general provisions of the Act, and the particular provisions in other respects of s. 19, but very much by the express words which are found in s. 19, and repeated in s. 20, that for the purpose of the buildings so to be erected by them, they should have power to purchase, not only the land but any right over land. In the next section (s. 20), it is said that the land, within the meaning of this section, shall be construed to include "any right over land." Those are very large powers; and, accordingly, they appear to me to show that the intention of the legislature was to give the land which is required, to the school board absolutely, free of any jus tertii, which would control their absolute dominion over it for the purpose of the duty which they have to discharge. The right as against his neighbour which a man acquires by reason of the possession of ancient lights, is on the part of that neighbour strictly within the nature of the servitude known to the Roman and to the civil law by that phrase, jus non altius tollendi, which expresses positive liability, and which cannot be acquired against a neighbour by less than twenty years' user. It is, therefore, strictly within the meaning of those words, a right over land, just like the right to take a water course, or a right of way over land. The expression is a right over the land, whether exercised upon the surface or under the surface. It strikes me that it is about the largest expression that could have been used, if it was the object of the legislature to show that the land was to be acquired absolutely on the part of anybody for the public service.

If so, of course it must be the subject of compensation under the Act, which is as to the right of anyone interfered with; and the sole question which appears to me to be one of nicety, is as to the mode that compensation is to be given; that is to say whether the introduction of these words, "any right over land," makes it necessary for the board to give notice to purchase the right whenever there should be an interference with any servitude of this description, or whether the compensation is to be obtained under those provisions of the Lands Clauses Consolidation Act, which deal with persons whose lands are not taken, but are injuriously affected. In my opinion, the sound view is, that the application, according to the nature of the subject-matter in the different compensation clauses of the Lands Clauses Consolidation Act, is not meant to be altered by this special definition in the special Act, that in the word "land" is included "any right over land," or by the express mention that the compulsory powers are to extend over lands. The general Act contains a scheme of provisions applicable to working out the right to compensation, and that scheme of provisions varies according to the nature of the matter. In some clauses, where the purchase of land is meant, when land is to be taken notice is to be given, and if that notice is given, then there is a right to take it, and no injunction may be granted; but if it is attempted to enter without notice, or

taking the proper steps, then an injunction may be granted. The interference with ancient lights is not a thing which can come within the expression, "entering upon." The word "entering" is inapplicable to it, and therefore such a clause as that is inapplicable to it. But there are other cases in the Lands Clauses Consolidation Act, as to compensation to be made, such as a case in which no agreement has been arrived at, where an injurious act is proposed to be done upon lands not taken. That seems to me to be applicable to a case of this kind; and the more especially, because until the thing is done, in many such cases it cannot be known whether it will be injuriously affected, so as to be the subject of compensation or not.

I am very glad to find that in coming to that conclusion we are not without authority, because *Macey* v. *Metropolitan Board of Works* (1) seems on all fours in that respect with the present case, for there the Thames Embankment Act, by a definition clause, similar to that which we have to construe here, says that the word "land" is to be construed to include easements and rights over land. In the execution of the works, the Metropolitan Board of Works proceeded to fill up the river in front of the plaintiff, Mr. Macey's wharf, and it was found that that would destroy a very valuable right over land which he possessed, and he insisted that they should have given the notice, which they had authority to do, and so acquired the easement by purchase; but it was held that that was not so, that their right to enter and execute the works was not in abeyance till they had done the act, and that the nature of the right was such that the proper compensation clauses applicable to it were those which related to persons whose lands were injuriously affected, and not those which related to persons whose lands were purchased under what we call the purchase clauses. That is an authority that appears to be consistent with common sense, and from which, for my part, I do not differ.

That, of course, disposes of the right of the plaintiff (if this case had been brought to a hearing without the intervention of an Act of Parliament altering the position of the parties) to maintain the injunction he has obtained, and to obtain a decree; but, it seems to us, looking at everything that has passed, and at the fact that this is an important general question, the decision of which to some extent will affect other cases, and on the other hand, looking at the fact that there is something special in the general form of this Act, in the sections we have to construe (ss. 19 and 20), and particularly in these words as to "any right over land," I think we shall not be doing wrong in dismissing the bill simply, without costs.

MELLISH, L.J.—I am entirely of the same opinion. During the argument I for some time thought it was doubtful whether, according to the true construction of the Act, the meaning was not that the school board were to purchase all such land as would enable them to build their school without interfering with the rights of any third persons, and that it was, therefore, merely a question of the sum which they were to pay for it; but I am now satisfied there is no ground for that view. I think they are only required, and indeed authorised, to purchase that quantity of land which they want for the purpose of building the school house, including, of course, the house which they are bound to have for the master; and it would have been rather an extraordinary thing, considering that the site and school are to be paid for by the ratepayers, if Parliament had made it necessary that a larger quantity of land should be purchased than was really necessary for the purpose for which it was required. I think, therefore, that they are not authorised, and had no compulsory power, properly speaking, to purchase any land except that land which might be required for the purposes of their new buildings.

That is made clear by those words which were pressed so much upon us, namely, "any interest or right over land"; because what s. 19 says is: "If

you want to erect a school you may purchase land, and then, in order that you may be perfectly unfettered in building the school, you may purchase any right which any third person has over that land"; that is, supposing they cannot get the whole of it by voluntary sale, that the owner of the land will not sell it, or the owner of the right over the land will not sell it. Then the next section proceeds to give the compulsory power, and incorporate the various clauses of the Lands Clauses Consolidation Act, and says that land shall include any right over land. I cannot help thinking that they have, under the compulsory powers, not only the land itself, which they acquire, but any right over that land, that is, any easement which any third person has over it; and if it is necessary, then they shall acquire that for the purpose of building the school. I agree entirely with the cases that have been cited. This makes no difference in the forms that are to be adopted for the purpose of getting compensation by a person in the position of the plaintiff; and by the terms of the Lands Clauses Consolidation Act, his land is to be treated as land which has been injuriously affected.

JAMES, L.J.—The bill will be dismissed without costs, and the deposit returned.

Solicitors: *Lewin & Co.; Sydney Gedge & Co.*

ANDERSON *v.* BANK OF BRITISH COLUMBIA

[COURT OF APPEAL (James and Mellish, L.JJ., and Baggallay, J.A.), March 29, 31, 1876]

[Reported 2 Ch.D. 644; 45 L.J.Ch. 449; 35 L.T. 76; 24 W.R. 624, 724; 3 Char. Pr. Cas. 212]

Discovery—Privilege—Production of document—Document made in connection with litigation—Principal and agent—Principal threatened with litigation—Request to agent for information—Report of agent.

A bank was threatened with litigation, and telegraphed to their agent who transacted the business involved requesting information about the facts of the case. Proceedings were subsequently begun, and the question arose whether the agent's reply was privileged,

Held: a letter by a mercantile agent to his principal giving information respecting what the agent had actually done for and on account of the principal was not privileged even though it was sent in compliance with the request of the principal after the principal had been threatened with litigation respecting the matter on which he required information.

Per Curiam: Where a party asks a principal by an interrogatory what he knows respecting matters which an agent has done for him and on his account, he is necessarily entitled to the information which the agent has sent respecting them.

Notes. For the provisions relating to discovery and inspection of documents, see R.S.C. (Revision) 1962 Ord. 24.

Applied: *Atherley* v. *Harvey* (1877), 2 Q.B.D. 524. Considered: *Southwark and Vauxhall Water Co.* v. *Quick* (1878), 3 Q.B.D. 315. Distinguished: *Wheeler* v. *Le Marchant* (1881), 17 Ch.D. 675. Applied: *The City of Baroda*, [1926] All E.R. Rep. 653. Considered: *Ankin* v. *London and North Eastern Rail. Co.*, [1929] All E.R. Rep. 65; *Ogden* v. *London Electric Rail. Co.*, [1933] All E.R. Rep. 896.

Distinguished: *Westminster Airways, Ltd.* v. *Kuwait Oil Co.*, [1950] 2 All E.R. 596. Referred to: *Bullock* v. *Corrie* (1878), 38 L.T. 102; *Bewicke* v. *Graham* (1881), 7 Q.B.D. 400; *Nordon* v. *Defries* (1882), 8 Q.B.D. 508; *Kyshe* v. *Holt, Childs and Brotherton*, [1888] W.N. 128; *Re Worswick, Robson* v. *Worswick* (1888), 36 W.R. 685; *McLean and Rigg* v. *Jones* (1892), 66 L.T. 653; *Collins* v. *London General Omnibus Co.*, [1891-4] All E.R. Rep. 213; *Learoyd* v. *Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686; *Re Strachan*, [1895] 1 Ch. 439; *Jones* v. *Great Central Rail. Co.*, [1910] A.C. 4; *Birmingham and Midland Motor Omnibus Co.* v. *London and North Western Rail. Co.*, [1913] 3 K.B. 850; *Lambert* v. *Home*, [1914] 3 K.B. 86; *Feuerheerd* v. *London General Omnibus Co.*, [1918-9] All E.R. Rep. 955; *Conlon* v. *Conlons, Ltd.*, [1952] 2 All E.R. 462; *Seabrook* v. *British Transport Commission*, [1959] 2 All E.R. 15.

As to discretion in granting discovery, see 12 Halsbury's Laws (3rd Edn.) 5-6; as to legal professional privilege, see ibid. 39 et seq.; as to answers to interrogatories, see ibid. 78-79; and for cases see 18 Digest (Repl.) 102-103.

Case referred to:

(1) *Ross* v. *Gibbs*, *Gibbs* v. *Ross* (1869), L.R. 8 Eq. 522; 39 L.J.Ch. 61; 18 Digest (Repl.) 106, *907*.

Also referred to in argument:

Lafone v. *Falkland Islands Co. (No. 1)* (1857), 4 K. & J. 34; 27 L.J.Ch. 25; 30 L.T.O.S. 129; 6 W.R. 4; 70 E.R. 14; 18 Digest (Repl.) 108, *919*.

Hooper v. *Gumm* (1862), 2 John. & H. 602; 6 L.T. 891; 10 W.R. 644; 70 E.R. 1199; 18 Digest (Repl.) 102, *865*.

Chartered Bank of India v. *Rich* (1863), 4 B. & S. 73; 32 L.J.Q.B. 300; 8 L.T. 454; 11 W.R. 830; 120 E.R. 387; sub nom. *Bank of India, Australia and China* v. *Rich*, 2 New Rep. 316; 18 Digest (Repl.) 108, *920*.

Skinner v. *Great Northern Rail. Co.* (1874), L.R. 9 Exch. 298; 43 L.J.Ex. 150; 32 L.T. 233; 23 W.R. 7; 18 Digest (Repl.) 111, *941*.

Fenner v. *London and South Eastern Rail. Co.* (1872), L.R. 7 Q.B. 767; 41 L.J.Q.B. 313; 26 L.T. 971; 37 J.P. 182; 20 W.R. 830; 18 Digest (Repl.) 111, *940*.

Reid v. *Langlois* (1849), 1 Mac. & G. 627; 2 H. & Tw. 59; 19 L.J.Ch. 337; 14 Jur. 467; 41 E.R. 1408, L.C.; 18 Digest (Repl.) 102, *868*.

Bolton v. *Liverpool Corpn.* (1833), 1 My. & K. 88; You. 378, n.; Coop. temp. Brough. 19; 1 L.J.Ch. 166; 39 E.R. 614, L.C.; 18 Digest (Repl.) 121, *1040*.

Woolley v. *North London Rail. Co.* (1869), L.R. 4 C.P. 602; 38 L.J.C.P. 317; 20 L.T. 613; 17 W.R. 650, 797; 18 Digest (Repl.) 111, *937*.

Cossey v. *London, Brighton and South Coast Rail. Co.* (1870), L.R. 5 C.P. 146; 39 L.J.C.P. 174; 22 L.T. 19; 18 W.R. 493; 18 Digest (Repl.) 111, *938*.

English v. *Tottie* (1875), 1 Q.B.D. 141; 45 L.J.Q.B. 138; 33 L.T. 724; 24 W.R. 393; 3 Char. Pr. Cas. 198; 18 Digest (Repl.) 106, *909*.

M'Corquodale v. *Bell* (1876), 1 C.P.D. 471; 45 L.J.Q.B. 329; 35 L.T. 261; 24 W.R. 399; Bitt. Prac. Cas. 111; 2 Char. Cham. Cas. 48; 18 Digest (Repl.) 104, *883*.

Brown v. *Oakshott* (1849), 12 Beav. 252; 50 E.R. 1058; 18 Digest (Repl.) 119, *1021*.

Greenough v. *Gaskell* (1833), 1 My. & K. 98; Coop. temp. Brough. 96; 39 E.R. 618, L.C.; 18 Digest (Repl.) 95, *782*.

Appeal by the defendants from a decision of Sir George Jessel, M.R., ordering the production of a letter addressed to the defendants by the manager of their branch at Portland, Oregon, in North America, in answer to a telegram from the manager of the London establishment requiring full particulars of the transactions in respect of which the present suit, which was at that time threatened, had been instituted.

The plaintiffs, Messrs. Anderson & Co., merchants in London, had been engaged in certain shipping transactions with Messrs. Laidlaw, Gate & Co., commission merchants at Portland, Oregon, in respect of which a credit was granted, and bills had been drawn, and the proceeds lodged with the Bank of British Columbia. The proceeds were, it was alleged, appropriated by the bank in satisfaction of a balance claimed to be due to them from Laidlaw, Gate & Co., and in September, 1874, a member of the firm of Anderson & Co. called at the London branch of the bank, and stated generally the nature of the claim to such money which was asserted by his firm. Mr. Ransom, the manager of the bank in London, at one wrote to the manager of the Oregon branch to make inquiries, and on Nov. 7, in due course of post, received an answer, setting forth certain facts connected with the account. On Nov. 11 matters assumed a more serious aspect, and the solicitors of Anderson & Co. wrote, making a formal application for the sum of 21,194 dollars, and threatening litigation in default of compliance. Ransom, considering, from what passed at the interview, and the letter from the solicitors, that litigation was imminent, on Nov. 14, 1874, sent to Russell, the manager of the branch at Portland, the following telegram:

> "Claim referred to by letter of Sept. 18 made for 25,000 dollars. Send by letter fullest particulars whole transaction, especially cargo *Melancthon*, and copy of account."

Mr. Ransom on the same day, wrote to the solicitors of the bank stating that the directors would be glad to confer with them at their next meeting, to be held on the following Tuesday, and on that occasion the plaintiff's claim and threat of litigation were laid before the solicitors of the bank. In answer to his telegram the English manager received a letter, for which the defendants, by their affidavit as to documents, claimed privilege, on the ground that it was a communication in reference to the subject-matter of the litigation, made by a third person to enable the defendants to prepare their defence to the litigation then in anticipation. The matter having been adjourned into court for argument, Sir George Jessel, M.R., held that the letter was not a privileged communication, and ordered it to be produced. The defendants appealed.

Chitty, Q.C., and *Kekewich* for the defendants.
Graham Hastings, Q.C., and *Laing* for the plaintiffs.

JAMES, L.J.—Notwithstanding the length of the arguments addressed to us, and the number of cases cited, I think this is one of the clearest and plainest cases that have ever come before the court. According to all the practice laid down ever since I have known anything about the court, and everything I have read about the practice of the court, I think that this is a document which ought to be produced.

The old rule was, that every document in the possession of a man must be produced if it was material or relevant to the cause, unless it was covered by some established privilege. Then it was established that communications made by a man to his solicitor, or by the solicitor to the man, were privileged for certain reasons. It is supposed that that rule was entirely altered by an expression of Stuart, V.-C., in *Ross* v. *Gibbs* (1). I am quite sure that the Vice-Chancellor did not intend, and it was not competent for him, by a mere casual and hasty generalisation, not called for at all by the facts of the case, to alter the whole tradition and course of this court with respect to the production of documents. If the rule had been, as it is supposed to be laid down in that case, all that had been previously said in textbooks by learned authors, with regard to the origin of the principle and the justification of the privilege, all that has been said about its being confined to lawyers and not extending to doctors and priests, all that has been said by learned judges in

Chancery in the particular circumstances of the cases that have come before them to show how they might be brought within that general principle—the whole of that would be, to my mind, puerile nonsense if the law had been, as it is supposed to have been laid down by the Vice-Chancellor, that any communication made by a person with a view to litigation, whoever the person may be, was to be protected.

As to the cases at law, they seem to have been brought, now at least, very much into conformity with the principle of the cases in equity. I do not think it is necessary to review them to see whether, if the same state of circumstances came before this court, exactly the same decision would be arrived at; but looking at the dicta and the judgments cited, I think that they may possibly all be based upon this, which is an intelligible principle of production, namely, that you have no right to see your adversary's brief; and, as you have no right to see your adversary's brief, you have no right to see the materials, that which comes into existence simply as the materials, for your adversary's brief. But that seems to me to have no application whatever to a communication between a principal and his agent in the matter of the agency, giving information concerning the facts and circumstances of the very transaction which is the subject-matter of the litigation. If there is anything which ought to be produced, it seems to me it is that. That is exactly this case.

A man makes a claim against a bank in London; the bank in London, not having all the facts in their knowledge, send out a letter and send out a telegram to say to their agent who transacted the business: "Give us the fullest information that you have of all the facts and circumstances of the case—all about the shipping documents and everything of the kind connected with it." That was exactly what the agent ought to do. It was the duty of the man in the ordinary course of business to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent, and the principal ought to know what the agent knows. The knowledge of the agent in the matter of the agency is or ought to be the knowledge of the principal; and even if, after the bill had been filed, the defendant had said, when asked for discovery, "I do not know everything that is known by my agent in Oregon," this court would say, "That is no answer; it is your duty in making the discovery to use your best efforts bona fide to obtain all the information that your agent can give you, and whether it is before or after litigation it is your duty to write to him, if necessary, and get that information from him, and when you get it you must discover it so that we may know the exact facts and circumstances of the case."

That being so, it is impossible to say that the discovery of this particular document is on any other footing than that. The agent, as we must assume, has sent to the principal the account or statement of what took place between him and the other party. The other party says: "You have got that statement of facts, produce it, it is the best evidence of the facts within your knowledge." I am of opinion, therefore, upon the plainest principles on which discovery is given by this court, that this letter ought to be produced, and the appeal dismissed with costs.

MELLISH, L.J.—I am of the same opinion. The question as to the right to discovery depends upon R.S.C., 1875, Ord. 31, r. 11. That is really copied from the provisions contained in the Chancery Amendment Act, 1852, s. 18, and although it differs very little from a similar provision in the Common Law Procedure Act, 1854, yet, having regard to the general rule that the practice in equity is to prevail, there can be no doubt that the rules previously existing respecting discovery in the old Court of Chancery are now binding upon all the courts.

With regard to the present case, I do not at all wish to go beyond what is necessary for the purpose of deciding the particular question involved. That question is whether a letter by a mercantile agent to his principal, giving information respecting what the agent has actually done for and on account of the principal, is to be privileged because it is sent in compliance with the request of the principal after the principal has been threatened with litigation respecting the matter on which he requires information. I am clearly of opinion that such a communication is not privileged.

To be privileged it must come within one of two classes of privilege, either, first, the privilege which protects a man from producing confidential communications made between him and his solicitor (sent directly by himself to his solicitor, or by himself to an agent who is to communicate them to the solicitor), or, secondly, the privilege which entitles him to refuse to communicate evidence which he has obtained for the purpose of litigation. In declaring to what extent the latter privilege goes, some very nice questions may arise, particularly when the evidence is not obtained for the direct purpose of being given in the action, but is obtained before the action is commenced, or before the defence is relied on, in order that the party who seeks it may obtain information for the purpose of determining whether he will commence or defend an action. If the information is really and simply information obtained from a person who is to be a witness, I do not think it is necessary to give any opinion on the present occasion whether that would be privileged or not. Supposing a collision has taken place either at sea or on land, and a man before he determines whether he will bring an action or defend an action, writes to a person and says, "Get me an account from every one of the passengers and crew respecting this transaction; write it down as accurately as you can and send it up to me," it might be that that would be privileged, although he sent and asked for it before he determined whether he would bring an action or defend an action, just as much as it would be if it was sent after the action was commenced, and he wished to obtain information as to what evidence such persons would probably give. He may say that if the other person wants the information he may go to the same persons and ask them himself what evidence they will give, and if they will only inform one side what the evidence may be and not the other, that may be the misfortune of the other side.

As a general rule, no doubt, a man is not bound to disclose such information. But I cannot think that that is the principle which ought to be held to apply to information which a principal asks his agent to give respecting the matters which the agent has done for and on account of the principal. That is information respecting matters which, in point of law, are the acts of the principal himself, matters as to which the knowledge of the agent is the knowledge of the principal. In point of law the principal knows the facts, or is to be deemed to know the facts, before he has himself personally got the information. I cannot but think that, as you are entitled to ask the principal, by an interrogatory, what he knows respecting those facts, you must necessarily be entitled to the information which his agent has sent respecting them. As I have observed during the course of the argument, I cannot conceive that there is any distinction between written and verbal communications by an agent to his principal. To say that the defendant in this case is not bound to produce this letter, would, as it seems to me, be the same as saying that if you asked the principal a question respecting anything which had happened in his own office concerning a matter of business not actually transacted by himself, he could reply, "I do not know personally how this was done, the only information which I have respecting it is the information I have obtained from my clerks and servants, and they gave me that information in consequence of a question which I put to them after I was threatened with an action." You cannot, for a moment, suppose that such an answer would excuse

A a man from giving the discovery sought for. It appears to me that, even if we had a discretion to say what was just and right, it would be a decision very detrimental to the ordinary purposes of justice to say that such communications as this are privileged. Practically, we should be depriving a man of the benefit of discovery in a very great number of cases.

B So far from the fact that the information comes from the other side of the world being a reason why it should be privileged, that is really a reason making it additionally important that it should be discovered. Anybody who is at all aware of the practice at common law in mercantile cases must know the extraordinary inconvenience, delay, and expense which results from commissions having been sent abroad to prove facts, and obtain evidence respecting which there is no real doubt or dispute whatever; and the necessity for sending out C such commissions would be enormously increased if we were to hold that principals are not to be bound to discover the information which they have received from their agents. If both parties are bound to discover information so received, then, in all probability, in a great many cases, the facts would be perfectly ascertained. The question before us is a strong D instance of this. Here is a transaction which took place with the Bank of British Columbia, by their agent out at Oregon. Of course, the person, whoever he may be, who may be made a defendant for the purpose of discovery, will not know of his own knowledge what took place out in Oregon; and if it is necessary to wait until somebody goes and examines the books out at Oregon, nobody can tell what the expense and delay may be. If the matter E had happened in London, or the man who actually knew the facts, and who was the person to actually give the discovery, was here, there would not be the slightest doubt but that he would be bound to make the discovery and produce the books Why should there be a less right to discovery because this took place at Oregon, and because the information is contained in a letter sent by an agent in Oregon to his principal in this country?

F I am, therefore, clearly of opinion, in accordance with the practice that previously prevailed in courts of equity, and I should add in accordance with what I think is just, right and expedient, if we simply take the rule as we find it laid down in the order and interpret it, that this discovery ought to be made.

G

BAGGALLAY, J.A.—I am of the same opinion. The bill in this case asserts a claim based upon a transfer by the defendants, the banking company, at their branch in Oregon, of a balance from one account to another. Whether that claim is well or ill-founded depends upon the particular circumstances of the case, all which circumstances are within the knowledge of the manager H of the banking corporation in Oregon. Some ten months before the bill was filed, and at a time when it would appear from the affidavits that litigation was very probable in respect of this matter, a telegram was sent from the London bank to the Oregon manager requesting him to send the fullest particulars of the transaction. If the defendants in this case, instead of being a banking company had been an individual banker, whose business either in London I or Oregon had been carried on under his own immediate direction, it could not have been for one moment contended that he would not be bound to give the fullest particulars as to the circumstances under which this transfer from one account to the other took place. It would be no answer for him to say, "I did not attend to this matter personally. I sat upstairs, and the business was carried on by my clerks here or by my clerks in Oregon." It would be no answer to say that. He would be bound, for the purpose of making the discovery, to ascertain from his clerks or manager, all the particulars of the case.

Is there any difference between that case and this? You have the defendants who are a corporation instead of a defendant who is an individual. The banking corporation can only answer through their manager or through their official, and they are bound in some form or other, either by answer from their manager or by answer put in under their common seal, to give the fullest and most complete information as to the whole matter. I can understand no possible ground, consistent with the recognised principles on which discovery is given in suits of equity, upon which the information afforded by this letter can be withheld. It might be very different indeed if the letter had contained certain matters not within the knowledge of the party writing the letter, or not within his means of information in the ordinary discharge of his duties. It might possibly be that there might be some information contained in the letter which might be the subject of privilege. But that claim is not made here. There is no claim made of special privilege as regards the contents of the letter, but it is simply a claim of privilege on the ground that it was written in reply to a telegram asking for particulars.

Appeal dismissed

Solicitors: *Parker & Clarke; Freshfields & Williams.*

[*Reported by* E. Stewart Roche, Esq., *Barrister-at-Law.*]

SANDYS *v.* SMALL

[Queen's Bench Division (Cockburn, C.J., and Mellor, J.), June 26, 1878]

[Reported 3 Q.B.D. 449; 47 L.J.M.C. 115; 39 L.T. 118; 42 J.P. 550; 26 W.R. 814]

Food and Drugs—Sale to prejudice of purchaser—Presumption in respect of altered article—Defence—Knowledge of purchaser—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 6, *s.* 8.

By the Sale of Food and Drugs Act, 1875, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser, under a penalty . . . ." By s. 8: "Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed."

Held: (i) s. 6 of the Act applied to cases where a seller professed to sell to the purchaser an article as being of a certain denomination, whereas the article had been altered by the admixture of some ingredient; when the article was so altered, this must be considered to have been done "to the prejudice of the purchaser," unless it was sufficiently brought to his knowledge, but if the alteration was brought to the purchaser's knowledge and he chose to purchase the article nothwithstanding, it could never be intended that such a transaction should be interfered with; if the seller chose to sell an article as of a certain denomination and the article was mixed with foreign ingredients, it lay on him to show that the purchaser knew what he was purchasing: (ii) s. 8 of the Act provided a mode by which the seller might insure himself against all possibility of being charged with an offence under the Act; that section did not mean that the

affixing of a label was to be the only mode of bringing knowledge home to the purchaser, but if he used some other means (with regard to which he would be subject to be met by counter-proof), it was incumbent on him to prove that the purchaser had notice of what he was purchasing.

Notes. The Sale of Food and Drugs Act, 1875, has been repealed. For s. 6 and s. 8 of that Act, see now s. 2 and s. 3 of the Food and Drugs Act, 1955.

Followed: *Gage* v. *Elsey* (1883), 10 Q.B.D. 518. Referred to: *Hoyle* v. *Hitchman* (1879), 4 Q.B.D. 233; *R.* v. *Denis*, [1894] 2 Q.B. 458; *Fowle* v. *Fowle* (1896), 75 L.T. 514; *Palmer* v. *Tyler* (1897), 61 J.P. 389; *Smith* v. *Wisden* (1901), 66 J.P. 150; *Pearks, Gunston and Tee, Ltd.* v. *Houghton*, [1902] 1 K.B. 889; *Dawes* v. *Wilkinson*, [1907] 1 K.B. 278; *Williams* v. *Freind*, [1912] 2 K.B. 471; *Batchelour* v. *Gee*, [1914] 3 K.B. 242; *Clifford* v. *Battley*, [1915] 1 K.B. 531; *Preston* v. *Grant* (1924), 41 T.L.R. 132; *Square* v. *Model Farm Dairies* (*Bournemouth*), *Ltd.*, [1939] 1 All E.R. 259.

As to the sale of an article not of the nature demanded, see 17 HALSBURY'S LAWS (3rd Edn.) 484 et seq.; and for cases see 25 DIGEST (Repl.) 83 et seq. For the Food and Drugs Act, 1955, s. 2 and s. 3, see 35 HALSBURY'S STATUTES (2nd Edn.) 97, 99.

Case Stated by justices.

The appellant, an inspector of weights and measures of the county of Derby, laid an information against the respondent for an offence under s. 6 of the Sale of Food and Drugs Act, 1875. At the hearing it was proved or admitted that the respondent was a licensed victualler at Langley Mill, in the township of Heanor, in the county of Derby. The appellant and one Samuel Slack, his assistant, were together in the performance of their duties under the Act near the house of the respondent on Mar. 13, 1878. Slack, acting under the appellant's directions, went into the house and stood at the bar window, and there asked the respondent's wife for half a pint of whiskey. The respondent's wife gave him half a pint of whiskey, for which he paid, placing it in a bottle which was produced by Slack, without making any observation as to its quality or putting a label on the bottle. It was admitted by the appellant that, on subsequently going into the house, he saw posted in the smoke-room a notice as follows: "All spirits sold here are mixed—38 & 39 Vict., c. 63, ss. 8 and 9." Slack denied seeing any notice at the moment when he bought the whiskey, although it was proved that a similar notice was posted in full view of persons purchasing at the bar window. It was proved on behalf of the respondent that the notice referred to was printed in large capital letters, and was placed in a conspicuous position in the smoke-room; and it was also proved that similar notices were conspicuously placed in the bar and in every other room in the house ordinarily used by the respondent for the purpose of his business. The whiskey, when analysed, proved to be mixed with water, and thirty degrees under proof.

It was contended, on behalf of the respondent that the posting of the notice referred to in the smoke-room and bar, and within view of persons purchasing at the bar window, was equivalent to a declaration on the part of the respondent to the purchaser that the whiskey sold was not of the nature, substance, and quality demanded by the purchaser. The appellant contended that the respondent should have placed a label on the bottle in which the whiskey was put, in accordance with s. 8 of the Act.

The justices dismissed the information, and the appellant now appealed. The question for the opinion of the court was, whether the posting of the notice as aforesaid was equivalent to a declaration by the respondent that the whiskey sold was not of the nature, substance, and quality of the article demanded by the purchaser, and relieved him from the penalty.

Wills, Q.C., for the appellant.
Mellor, Q.C. for the respondent.

COCKBURN, C.J.—I am of opinion that our judgment must be for the respondent. I should be very sorry to diminish the efficacy of a very useful Act of Parliament, the Sale of Food and Drugs Act, 1875, which was intended to protect the public from frauds committed by the sellers of the articles to which the Act relates; but we ought, if possible, to construe the words of the Act so as not to interfere with due freedom of dealing between the seller and the purchaser, and not unfairly to prejudice either party. I think that we should be doing this if we held that its provisions apply to cases such as the present, where both parties perfectly well knew what they are dealing with. The provisions of the Act were intended to apply to adulterations of a clandestine character, which operate to the prejudice of the purchaser.

The provisions of s. 6 seem to me to apply to cases where a seller professes to sell to the purchaser an article as being of a certain denomination, whereas the article has been altered by an admixture of some other ingredient, and it seems that, when the article is so altered, this must be considered to have been done "to the prejudice of the purchaser," unless it is duly and sufficiently brought to his knowledge; but if the alteration of the article, as of spirits by the admixture of water, is brought to the knowledge of the purchaser and he chooses to purchase it notwithstanding, it can never be intended that such a transaction should be interfered with. On the other hand, however, if the seller chooses to sell an article as of a certain denomination, and the article is really mixed with foreign ingredients, it lies on him to show that the purchaser knew what he was purchasing.

Section 8 of the Act provides a mode by which the seller may insure himself protection against the possibility of the enactment operating to his prejudice. If he delivers the label as provided by that section, he protects himself against all possibility of being charged with an offence under the Act. If he does not, then I think it incumbent on him to prove by some other means (with regard to which he will be subject to be met by counter-proof) that the purchaser had notice what he was purchasing. If the seller can show that he had such notice, then I think that no offence will be committed, because the sale will not be "to the prejudice of the purchaser." I do not think that the section means that the affixing of the label is to be the only mode of bringing knowledge home to the purchaser. I think, for instance, if a man put up in a conspicuous position a notice in large letters, as was done here, and it is clear that it must have come under the observation of the customer, that s. 6 would not apply. It has been suggested that it was not clear in the present case that the purchaser had seen the notice when he had purchased the whiskey, and that the Case should go back that the facts may be stated more distinctly as to this. It is found that notices were posted up in all the rooms of the house in conspicuous places, so that customers could not fail to see them.

We are clear that, under the circumstances, there was no real offence against the provisions of s. 6, and, that being so, it seems to us that we should deal with the Case as it stands, and that we ought not to send the Case back for the purpose of giving an opportunity of proving that the particular individual who bought the whiskey for the purpose of this prosecution had not seen the notice. On the Case as it stands, we think that our judgment must be for the respondent.

MELLOR, J.—I am of the same opinion. The statement of the facts is not very distinct whether the purchaser had an intimation by means of the notice that he was purchasing a mixture. It is left to us to draw the inference whether that was so or not, and, from the facts stated, I should rather infer that, though the purchaser may not have seen the notice at the exact moment when he asked for the whiskey, yet that he might well have seen it directly afterwards, and before the transaction was completed by the payment of the money and his

receipt of the article. With regard to the construction of the Sale of Food and Drugs Act, 1875, I agree with my Lord that no offence was committed under s. 6.

Appeal dismissed.

Solicitors: *Greenfield; Warriner.*

[*Reported by* M. W. MCKELLAR, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* BOWERS

[COURT OF APPEAL (James and Mellish, L.JJ., Baggallay, J.A., and Grove, J.), February 14, 15, 1876]

[Reported 1 Q.B.D. 291; 46 L.J.Q.B. 39; 34 L.T. 938; 24 W.R. 499]

Contract—Illegality—Fraudulent assignment of goods—Intention to defraud creditors—Right of assignor to recover goods.

The plaintiff, in order to carry out a scheme for defrauding his creditors, assigned and delivered goods to A., fictitious bills being accepted or drawn by A. in the plaintiff's favour as the pretended consideration for the assignment. The defendant, one of the plaintiff's creditors, was a party to the scheme. Some months after A. had removed the goods from the plaintiff's premises and after the failure to effect a compromise with the plaintiff's creditors, A. executed a bill of sale of the goods to the defendant for the alleged purpose of securing the debt due from the plaintiff to the defendant. The plaintiff had no knowledge of this and was not a party to it, and brought an action against the defendant in detinue to recover possession of the goods.

Held: the plaintiff, not being compelled to rely on the illegal transaction, was entitled to repudiate it and recover the goods from A.

Notes. Distinguished: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.Ch. 68. Doubted: *Kearley* v. *Thomson and Another*, [1886-90] All E.R. Rep. 1055. Considered: *Hermann* v. *Charlesworth* (1905), 74 L.J.K.B. 742. Applied: *Petherpernal Chetty* v. *Muniandy Servai* (1908), 24 T.L.R. 462. Considered: *Gordon* v. *Metropolitan Police Chief Comrs.*, [1908-10] All E.R. Rep. 192. Distinguished: *Bigos* v. *Bousted*, [1951] 1 All E.R. 92. Referred to: *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548; *Alexander* v. *Rayson*, [1935] All E.R. Rep. 185; *Berg* v. *Sadler and Moore*, [1937] 1 All E.R. 637; *Harry Parker, Ltd.* v. *Mason*, [1940] 4 All E.R. 199; *Kiriri Cotton Co., Ltd.* v. *Dewani*, [1960] 1 All E.R. 177.

As to incidents of illegal contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 147 et seq.; and for cases see 12 DIGEST (Repl.) 310 et seq.

Case referred to:

(1) *Bowes* v. *Foster* (1858), 2 H. & N. 779; 27 L.J.Ex. 262; 30 L.T.O.S. 306; 4 Jur.N.S. 95; 6 W.R. 257; 157 E.R. 322; 12 Digest (Repl.) 559, *4238*.

Also referred to in argument:

Simpson v. *Bloss* (1816), 7 Taunt. 246; 2 Marsh. 542; 129 E.R. 99; 12 Digest (Repl.) 311, *2399*.

Symes v. *Hughes* (1870), L.R. 9 Eq. 475; 39 L.J.Ch. 304; 22 L.T. 462; 12 Digest (Repl.) 314, *2423*.

Holman v. *Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, *2404*.

Pickard v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, *1103.*

Alner v. *George* (1808), 1 Camp. 392, N.P.; 12 Digest (Repl.) 559, *4231.*

Fivaz v. *Nicholls* (1846), 2 C.B. 501; 15 L.J.C.P. 125; 6 L.T.O.S. 319; 135 E.R. 1042; sub nom. *Finan* v. *Nicholls*, 10 Jur. 50; 12 Digest (Repl.) 323, *2494.*

Appeal by the defendant from a decision of the Queen's Bench (COCKBURN, C.J., MELLOR and QUAIN, JJ.), discharging a rule obtained by the defendant for an order that judgment be entered in his favour.

The plaintiff was a machinist, carrying on business at Banton, near Stafford, and in 1868 was possessed of goods consisting of a portable steam engine and threshing machine and other articles. In the latter part of 1868, the plaintiff went to America, leaving his wife and son in possession of his stock-in-trade, and they carried on the business in his absence. He returned from America in 1869, and then learned that his son had incurred debts in respect of which he feared that claims would be made on him, as having been incurred on his account. He thereupon consulted one Alcock, his nephew, who advised that all the plaintiff's goods should be assigned to and delivered over to him, and that fictitious bills or notes should be accepted or drawn by him (Alcock) in the plaintiff's favour as the pretended consideration for the assignment. The plaintiff consented to this, and the assignment having accordingly been made, Alcock removed the goods to an inn yard at Stafford. The defendant, to whom the plaintiff owed £100, was taken into consultation by Alcock and the plaintiff, and was a party to the scheme for defrauding the creditors. Several meetings of the plaintiff's creditors were held, but any attempt to effect a compromise with the creditors failed. Some months after the goods had been removed to Stafford, Alcock executed a bill of sale of them to the defendant for the purpose, as was alleged, of securing the defendant's debt, but it did not appear that the plaintiff sanctioned, or had any knowledge of, the assignment, and, seeing that nothing was being done with respect to his creditors, he afterwards demanded the goods back from Alcock and the defendant. They refused to return the goods, and the defendant put the goods up to auction and sold them. They were bought much under their value by one Locket, and immediately after the sale were removed to the defendant's premises. The plaintiff sued the defendant in detinue to recover possession of the goods. The action was tried before COCKBURN, C.J., at the Chester Summer Assizes, 1874, and a verdict was found for the plaintiff, leave being reserved to enter a verdict for the defendant or a nonsuit. A rule was accordingly obtained by the defendant on the ground that the plaintiff could not, by the allegation of his own fraud, recover the goods from the defendant.

B. T. Williams, Q.C. (with him *Bigham*), for the defendant.

McIntyre, Q.C. (with him *Mellor, Q.C.*), for the plaintiff.

JAMES, L.J.—The only question is whether the rule granted by the Court of Queen's Bench ought to be made absolute or not. The rule was granted on a very short and simple point, namely, whether the plaintiff, in order to recover his goods from the defendant, was obliged to rely on the allegation of his own fraud as a material part of his case. The question is one of the demerit of the plaintiff, and we have not to inquire into the merit or demerit of the defendant. The judgment in the court below appears to have gone on the ground that, the assignment from the plaintiff to Alcock having been fraudulent, and fraudulent to the knowledge of the defendant who was a party to the scheme, neither Alcock nor the defendant had any legal possession in reference to these goods under the assignments from the plaintiff to Alcock and Alcock to the defendant. It appears to me that all that the plaintiff need say is, "These are my goods. I have never parted with the

possession of them. They are still my goods"; but the defendant, on the other hand, has to make out his title through the fraudulent possession given to Alcock. Under those circumstances, I should have said, in the absence of authority, that the plaintiff was not obliged to rely on his own fraud in order to recover possession of his goods. But *Bowes* v. *Foster* (1) appears to be exactly on all fours with the present case. I think that the judgment of the court below should be affirmed.

MELLISH, L.J.—I am of the same opinion. The only question open on this rule is whether, if the plaintiff has never really intended to part with the possession of his goods, he is estopped from recovering them from the defendant, because he has to set up the illegal transaction to which he was a party. That is the point raised by the rule, and it is a point of law only. It seems to me that the defendant is in precisely the same position with respect to possession of the goods as Alcock, because unless the plaintiff assented to the assignment from Alcock to the defendant for the purpose of paying the plaintiff's debt to the defendant, that assignment becomes immaterial in considering the plaintiff's position with reference to the goods. In my opinion, if the defendant had been a bona fide holder of the goods for valuable consideration, he could have held possession of them as against the plaintiff, because he could then hold out Alcock's title as against the title of the plaintiff. But it seems to me that the plaintiff, in order to recover his goods from the defendant, does not require any aid from the illegal transaction. He is not seeking to further that transaction, but the contrary. If the scheme had been carried out, and a composition of 1s. in the pound had been made, the plaintiff could not, in my opinion, recover his goods; but the scheme has not been carried out, and the effect has been to put all the parties in the same position as they were before. If money is paid, or goods are delivered, for an illegal purpose, and that purpose is afterwards abandoned and repudiated, I think that the person paying the money or delivering the goods may recover; but if he waits until the illegal transaction is carried out, or seeks to enforce it, he cannot maintain his action. I think that the Queen's Bench properly held that the plaintiff does not require the aid of the illegal transaction in order to enable him to get back the goods.

BAGGALLAY, J.A.—I am of the same opinion, for the reasons assigned by MELLISH, L.J.

GROVE, J.—I am of the same opinion. I should have hesitated if the notes of the Chief Justice had not been read, and if I had not come to the conclusion that the expression in the terms of the rule that "the plaintiff could not, by the allegation of his own fraud, get back his goods from the defendant," is confined to the sham assignment from the plaintiff to Alcock. If the jury had found that the plaintiff knew of, and connived at, the assignment from Alcock to the defendant, who was a creditor, it would require some argument to convince me that the plaintiff need not allege a fraudulent transaction in order to recover his goods, but the jury did not find that the plaintiff knew of it, and it seems to have been assumed in the court below, and at the trial, that he did not sanction the assignment from Alcock to the defendant. Under these circumstances, I do not think that the plaintiff need rely on the illegal transaction in order to recover the goods.

Appeal dismissed.

Solicitors: *Milne, Riddell & Mellor*, for *Greatorex*, Stafford; *Chester, Urquhart & Co.*, for *Hodgkinson*, Stone.

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

A

WOOD *v.* WOAD AND OTHERS

[Court of Exchequer (Kelly, C.B., Amphlett, Cleasby and Pollock, BB.), May 27, 1874]

B

[Reported L.R. 9 Exch. 190; 43 L.J.Ex. 153; 30 L.T. 815; 22 W.R. 709; 2 Asp.M.L.C. 289]

Domestic Tribunal—Conduct of hearing—Observation of principles of natural justice—Wrongful expulsion from association—Avoidance of order—Damages.

C

A domestic tribunal established by an association of persons under whose rules the tribunal has power to expel a member of the association on grounds specified in the rules must, before hearing a complaint against a member and ordering his expulsion, give him notice that they are about to consider the complaint and so enable him to appear before the tribunal and defend himself against any charge which is made against him. If the tribunal fails to follow this procedure and makes an order for expulsion, their act is unlawful and a nullity. Accordingly (per Kelly, C.B., Pollock, B., and Amphlett, B., Cleasby, B., dissenting) in such a case the member proceeded against is not entitled to damages for the wrongful expulsion for whatever rights he possessed before the purported expulsion he still possesses and so he has suffered no damage as the result of the order.

D

E

Notes. Distinguished: *Cooper* v. *Page* (1876), 34 L.T. 90; *Russell* v. *Russell* (1880), 14 Ch.D. 471. Explained: *James* v. *Chartered Accountants' Institute* (1907), 98 L.T. 225. Considered: *Green* v. *Howell*, [1910] 1 Ch. 495; *Cassel* v. *Inglis*, [1916] 2 Ch. 211; *R.* v. *Housing Appeal Tribunal*, [1920] 3 K.B. 334. Approved: *Ridge* v. *Baldwin*, [1963] 2 All E.R. 66. Referred to: *Steuart* v. *Gladstone* (1879), 10 Ch.D. 626; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal*, [1906] A.C. 535; *D'Arcy* v. *Adamson* (1913), 29 T.L.R. 367; *Weinburger* v. *Inglis*, [1919] A.C. 606; *R.* v. *Leman Street Police Station Inspector and Secretary of State for Home Affairs, Ex parte Venicoff* (1920), 89 L.J.Q.B. 1200; *Russell* v. *Duke of Norfolk*, [1949] 1 All E.R. 109; *Lee* v. *Showman's Guild of Great Britain*, [1951] 1 All E.R. 1175; *Bonsor* v. *Musicians' Union*, [1954] 1 All E.R. 882.

F

G

Cases referred to:

(1) *Copin* v. *Adamson* (1874), L.R. 9 Exch. 345; 43 L.J.Ex. 161; 31 L.T. 242; 22 W.R. 658; affirmed (1875), 1 Ex.D. 17; 45 L.J.Q.B. 15; 33 L.T. 560; 24 W.R. 85, C.A.; 11 Digest (Repl.) 509, *1246*.

(2) *Re Hammersmith Rent-Charge* (1849), 4 Exch. 87; 19 L.J.Ex. 66; 14 L.T.O.S. 85; 19 Digest (Repl.) 528, *3655*.

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(3) *Capel* v. *Child* (1832), 2 Cr. & J. 558; 2 Tyr. 689; 1 L.J.Ex. 205; 149 E.R. 235; 19 Digest (Repl.) 447, *2644*.

(4) *Blissett* v. *Daniel* (1853), 10 Hare, 493; 1 Eq. Rep. 484; 18 Jur. 122; 1 W.R. 529; 68 E.R. 1022; 36 Digest (Repl.) 609, *1703*.

(5) *Beaurain* v. *Scott* (1812), 3 Camp. 388, N.P.; 22 Digest (Repl.) 137, *1212*.

(6) *Batterbury* v. *Vyse* (1863), 2 H. & C. 42; 2 New Rep. 79; 32 L.J.Ex. 177; 8 L.T. 283; 9 Jur.N.S. 754; 11 W.R. 891; 159 E.R. 19; 7 Digest (Repl.) 373, *139*.

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Also referred to in argument:

Re London Marine Insurance Association, Smith's Case (1869), 4 Ch. App. 611; 38 L.J.Ch. 681; 21 L.T. 97; 33 J.P. 643; 17 W.R. 941; 3 Mar. L.C. 280, L.JJ.; 10 Digest (Repl.) 1162, *9091*.

Fisher v. *Liverpool Marine Insurance Co., Ltd.* (1873), L.R. 8 Q.B. 469; 42 L.J.Q.B. 224; 28 L.T. 867; 22 W.R. 13; 2 Asp.M.L.C. 44; affirmed (1874),

L.R. 9 Q.B. 418; 43 L.J.Q.B. 114; 30 L.T. 501; 22 W.R. 951; 2 Asp.M.L.C. 254, Ex. Ch.; 29 Digest (Repl.) 86, *326.*

Gill v. *Continental Gas Co.* (1872), L.R. 7 Exch. 332; 41 L.J.Ex. 176; 27 L.T. 424; 21 W.R. 111; 21 Digest (Repl.) 758, *2429.*

Rooke's Case (1598), 5 Co. Rep. 99, b.; 77 E.R. 209; 41 Digest 62, *447.*

Keighley's Case (1609), 10 Co. Rep. 139a; 77 E.R. 1136; 36 Digest (Repl.) 164, *869.*

R. v. *Cambridge University, Bentley's Case* (1723), Fortes. Rep. 202; 2 Ld. Raym. 1334; 8 Mod. Rep. 148; 1 Stra. 557; 92 E.R. 818; 19 Digest (Repl.) 654, *316.*

Ex parte Ramshay (1852), 18 Q.B. 173; Cox, M. & H. 589; 21 L.J.Q.B. 238; 18 L.T.O.S. 273; 16 J.P. 135; 16 Jur. 684; 118 E.R. 65; 13 Digest (Repl.) 371, *24.*

Dixon v. *Fawcus* (1861), 3 E. & E. 537; 30 L.J.Q.B. 137; 3 L.T. 693; 7 Jur.N.S. 895; 9 W.R. 414; 121 E.R. 544; 17 Digest (Repl.) 138, *418.*

Ashby v. *White* (1703), 2 Ld. Raym. 938; Holt, K.B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E.R. 126; on appeal (1704), 1 Bro. Parl. Cas. 62, H.L.; 17 Digest (Repl.) 79, *22.*

Innes v. *Wylie* (1844), 1 Car. & Kir. 257; 8 J.P. 280, N.P.; 8 Digest (Repl.) 655, *33.*

Hayman v. *Rugby School (Governors)* (1874), L.R. 18 Eq. 28; 43 L.J.Ch. 834; 30 L.T. 217; 22 W.R. 587; 19 Digest (Repl.) 659, *346.*

Rule Nisi to set aside a nonsuit and for a new trial in an action brought by the plaintiff against the defendants as the committee of a mutual marine insurance association, for the alleged wrongful, collusive, and improper expulsion of the plaintiff as a member from the said association.

By his declaration the plaintiff charged that he was a member of a mutual marine insurance association called the Goole Marine Insurance Society, which had been formed and established for the purpose of mutually insuring and indemnifying the several members thereof against losses and damages by the perils of the seas, rivers, navigations, and waters, enemies, pirates, jettison, and fire happening to or done by their respective vessels and parts of vessels, entered and insured by them on the books of the society, upon deposit with the treasurer of the society of a sum equal to £8 per cent on the amount of the sum for which such vessels should be insured, and upon other terms contained in the rules of the society. The plaintiff, as such member as aforesaid, and having deposited with the treasurer of the society such sum as aforesaid, had a ship or ships entered in the books of the society, upon and in accordance with the terms aforesaid. The defendants were the committee of the society. One of the rules of the society was as follows:

"That the management of the affairs of this society shall be at all times hereafter conducted by a committee of not less than nine persons (either members of the society or not) one of which shall be appointed the president of the society; that such committee shall have the entire control of the funds, affairs, and concerns of the society, and shall determine upon the admission, rejection, and exclusion of any vessel insured or proposed to be insured by it, and their determination shall be final and binding on all parties, unless where they afterwards see cause to alter, and do alter the same; provided that no member of the committee shall act as such in the settlement of his own loss; that the ordinary meetings of the committee shall be held in the first week of every month, at Goole, aforesaid, on such day and time as the president for the time being shall determine; that a majority of the committee present at any meeting shall have full power to act, provided such majority do not consist of less than three in number."

By r. 47:

"That if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have power to exclude such member, by directing the secretary to give such member notice in writing that the committee have excluded such member from this society, and after the giving of such notice such member shall be excluded, and have no claim, or be responsible for or in respect of any loss or damage happening after such notice."

The plaintiff pleaded that, as a member of the society, he was, in accordance with the rules, entitled to receive, and, but for the grievance hereinafter mentioned, would have received, from the funds of the society an indemnity for any loss or damage to his ship or ships entered as aforesaid, by the perils of the seas, rivers, navigations, and waters, enemies, pirates, jettisons, during his membership of the said society, yet the defendants, wrongfully, collusively, and improperly had contrived to deprive the plaintiff of the benefit of such indemnity, and did wrongfully, collusively, and improperly expel the plaintiff from the said society, on the alleged ground that his conduct was suspicious, or that he was for some other reason unworthy of remaining in the said society, without any just, reasonable, or probable cause whatsoever for such expulsion, without having given the plaintiff any notice that his conduct was to be investigated and adjudicated upon by the said committee, and without giving the plaintiff, or any person or persons on his behalf any opportunity whatsoever of being heard before them, and without, in fact, hearing the plaintiff or any person or persons on his behalf in defence and vindication of his conduct as a member of the society, with reference to the said ground of expulsion. The defendants put in a demurrer and joinder in demurrer. Issue was joined on all the pleas, and at the trial of the action, which took place in 1873 before POLLOCK, B., and a special jury, at the Leeds Summer Assizes, a nonsuit was entered by direction of the learned judge. A rule was subsequently obtained on behalf of the plaintiffs to set that nonsuit aside, and for a new trial, on the ground that the action was maintainable on proof of the facts stated in the declaration.

Waddy, *Q.C.*, and *S. Tennant*, for the defendants, supported the demurrer to the declaration.

Seymour, *Q.C.*, and *Lewers* for the plaintiff.

KELLY, C.B.—This case involves some very important considerations, and, but that from two or three different points of view we have all come to the same conclusion, namely, that the action is not maintainable, I should have desired time before I had expressly delivered the grounds upon which, in my opinion, the defendants are entitled to the judgment of the court.

The facts, as they appear upon the record, are that the plaintiff was a member of an association or co-partnership, instituted and carried on by the co-partners for the purpose of enabling each and every of them to effect insurances with the society upon ships of which they might be the owners. Among the rules of the association are those which are set forth upon the record, viz.

". . . that a majority of the committee present at any meeting shall have full power to act, provided such majority do not consist of less than three in number";

and

"That if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have power to exclude such member,

A by directing the secretary to give such member notice in writing that the committee have excluded such member from this society, and after the giving of such notice such member shall be excluded . . ."

I must not be understood to say that a body constituted like this committee is bound to allege or state any reason for any decision they may pronounce, but B it appears that, without anything on the record to show why or on what ground they have so acted, a committee of the necessary number have held a meeting, and have come to a decision deeming the conduct of the plaintiff suspicious, or deeming him unworthy of being in the society, and have accordingly given a notice to the plaintiff that they have met, and that by reason of his conduct having been deemed suspicious, he was unworthy to remain a member and C was to consider himself excluded. They did, accordingly, exclude him from the society, and gave him notice that the society would be responsible for no claim in respect of any loss or damage arising therefrom. He brings this action, treating the decision or notice, or the act of expulsion in question, of which he complains, as a ground of action, and alleging that he has sustained D damage for which he claims compensation in the count now before us. To that count the defendants demurred, and the question is, whether the action is maintainable. I am of opinion that it is not; but not on the ground that the act done by the committee is justifiable in law, it being expressly alleged on the record that it was done, and the plaintiff expelled, without his having had an opportunity of being heard in his own defence, and without his having had E notice so that he might have the means, if such existed, of showing that there was no ground for any suspicion against him, and that his conduct had not been, in the due and proper sense of the word, "suspicious," or, still less, such as to make him unworthy of remaining in the society. On these grounds it is that this is treated as an actionable wrong, for which damages are claimed.

I am of opinion that the committee, before they were justified in giving F notice to the plaintiff of his expulsion from the society, and before they came to the decision that his conduct had been "suspicious," or such as to render him unworthy of remaining in the society, were bound to give him notice that they were about to consider that question, so that he might have an opportunity of defending himself against any charge or suspicion which might be made or entertained against him. If the case rested there, I should have been of opinion G that this was a wrongful act, and, if it had been such as, in contemplation of law, to have occasioned damage to the plaintiff, that the action was maintainable, and that he might have recovered damages; but when we look at the nature of the act of expulsion, and see that its effect, if it had any effect at all, was to cause him to cease to be a member of the co-partnership, and that the only damage which he could possibly have sustained from the committee having H deemed his conduct suspicious and such as to render him unworthy of remaining in the society, would be that he was deprived of some right, privilege, or benefit to which he would otherwise, under the rules, have been entitled, the question arises whether, by reason of this notice of expulsion, he ceased to be a partner. If he thereby ceased to be a partner then, inasmuch as he had paid a deposit of £5, and had caused the name of a ship belonging to him to be entered in a I book, and would have been entitled to proceed to effect an insurance thereon at any time he thought proper, he would have been deprived of that advantage, and would have sustained damage. But I am of opinion that the act itself being unjustifiable and unlawful, for the reason that I have already stated, was void, and that consequently he did not cease to be a partner, but that he remained, and is at this moment, a partner and entitled to enforce any rights that he may possess as such.

The great question in the case then is whether the act was void. It has been argued with great force, and the argument is well entitled to our serious

attention, that these rules are absolutely unconditional in their terms. I quite agree that if the committee exercised the power they possessed under these rules, honestly, properly, lawfully, and in good faith, their decision could not be questioned. Their decision may have been wrong, and unfounded, and without sufficient reason, or without any reason at all; but I am aware of no power in the law to call in question or interfere with the honest and bona fide decision pronounced under rules so expressed by a committee existing, like the present, under these articles of association. Whether they had been right or wrong, and whether they had proceeded on insufficient grounds, or on no grounds at all, if they thought fit to allege that, in their judgment, the conduct of the plaintiff was suspicious, or that his conduct was such as to render him unworthy of remaining in the co-partnership, their decision would have been final, and not open to be questioned in a court of law. But I am of opinion that, upon the well-known principle of law that no one should, in any court, or before any tribunal or body of persons authorised to act in such a matter as that in the present case, be condemned unheard and without having the opportunity given to him of appearing and defending himself against the charge, the defendants were bound to give the plaintiff notice that this charge was about to be brought against him.

Many cases have been cited, in some of which the rule has been laid down in very strong and forcible terms. In other cases, it has appeared that, by the particular nature of the tribunal, or of the body of persons by whom the decision complained of has been pronounced, it was not open to question; or, as in *Copin* v. *Adamson* (1), lately before us with respect to a foreign judgment, there may be circumstances under which notice would be the legal effect of the proceedings in question; but the general rule is, as I have before said, that no man should be judged and condemned unheard. The principle is clearly and expressly stated by PARKE, B., in his judgment in *Re Hammersmith Rent-Charge* (2). Although PARKE, B., differed in that particular case from the majority of the court—and I am not prepared to say that that majority were not right on this particular point—after alluding to cases, in which the rule had been invariably laid down and acted upon, he expresses himself as follows (4 Exch. at p. 97):

> "In *Capel* v. *Child* (3) BAYLEY, B., says, that he knows of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property without his having an opportunity of being heard. This is an extremely strong case, and shows how powerful the principle of justice is in all judicial proceedings:—Quicunque aliquid statuerit, parte inaudita altera, aequum licet statuerit, haud equus fuerit."

I entirely adopt that principle, and apply that observation to the present case.

I come next to the Chancery case of *Blissett* v. *Daniel* (4), which is almost parallel and identical with the case now before the court. There a number of persons had entered into a co-partnership, with power to a certain number of the partners absolutely and unconditionally to dismiss and expel from the partnership any other partner as they might think proper. I will read the marginal note, because it shows how similar to, if not identical with, the present case, that case was. It is as follows (10 Hare, 493):

> "Articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares, for the time being, to expel any partner by giving him notice thereof under their hands, in the form thereby prescribed, and that, immediately after giving such notice, a notice of the dissolution as to the expelled partner should be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner; and it was provided that, if a

partner became bankrupt, insolvent, or was expelled, his interest should cease as to profit and loss, as if he had died on the day of such bankruptcy, insolvency, or expulsion, and that the amount of his share should be ascertained, and payment secured by the same arrangement as would have been applicable in case of his decease; and it was also provided, that the shares of retired, deceased, bankrupt, insolvent or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or partners, as the holders of a majority of shares should determine. The articles provided that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee, but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The articles also provided for the adjustment of the partners' accounts within sixty days after June 30 in each year, when an inventory of all the stock, debts, &c., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided, that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners at the amount at which the same stood at the time for making the yearly rest or settlement next preceding; and that the surviving partners were also to take the shares of a deceased partner at the amount at which the same stood at such next preceding yearly rest or settlement. HELD, that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion; but that the power must be exercised with good faith, and not against the truth and honour of the contract."

If it were necessary to consider the effect of the words "wrongfully, collusively, and improperly and without any just, reasonable, or probable cause," in the present declaration, it might be that there is enough on this record to show that the decision in the case which I have just referred to would be conclusive here. But that is not the ground on which I desire to put the present case.

The marginal note to *Blissett* v. *Daniel* (4) proceeds as follows:

> "The power was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners."

In that case the circumstances were entered into more fully, and more in detail than we are permitted by the form of this record to do here. But we may suppose the most favourable case which can be imagined on the part of the committee, and that there had been some complaint made before them affording just ground of suspicion, into the consideration of which they were about to enter, and that, perhaps, there was something which, unless explained, might have shown suspicious conduct on the part of the plaintiff, such as to render him unworthy to be a member of the society. *Blissett* v. *Daniel* (4) is a direct decision in point that it was incumbent on the defendants to give the plaintiff the opportunity of stating his case, and that it was unlawful and unjustifiable to come to a decision of expulsion without his knowledge and behind his back.

Having said that, we must now consider the legal effect of what has been done. It appears to me that the act was unlawful, and, therefore, absolutely

void, and that it had not the effect of causing the plaintiff to cease to be a member of the association. In *Blissett* v. *Daniel* (4), the decree that was made was as follows:

> "Declare that the notice of expulsion given to the plaintiff on Aug. 29, 1850, was void, and that the plaintiff did not, by virtue thereof, cease to be a partner in the co-partnership firm in the pleadings mentioned."

I apprehend that the present plaintiff has not, by reason of this notice of expulsion, which I hold to be absolutely void in law, ceased to be a member of the co-partnership, and that he may file a bill in equity, and thereby entitle himself to all the benefits which may belong to him as a co-partner. Had it appeared that any one or more persons had, by some unlawful act, prevented the plaintiff from deriving some benefit to which he was entitled under the articles of co-partnership, this action might have been maintainable for the wrong so done; but the present action is founded entirely on the act of expulsion. In contemplation of law he has sustained no damage at all from that act, he is exactly in the condition he was in before this notice was served upon him, and whatever rights he possessed then, he possesses still. This act is a void act, and the notice is merely waste paper.

It has, however, been urged that, even though the act done were absolutely void, yet, if it were a wrongful act, the party aggrieved thereby might maintain an action for damages in respect of it; and that the damage suffered need not necessarily be pecuniary, but that any damage, mental, moral, physical or social, would be sufficient to support the action. I had hoped that *Beaurain* v. *Scott* (5), might be an authority in support of that argument. On looking into that case, however, we find that the act done there, viz., the pronouncing sentence of excommunication, was an act of a peculiar kind. It was the act of a judge of an ecclesiastical court, and was in itself, if unauthorised, an indictable offence, and was of that public and important nature that it involved damage in law, and, therefore, although for the reason appearing in that case the sentence was void in law, yet the action was held maintainable by reason of the particular nature and judicial importance of the act done. It may further be observed that, in carrying the sentence into effect, which may be taken to be the act of the judge himself, the excommunication was publicly read during divine service from the pulpit of the parish church at which the plaintiff attended, and that his good name and fame were thereby injuriously affected. But the present is a case of a totally different nature. I wish I could feel myself at liberty, under the authority of *Beaurain* v. *Scott* (5), to hold that this action is maintainable, but when we come to look at it, the notice of expulsion had no effect at all; it was mere waste paper; and had the plaintiff at once treated it as absolutely void, for the reason that he had not been heard in answer to the charge, and had called upon the defendants to admit him into the association, and to respect his rights as usual, he might, had they not done so, have proceeded (and, indeed, may yet proceed) to enforce those rights in a court of equity. I must declare this action to be not maintainable, and consequently that the demurrer to the declaration must be allowed. On the same ground, I am of opinion that the nonsuit directed by POLLOCK, B., must stand, and that the plaintiff's rule to set it aside must be discharged.

CLEASBY, B.—I have come to the same conclusion, but not exactly on the same grounds. My ground is not that in this case there is an absence of damage, because I should have thought that wherever there is an injury to a right there arises a cause of action, and if the right of this plaintiff was to be a member, and to have all the profits of membership, his de facto exclusion from the society is a damage. It is plain that from the moment of the giving the plaintiff notice of his expulsion he became excluded, and had no claim

whatever in respect of any loss or damage happening thereafter. As I have said, I should have thought that that was in itself an injury to his right sufficient to give him a cause of action.

But I must say I am not satisfied that the committee are, in any case, in the absence of fraud, liable to an action for the manner in which they may have exercised their functions. Let us see what their powers are, and whether they are liable to an action because they do not give a member notice of their intention to exercise them. It appears that one of their rules is that the management of the society's affairs shall be governed by a majority of not less than nine—there appear to be twenty-two here—and they need not necessarily be members of the society. They have the entire control of the funds, affairs, and concerns of the society; they are to determine upon the admission, rejection, or exclusion of any vessel proposed; and, if they think the conduct of any member suspicious, they have power at once to exclude him, by directing notice to be served upon him. Supposing them to have acted bona fide, are they to be liable in respect of every vessel which has been proposed, and which they have rejected, or which they may have improperly admitted, or for the manner, or the negligent manner in which they have proceeded, on a vessel being proposed and rejected. So with respect to the management of the settlement of the claims, are they to be liable to an action at the suit of every disappointed person who makes a claim and does not receive satisfaction? All this is quite independent of the redress which could be got in a court of equity in case the funds were not properly administered. In consequence of the peculiar nature of the business of the society, the committee were expressly authorised to do that which in ordinary circumstances is a most unsafe thing to do, namely, to act on a mere suspicion. Suspicion generally disqualifies a person from exercising judgment in anything he has to deal with, but here the committee were to act upon it if they entertained it, and were not to wait for real grounds, which would have to be investigated. That being so, can it be made a ground of action that they have acted upon suspicion merely? I do not think it can be. I do not think they can be exposed to an action for a mere irregularity, or for negligence in their mode of proceeding.

I will now deal with the other part of the case, namely, the plaintiff's allegation that the defendants "wrongfully, collusively, and improperly" did the act complained of. The word "collusively" is an ambiguous word, and is used very loosely here. It does not, in my judgment, put the defendants to the proof that there was an absence of mala fides on their part. *Batterbury* v. *Vyse* (6) was very different from the present case. There the collusion alleged, and the way in which it was alleged, involved a charge of mala fides of a particular nature, because the defendant there had made a contract for the execution by the plaintiff of works which were to be paid for on the certificate of the architect only, as a precedent condition, and the action was brought against the defendant on the ground that, the architect's certificate being a condition precedent to payment, the architect had, in collusion with and by the procurement of, the defendant, neglected to certify, whereby the plaintiff was unable to obtain payment. There a specific act was charged. It does not appear to me that there is any such specific charge here, supposing even that, if there were, it could be made the subject of an action against persons in the position of the defendants, acting, as it were, in a judicial capacity, and not as partners, upon which, however, I do not at present, nor is it necessary that I should, venture to express a decided opinion. But I do say that here there is not a sufficiently definite allegation of fraud to make the defendants responsible.

POLLOCK, B.—I am also of the same opinion. This is a question involving and depending upon very many important principles of law, and some of them

first principles. In the first place I think there is no force in the objection made by the learned counsel for the defendants that the plaintiff had not insured his ship. I think the allegation that he was a member of the society and had paid his membership money is quite sufficient to give him an interest in it. I think also that there is nothing in the objection that the plaintiff is a member of a co-partnership, because, although, as between this plaintiff and the other members it would be necessary for him to go into equity to enforce any rights he might have against the whole body, still it is perfectly competent to him to have an action against these twenty defendants, provided they were guilty of such a dereliction of duty as to give him a legal cause of action.

Does the declaration then, disclose such cause? It states that "the defendants did wrongfully, collusively, and improperly expel the plaintiff from the said society." It seems to be conceded that the word "expelled" here must not be taken to be used in the sense of having physically turned him out of any room, but to mean the same as the word "exclude," as used in the rule under which the committee were acting on this occasion; that is to say, that they passed a judgment on him, saying he was no longer to be considered a member. On this part of the case I trust it will not be supposed that I think the mode of proceeding was a proper or right one on the part of the defendants. It will not be supposed that I think they were doing what was right and proper, under the circumstances, in meeting together and passing a resolution to exclude the plaintiff without hearing him. But whether that was so improper an act as to entitle the plaintiff to proceed in equity against the whole body of this association to restore him to his membership is one question, and whether it was such a wrongful act on the part of the defendants as to render them liable to an action at law is another question. In my judgment the allegation of "wrongfully, improperly, and collusively," does *not* go to establish what the plaintiff ought, in this case, to have established, and what by the use of the word "fraudulently" he might have done, namely, that the act was done by fraud, and by an actual fraudulent use of the power given to the defendants by this rule. The words "wrongfully and improperly" may be rejected. The word "collusively" is a word of vague and ambiguous meaning. It may mean a fraudulent collusion, or a collusion without fraud at all. It is a sound and wholesome rule of pleading that words should be taken most strongly against the pleader, and if words of doubtful meaning, equally capable of an honest and a dishonest meaning are used, they should be construed in their honest and innocent sense. If that were not so, a cause might go to trial at nisi prius, and a proposition be put before the jury in doubtful language, capable of meaning any one of several things, and so great difficulty and inconvenience would arise. I am of opinion that these words do not disclose a cause of action.

But now, supposing the plaintiff to be correct in his view of the case, it being admitted that there was no physical expulsion of the plaintiff, it merely amounts to this—that the act the defendants have done is a void act. If so, it seems to me to follow that no action can be maintainable. I am sorry to differ from my brother Cleasby, but it does seem to me very doubtful whether there has been a legal right infringed, so as to entitle the plaintiff to maintain his action, although he shows no damage. There are cases, no doubt, where there is no damage or anything more than nominal damage in which an action would lie, if the defendants could be charged with conspiracy. If a man commits an offence by which a person is put in peril for a while, that person may recover. That is not the case here. The plaintiff is still a member of the society. He is in this position. If he is expelled by a right and valid decision of the committee, then no action lies. If, on the other hand there is a merely nominal sentence of no validity whatever, by reason of his not having had notice and opportunity to defend himself, then, however wrong the society may be in removing him, the removal is altogether a void act, and gives the plaintiff no right of action.

A **AMPHLETT, B.**—I am of the same opinion. I should not have added anything to what has been said by my learned brothers, but that, although we agree in the conclusion we have arrived at, there is some difference as to the grounds on which we have arrived at it. Therefore, perhaps, I may in a few words say what portion of that which has been already said I agree with, and what is the real ground on which I have come to the same conclusion.

B It appears to me, and has done so throughout the whole of the argument, that the question here depends upon whether or not the plaintiff has, in consequence of the acts of the defendants, ceased to be a member of the partnership. If he has not ceased to be a member, it does not appear to me that by this brutum fulmen, as it would be in that case, any wrong has really been done to him, for which he ought to recover damages. But, on the other hand, and this C appeared to me to be the only way in which the case for the plaintiff could be successfully argued, if it could be brought to this, that the expulsion of the plaintiff had been effected by fraudulent means on the part of the committee, then undoubtedly the plaintiff would have suffered a great injury, and, in my judgment, would, upon the allegation in this declaration, have been entitled to recover damages. I thought at first that it was possible that the case might D be argued in this way, though I have subsequently arrived at a different conclusion, namely, that it might be said that the members of this partnership had agreed to give the committee plenary powers to act for all the other members of the partnership, and when they came to the conclusion that this man was not fit to remain a member, that, so far as the partnership was concerned, however wrong or negligent the conduct of the committee might be in coming to that E conclusion, I thought it might be argued that the expulsion was complete, and that he must seek a remedy against the committee for that expulsion, because it was effected, and he no longer remained a member of the society. It appears to me that the allegations in the declaration are quite sufficient to support an action, because, although the word "fraudulent" is not used, the allegation is: "That the defendants, well knowing that if the plaintiff remained a member of F the society he would be entitled to be indemnified out of the society's funds, and wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of that indemnity, wrongfully, collusively, and improperly" expelled him, upon the alleged ground that, according to the terms of the rule, his conduct was "suspicious," and that he was not a proper person to remain a member of the society. If the expulsion had been carried into effect by that conduct on the G part of the committee, I should not have doubted, but for the doubt expressed by my learned brothers, that these allegations would have been amply sufficient to support an action.

The case, then, according to my view, comes to this,—that, upon the allegation that he had been "wrongfully, collusively, and improperly" expelled without being heard in his own defence, I think it is impossible to hold that H the society, having established the committee as a tribunal to determine these questions, could derive any benefit from—I will not use the word "fraud" in any other than a legal sense—but will say, the collusive and improper exercise of discretion by the committee.

Then comes the question whether they were justified, under any circumstances, in expelling a man from the society, by deeming his conduct (to use the words I of the rule) "suspicious," or that he was unworthy to remain a member, without communicating with him, and giving him some opportunity of explaining before they deemed him to be a character of that description. The case which recommends itself to my sense of justice is the decision which was come to after great consideration in *Blissett* v. *Daniel* (4) that, where there was an absolute power for two-thirds of the members of a partnership to exclude another without any cause being assigned, it was held that those members ought to have given an excluded member an opportunity of being heard, and for this reason, that one man may have had a prejudice against him and gone to the others behind

his back and stated the grounds of that prejudice, and prevailed upon two-thirds to sign his expulsion, whereas, if he had been heard, very possibly he might have removed the impression the others had derived from something said behind his back. If, the day after that decision in *Blissett* v. *Daniel* (4), the partners had met and had come to the decision that the plaintiff should be removed from the firm, if the court had decided that they were acting bona fide, and not out of spite to him, or for any illicit purpose, but only for the benefit of the partnership, that decision of removal would have been perfectly right. So, here, if the committee had called the plaintiff before them, although they had not been able to show by evidence that he ought justly to be deemed a "suspicious" person, and although they were not able to give legal proof of his conduct, there can be no doubt that they would have been entitled to expel him. But, according to the allegations in this declaration they never gave him the opportunity of explaining his conduct, and I entertain no doubt (always supposing that these allegations could have been proved), that the plaintiff by going into a court of equity would be restored to his rights.

If that is so, what damage has he sustained? He has not ceased to be a member; he has still all his rights of membership, and the mere fact that the defendants have done something which is illegal and void, does not appear to me to authorise him in coming to this court to recover damages. For what? For an ineffectual attempt to expel him from the partnership. He has not been injured because, if he went into a court of equity, it would hold that he has not been expelled, and so no action will lie. I agree with the opinion expressed by my Lord and my learned brethren, and think that the demurrer to this declaration ought to be allowed.

Demurrer allowed.

Solicitors: *W. Eley* for *F. Summers*, Hull; *Williamson, Hill & Co.* for *England & Son*, Goole.

CARR *v.* LONDON AND NORTH WESTERN RAIL. CO.

[Common Pleas Division (Brett and Denman, JJ.), November 25, 1874, January 20, 1875]

[Reported L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747]

Estoppel—Estoppel by representation—Representation as to existence of certain facts—Belief by representee in truth of representation—Action in accordance with belief—Damage resulting to representee.

If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts

which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards as against the first, to show that the state of facts referred to did not exist.

The plaintiff, having received from the defendant railway company advice-notes that three consignments of goods were being held by the company to his order, paid the company's charges and re-sold the goods. Later it was found that one of the three consignments had never been received by the company, but remained in the possession of the consignors. In an action by the plaintiff against the company in which he sought to recover as damages an amount which he had had to pay to his purchaser who had had to buy against him at a higher price goods to replace those comprised in the third consignment and not delivered to him,

Held: the plaintiff had not brought the case within any of the propositions stated above, and, therefore, the defendant company was not estopped from denying that they had never received the third consignment, and so were entitled to succeed in the action.

Notes. Applied: *Coventry* v. *Great Eastern Rail. Co.* (1883), 11 Q.B.D. 776; *Seton* v. *Lafone* (1887), 19 Q.B.D. 68. Considered: *Tomkinson* v. *Balkis Consolidated C.*, [1891] 2 Q.B. 614; *Sarat Chunder Dey* v. *Gopal Chunder Lala* (1892), 56 J.P. 741; *Foster* v. *Tyne Pontoon and Dry Docks Co. and Renwick* (1893), 63 L.J.Q.B. 50. Applied: *Re Bentley and Yorkshire Breweries, Ex parte Harrison* (1893), 69 L.T. 204. Considered: *Cavanagh* v. *Whitechurch* (1900), 16 T.L.R. 303. Applied: *Comitti* v. *Maher* (1905), 94 L.T. 158; *Lancashire and Yorkshire Railway, London and North Western Railway, and Graeser, Ltd.* v. *MacNicoll* (1918), 88 L.J.K.B. 601; *Colley* v. *Overseas Exporters (1919), Ltd.*, [1921] All E.R. Rep. 596; *Rodenhurst Estates, Ltd.* v. *Barnes, Ltd.*, [1936] 2 All E.R. 3. Referred to: *Farmeloe* v. *Bain* (1876), 1 C.P.D. 445; *Harris* v. *Truman* (1881), 7 Q.B.D. 340; *Manchester and Oldham Bank* v. *Cook* (1883), 49 L.T. 674; *Joseph* v. *Webb, Joseph* v. *Lyons, Joseph* v. *Pidcock, Joseph* v. *Jones* (1884), Cab. & El. 262; *Proctor* v. *Bennis* (1887), 36 Ch.D. 740; *Gillman Spencer* v. *Carbutt* (1889), 61 L.T. 281; *Low* v. *Bouverie*, [1891-4] All E.R. Rep. 348; *Dixon* v. *Kennaway*, [1900] 1 Ch. 833; *Whitechurch* v. *Cavanagh*, [1902] A.C. 117; *Dominion Coal Co.* v. *Mastinonge Steamship Co.*, [1922] 2 K.B. 132; *Bradford* v. *Price* (1923), 92 L.J.K.B. 871; *Jones Bros. (Holloway), Ltd.* v. *Woodhouse*, [1923] 2 K.B. 117; *De Tchihatchef* v. *Salerni Coupling, Ltd.*, [1931] All E.R. Rep. 233; *Maritime Electric Co.* v. *General Dairies, Ltd.*, [1937] 1 All E.R. 748; *Veitch* v. *Caldicott* (1945), 173 L.T. 30; *Wilson and Meeson* v. *Pickering*, [1946] 1 All E.R. 394; *London County Territorial and Auxiliary Forces Association* v. *Nichols*, [1948] 2 All E.R. 432.

As to estoppel by representation and conduct, see 15 HALSBURY'S LAWS (3rd Edn.) 223 et seq.; and for cases see 21 DIGEST (Repl.) 366 et seq.

Cases referred to in argument:

Freeman v. *Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest (Repl.) 366, *1090*.

Pickard v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, *1103.*

Collins v. *Evans* (1844), 5 Q.B. 820; 21 Digest (Repl.) 675, *1644.*

Swan v. *North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex. Ch.; 21 Digest (Repl.) 370, *1107.*

Lebeau v. *General Steam Navigation Co.* (1872), L.R. 8 C.P. 88; 42 L.J.C.P. 1; 27 L.T. 447; 21 W.R. 146; 1 Asp.M.L.C. 435; 8 Digest (Repl.) 25, *146.*

Re Bahia and San Francisco Rail. Co. (1868), L.R. 3 Q.B. 584; 9 B. & S. 844; 37 L.J.Q.B. 176; 18 L.T. 467; 16 W.R. 862; 9 Digest (Repl.) 297, *1871.*

Stonard v. *Dunkin* (1809), 2 Camp. 344, N.P.; 3 Digest (Repl.) 109, *315.*

Motion by the plaintiff for judgment to be entered for him in an action of trover against the defendant railway company as carriers in respect of a parcel of goods of which the plaintiff was consignee. There was a second count alleging a bailment of goods to the defendants, and an undertaking by them to deliver them to the plaintiff's order.

The cause was tried in the Liverpool Court of Passage, when the verdict was entered for the defendants, leave being reserved by the assessor to the plaintiff to move to enter it for him if the court should be of opinion, on the present or any amended pleadings, that the plaintiff was entitled to recover.

Graham for the defendants.

Gully for the plaintiff.

Cur. adv. vult.

Jan. 20, 1875. **BRETT, J.,** read the following judgment: This case was tried in the Passage Court of Liverpool. A verdict was, by the direction of the learned assessor who tried the cause, entered for the defendants. Leave was given to the plaintiff to move this court to enter the verdict for the plaintiff for £70, or such other sum as this court should order, if the court should be of opinion that, on the present or any amended pleadings the plaintiff was entitled to recover.

The facts given in evidence at the trial were that the plaintiff, who carried on business at Liverpool as Carr & Co., entered in February, 1873, into a contract with Allan & Co., of Glasgow, for the purchase of thirty-five tons of bleaching powder, to be delivered in lots of about five tons per month, and immediately afterwards he entered into a corresponding contract of sale of thirty-five tons with other parties. Allan & Co., in order to fulfil their contract, entered into one with the Bridgwater Smelting Co., who were manufacturers at St. Helens, for the supply of thirty-five tons of bleaching powder to their order. The works of the smelting company were situated at about 1½ miles from a goods office of the defendants at St. Helens. The smelting company had a private line to join the defendants' line, and were supplied by the defendants with waggons, to be loaded by the smelting company at their works, and to be left at the junction to be picked up by a passing goods train. In the ordinary course of business, when the smelting company had loaded and addressed a waggon to any consignee, they sent to the defendants a consignment note, containing the date of the loading, the nature of the goods loaded, the marks and numbers of the goods, the station to which the goods were ordered, and the name of the consignee to whose order the goods were to be delivered. The consignment note was acknowledged by the company, but with the remark, "Not seen." Upon the receipt of the consignment note, a clerk of the defendants would advise it to the station to which the goods were consigned, and a clerk at that station would thereupon send "an advice note" to the consignee. The description of the goods in the advice note was in the ordinary course a copy of the description in the consignment note. This was because the goods were not seen by the defendants' servants when sent forward.

A The powder having been manufactured, an invoice was on May 30 sent by the smelting company to Allan & Co., and another was sent from Allan & Co. to the plaintiff for the price of fourteen casks marked "A 1" to "A 14". On June 30, an invoice was sent by the smelting company to Allan & Co., and another by Allan & Co. to the plaintiff, for the price of fifteen casks, marked "B 1" to "B 15". On the same day, June 30, other invoices were B sent in the same way for fifteen casks, marked "B 16" to "B 30". On July 3 the plaintiff, having notice that the bleaching powder was to come from the smelting company at St. Helens, wrote to them to have the ten tons of bleach A 1 to A 14 and B 1 to B 15, sent to Wapping Station, Liverpool, to the plaintiff's order. No such letter was ever sent by the plaintiff with regard to casks marked and numbered B 16 to B 30. On July 5 the smelting company C loaded waggons with fourteen casks of powder, marked and numbered A 1 to A 14, and with fifteen casks marked and numbered B 1 to B 15, but they never loaded any waggon with casks marked and numbered B 16 to B 30, though they had marked and numbered fifteen casks with such marks and numbers in the warehouse. On July 15 the shipping clerk of the smelting company forwarded to the defendants' station at St. Helens, a consignment D note in the following form: "Delivered in good order, . . . in waggons numbered—fourteen casks bleaching powder, Mark A, Nos. 1 to 14, to be forwarded to Wapping Station, Liverpool, for the order of Carr & Co." On the same day the clerk sent a similar consignment note for fifteen casks, but by mistake gave the marks and numbers as "Mark B, Nos. 16 to 30." These consignment notes were acknowledged by the defendants' clerks at St. Helens, but with the remark, E "Not seen"; and the consignments were, by the defendants' clerks at Liverpool. On July 7, the defendants' clerks at Liverpool, sent to the plaintiff an "advice note," as follows:

"Advice of Goods.

"Wapping Station, July 7.

"The undermentioned goods consigned to you are advised here to your F address. I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers but as warehousemen, at owners' risk, &c., and subject to the usual warehouse charges in addition to the charges now advised:

G

From	No. of Packages	Species of goods	Marks	Weight	Total
					£ *s.* *d.*
St. Helens	— 15 —	Casks B. Powder	B. 16/30	—	1 0 10
$10/_{\frac{8}{12}}$	— 14 —	—	A. 1/14	—	0 17 11"

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On the same July 7, the shipping clerk of the smelting company discovered his mistake in stating one of the consignments sent forward to be fifteen casks B 16 to B 30. No such casks were ever delivered by him into any I waggon of the defendants. He thereupon took to the defendants' office at St. Helens, an amended consignment note, described on the face as corrected, and giving the marks and numbers of the fifteen casks as B 1 to B 15. This was advised to the defendants' clerks at Wapping, who thereupon forwarded to the plaintiff, but not on paper of the colour ordinarily used for corrected advice notes, an advice note in the following form:

"Advice of Goods.

"July 9.

"The undermentioned goods consigned to you are advised here to your

address. I will thank you for instructions, &c. (This was in the ordinary printed form as before, but was then filled up as follows):

From	No. of Packages	Species of goods	Marks	Weight	Total
St. Helens $12/_{5}^{5}{}_{7}^{7}{}_{5}^{5}$	— 15 — " Originally	Casks B. Powder entered per our invoice July 5th, /73 "	B. 1/15	— $10/_{4}^{6}{}_{4}^{4}{}_{2}^{2}$,	£ s. d. 0 19 0

The number $10/_{4}^{6}{}_{4}^{4}{}_{2}^{2}$ is a reference to the number on the former advice note".

In August, the smelting company, making another mistake, sent to Allan & Co., and they sent to the plaintiff, an invoice for the price of three parcels of goods, as delivered, viz., for fourteen casks, A 1 to A 14; for fifteen casks, B 1 to B 15; and for fifteen casks B 16 to B 30; and the plaintiff paid that invoice by acceptance.

On Aug. 21, the plaintiff's broker presented at the defendants' office at Liverpool, the advice notes of July 5 and 7, in order that, according to custom, the warehouse charges might be added to them, and the defendants' clerks, not noticing and not being informed that the second was in correction of part of the first, added to the first the warehouse rent for two parcels, A 1 to A 14, and B 16 to B 30, and to the second for B 1 to B 15, and received payment. Afterwards the casks, A 1 to A 15 and B 1 to B 15, were delivered to the plaintiff's vendees, but when they demanded fifteen other casks, B 16 to B 30, the mistake was discovered and made known to all parties. The plaintiff thereupon desired that if no such casks had been delivered for him to the defendants, none such should then be accepted by them on his account. The plaintiff's purchaser then bought in fifteen casks against him, at a loss to him of £5, the value of the fifteen casks B 16 to B 30 being said to be in August, if they had been sent forward, £65. The present action was brought by the plaintiff against the defendants to recover the value of the fifteen casks B 16 to B 30, and the damage to him by reason of the sale against him, first, on a count in trover, and, secondly, on a count alleging a bailment to the defendants upon an undertaking by them to deliver to the plaintiff's order on demand. The plaintiff's counsel at the hearing before us, proposed a further count, averring that, in consideration of the plaintiff paying rent for the fifteen casks B 16 to B 30, according to notice from the defendants, they warranted that they had such casks in their possession, and promised to deliver them on demand. The jury at the trial, in answer to the only question left to them, found "that the defendants knew of the mistake on July 9, and that there was no sufficient intimation by the defendants to the plaintiff of the mistake." They founded the latter part of their decision, as we were informed, upon the fact that the corrected advice note was not on paper of the usual colour.

Upon these facts it was argued before us, on behalf of the plaintiff, that the defendants were estopped from alleging that they had not received fifteen casks B 16 to B 30, that consequently they had refused to deliver on demand fifteen such casks which they could not deny that they had received, and that they, therefore, must be taken to be found guilty of a conversion of fifteen such casks. If not liable in trover, they were liable upon a contract to be implied from their representations or conduct, and a consequent alteration of the position of the plaintiff acting on the faith of such representation or conduct. It was argued on behalf of the defendants that there was no estoppel, and, if no estoppel, no such contract as is relied on in either the original or amended

counts. If there be no estoppel, we are of opinion that there is no such contract as has been relied on, or as could make the defendants liable for breach of contract. If there is no estoppel, the case must be considered upon the basis that no such casks as fifteen casks B 16 to B 30 were ever in the possession of the defendants. Then there is no foundation for the contract set forth in the declaration, which rests upon a promise founded upon the consideration of an alleged delivery of fifteen casks to the defendants; and, as to the amended count, there is no evidence that the defendants ever intended, that is to say, had it in their minds, to enter into a contract of guarantee such as is alleged in the second count, or that any statement of theirs caused or could reasonably cause the plaintiff to trust in such a guarantee as a contract of guarantee. In either view, therefore, if there is no estoppel there was no contract. If there is no estoppel, it is obvious that there is no case in trover; but if there is an estoppel, then, the defendants being prohibited from averring that they did not, as carriers, receive such goods upon an undertaking to the consignor to deliver them to the order of the plaintiff, and there being a demand and refusal, it seems to me impossible to say that a jury ought not to find a conversion and a verdict for the plaintiff on the count in trover. It may also be, that if the defendants are estopped from denying that they had such goods, they have made themselves liable to the plaintiff in contract to deliver to him the goods on demand. If there be an estoppel, a question may arise as to the amount of the damages.

The question of liability, however, as it seems to me, depends entirely upon whether the defendants are or are not estopped in an action brought against them by the plaintiff. In order to justify the plaintiff in his assertion that the defendants are estopped as against him from denying that they were in possession of fifteen casks of bleaching powder, B 16 to B 30, which they were, if in possession, bound to deliver to him, he must bring the case within one of the recognised propositions of an estoppel in pais. One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. The present case cannot be brought within that proposition, because it is not pretended that there was any statement or conduct false to the knowledge of the defendants or any of their servants. Another recognised proposition seems to be, that if a man either in express terms, or by conduct, makes a representation to another of the existence of a certain state of facts, which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. Another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that he was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented. It seems to us that the plaintiff has failed to bring the present case within the bounds of either of those propositions.

As to the first it cannot, as it seems to us, be truly affirmed that the defendants intended any representation of theirs to be acted upon by the plaintiff in the way of re-selling the goods; there is no evidence of a custom to re-sell upon the faith of such an advice note as a railway company sends to a consignee. The only intention on the part of the defendants which can be properly inferred from the sending of an advice note, is that the consignee should send for the goods. If the first intention could be inferred, the plaintiff

did not in re-selling act upon any representation of the defendants, for he re-sold before they made any communication to him—in re-selling he neither acted upon nor was damaged by reason of any representation of theirs. If the second intention be inferred, the plaintiff did not act upon it by sending for the goods; he never did send for them. If it can be said that by means of his vendees he did, he suffered no damage by reason of sending for them; any damage which he suffered was by reason of the re-sale. Neither the payment of the warehouse rent or of the invoice price can be relied upon as damage to support an estoppel to deny the possession of the goods, because either damage can be rectified without the intervention of such an estoppel; there is consideration for either payment; both were paid under a mistake of facts.

As to the second proposition, it is open to the same objections, and to this further one, that notwithstanding the finding of the jury we are not prepared to say that the plaintiff's servants could have been misled, if they had acted with reasonable care and attention. The original advice note sent to the plaintiff contained two lots of casks, one of fourteen casks marked A 1 to A 14, and another of fifteen casks marked B 16 to B 30; the corrected advice note speaks of one lot of fifteen casks. If it refers at all to the former advice note, it must refer to the lot of fifteen casks, and not to that of fourteen casks; it does, we think, refer distinctly to the former advice note by the entry, "originally entered per our invoice $10/\frac{6}{442}$, July 5, 1873." The date is that of the former advice note, and the figures $10/\frac{6}{442}$ are those of the advice note. The smallest attention to this entry must, in our opinion, have led the plaintiff's clerks to see that the second advice note referred to the lot of fifteen casks marked and numbered B 16 to B 30 in the first advice note, and was intended to correct the marks to B 1 to B 15. The finding of the jury does not affect the conduct of the plaintiff's servants, but amounts only to a finding that the defendants' servants did not take the best course.

There is yet another proposition as to estoppel. If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist. Here again we are of opinion that the plaintiff fails to bring the present case within the proposition. The jury have not found negligence on the part of the defendants. Everything on their part seems to have been in ordinary course unless it be the difference of colour of the paper of the corrected advice note, and we are not prepared to say that that alone amounts to culpable negligence. If there was negligence, it did not induce the plaintiff to re-sell. The re-sale was the only cause of damage to the plaintiff. We are, therefore, of opinion that the plaintiff has failed to make out that the defendants were estopped, and are of opinion that the judgment was properly entered for the defendants, and that this rule must be discharged.

DENMAN, J.—I entirely agree in the judgment of my brother BRETT, so far as the result is concerned; but there is one part as to which I doubted at one time if I could agree. It was assumed that if an action of trover would lie the damages would be recoverable for the whole value of the goods. I do not think that that is necessarily the result. If trover by estoppel would lie, I wish to guard myself against being supposed to hold that the damages would be for the whole value of the goods. Upon consideration, however, I need not differ from the statement of the law as applied to the facts in this case, and I think that the view which I am anxious to express myself as holding in within the four corners of my brother BRETT'S judgment. I wish further to say, on a point which I threw out during the argument, that I am not

satisfied that trover could lie upon a representation that goods are in the defendants' possession, where no goods really were in their possession at any time, and there could not actually have been a conversion in fact. We were referred to only one case, in which a defendant was held estopped from denying that goods were the plaintiff's, and in that case there had been an actual conversion. I cannot, however, find any case, where as a fact there were no goods at all which came into the defendant's possession, and where it has been held that trover by estoppel would lie. There must therefore be an actual conversion of the goods sued for before there can be an action maintainable in trover by estoppel.

Rule discharged.

Solicitors: *Collins & Williamson*, for *Francis, Almond & Co.*, Liverpool; *R. F. Roberts.*

SMITH *v.* BULLER

[VICE-CHANCELLOR'S COURT (Malins, V.-C.), January 16, February 13, 1875]

[Reported L.R. 19 Eq. 473; 45 L.J.Ch. 69; 31 L.T. 873; 23 W.R. 332]

Costs—Taxation—Party and party—Basis of assessment—Expenses absolutely necessary for conduct of litigation—Exclusion of expenses incurred for greater convenience.

On a taxation of costs as between party and party the successful party must be allowed all costs which are necessary for the conduct of the litigation. Expenses for conducting the litigation more conveniently, but which are not absolutely necessary, are luxuries, and must be borne by the party which incurred them.

Notes. The principles of party and party taxation and the assessment of costs is now dealt with by the Supreme Court Costs Rules, 1959, r. 28; see ANNUAL PRACTICE (1964) 1999/289 et seq. The solicitor and client basis for taxation (as distinguished from the party and party basis) has been superseded by the common fund basis: r. 28 (4).

As to special allowances on taxation of costs, see 30 HALSBURY'S LAWS (3rd Edn.) 431 et seq. and SUPP.; and for cases see DIGEST (PRACTICE) 947 et seq., and SUPP.

Cases referred to in argument:

Parkinson v. *Hanbury* (1865), 11 Jur.N.S. 474; 12 L.T. 624; 29 J.P. 692; 13 W.R. 1056, C.A.; Digest (Practice) 933, *4728.*

Cousens v. *Cousens* (1871), 7 Ch. App. 48; 41 L.J.Ch. 166; 25 L.T. 719; 20 W.R. 48, C.A.; Digest (Practice) 938, *4794.*

Betts v. *Cleaver* (1872), 7 Ch. App. 513; 41 L.J.Ch. 663; 27 L.T. 85; 20 W.R. 732, C.A.; Digest (Practice) 930, *4702.*

Smith v. *Earl of Effingham* (1847), 10 Beav. 378; 16 L.J.Ch. 297; 11 Jur. 444.

A.-G. v. *Munro* (1849), 1 Mac. & G. 213.

Pearce v. *Lindsay* (1860), 1 De G.F. & J. 573, 576; John. 702; 2 L.T. 169; 8 W.R. 383; 45 E.R. 483, C.A.; Digest (Practice) 937, *4762.*

Wentworth v. *Lloyd* (1866), L.R. 2 Eq. 607; 35 L.J.Ch. 642; 12 Jur.N.S. 581; 14 L.T. 751.

North Eastern Rail. Co. v. *Jackson* (1874), 22 W.R. 629; Digest (Practice) 938, *4783.*

Lawrie v. *Wilson* (1874), L.R. 10 C.P. 152; 44 L.J.C.P. 87; 31 L.T. 688; 23 W.R. 139. A

Hill v. *Hibbitt* (1872), L.R. 14 Eq. 221; 41 L.J.Ch. 705; 27 L.T. 334.

Summons by the plaintiff to review the taxation of the defendant's bill of costs in respect of certain items allowed by the taxing master. There was also a summons by the defendant to review the taxation in respect of items disallowed by the taxing master. B

The bill was filed in July, 1870, to restrain the defendant from infringing a patent for making swivels for watch chains. MALINS, V.-C., granted a perpetual injunction with costs, but, on appeal by the defendant the decree was reversed and the bill dismissed with costs partly on the ground that the plaintiff's patent was invalid for want of novelty in the invention. The taxing master, in taxing the costs of the defendant, as between party and party, allowed various items, amounting altogether to £21 12s. 6d., for drawing sections in the margin of the printed affidavits furnished to counsel. These sections were partly sections of exhibits and partly sections of swivels, etc., not evidence in the cause. The plaintiff objected that these drawings were not necessary, and, therefore, were not chargeable as between party and party. C

[There were other objections which are not material for this report.] D

Glasse, *Q.C.*, and *Freeling* for the plaintiff.—The expense of making these drawings may be perfectly right in a taxation of costs as between solicitor and client, but ought not to be charged against the plaintiff as between party and party.

W. Pearson, *Q.C.*, for the defendant.—The question of allowing for these drawings was a mere question for the discretion of the taxing master. E

MALINS, V.-C.—It is of great importance that the unsuccessful party should bear only the costs necessarily incurred and no more. Those who enter into litigation and are successful must be allowed by their adversary all the expenses necessarily incurred in the litigation but only those expenses which are necessary to conduct the litigation will be allowed in a taxation as between party and party. Expenses which are not absolutely necessary are luxuries. Where the successful party has chosen to conduct the litigation in a luxurious manner the extra expense must fall on him and not upon the unsuccessful party. In the present case the drawings furnished by the defendant were no doubt very convenient but as they were not absolutely necessary to the case they were luxuries which cannot be allowed on taxation. The objection to their allowance on taxation will therefore be allowed. F G

Order accordingly.

Solicitors: *Marriott, Indan & Cooper*; *C. Letts.*

[*Reported by* F. GOULD, ESQ., and JAMES E. HORNE, ESQ., *Barristers-at-Law.*]

A

MAHONY (PUBLIC OFFICER OF NATIONAL BANK OF IRELAND) v. EAST HOLYFORD MINING CO., LTD.

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley and Lord Penzance), June 29, July 1, 2, 6, 12, 1875]

B

[Reported L.R. 7 H.L. 869; 33 L.T. 383]

Company—Director—Authority—Director held out as having authority—Invalid appointment—Transaction carried out in accordance with articles—Instruction to bank as to payment of cheques—Duty of bank to enquire into internal management of company.

C

All persons dealing with a joint stock company are bound to take notice of its external position as evidenced by its articles of association, but they are not bound to inquire into its internal management, provided that their transactions with it are such as might legally take place and be consummated under the articles of association.

D

The articles of association of a company contained provisions as to the appointment of directors, and the drawing of cheques and also a clause validating the acts of the directors notwithstanding any defect in their appointment. Certain persons assumed the office of directors without having been properly appointed, and communicated to the bankers of the company an alleged resolution, in accordance with the articles, as to the form in which cheques were to be drawn. The bank acted upon this communication and honoured cheques drawn in the manner described. In an action brought by the official liquidator of the company to recover the amount paid upon these cheques,

E

Held: even without the validating clause, as the bank had dealt bona fide and in a manner authorised by the articles of association with persons who were the de facto directors of the company, suffered by the shareholders to occupy that position, they were not liable to refund the money so paid.

F

Notes. Considered: *Re Staffordshire Gas and Coke Co., Ex parte Nicholson* (1892), 66 L.T. 413. Applied: *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.*, [1895–9] All E.R.Rep. 847; *Duck Tower Galvanizing Co.* (1901), 2 K.B. 314. Considered: *Whitechurch* v. *Cavanagh*, [1902] A.C. 117. Distinguished: *Ruben* v. *Great Fingall Consolidated*, [1904] 2 K.B.

G

712. Considered: *Pacific Coast Coal Mines* v. *Arbuthnot*, [1917] A.C. 607; *A. L. Underwood* v. *Bank of Liverpool and Martins*, *A. L. Underwood* v. *Barclays Bank*, [1924] All E.R.Rep. 230; *Kreditbank Cassel G.m.b.H.* v. *Schenkers, Ltd.*, [1927] All E.R.Rep. 421; *British Thomson-Houston Co., Ltd.* v. *Federated European Bank, Ltd.*, [1932] All E.R.Rep. 448; *Algemeene Bankvereeniging* v. *Langton* (1935), 40 Com. Cas. 247. Distinguished: *Rama Corpn., Ltd.* v. *Proved Tin and General*

H

Investments, Ltd., [1952] 1 All E.R. 554. Referred to: *Sharpe* v. *Brighton and Dyke Rail. Co.* (1884), 1 T.L.R. 28; *Dey* v. *Pullinger Engineering Co.*, [1920] All E.R.Rep. 591; *Houghton* v. *Nothard, Lowe and Wills*, [1927] 1 K.B. 246; *B. Liggett (Liverpool), Ltd.* v. *Barclays Bank*, [1927] All E.R.Rep. 451; *Mercantile Bank of India, Ltd.* v. *Chartered Bank of India, Australia and China and Strauss & Co.*, [1937] 1 All E.R. 321; *Kanssen* v. *Rialto (West End), Ltd.*, [1944]

I

1 All E.R. 751.

As to contracts by companies, see 6 Halsbury's Laws (3rd Edn.) 430–432; and for cases see 9 Digest (Repl.) 674 et seq.

Cases referred to:

(1) *Ernest* v. *Nicholls* (1857), 6 H.L.Cas. 401; 30 L.T.O.S. 45; 3 Jur.N.S. 919; 6 W.R. 24; 10 E.R. 1351, H.L.; 9 Digest (Repl.) 96, *429*.

(2) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur.N.S. 663; 119 E.R. 886, Ex. Ch.; 9 Digest (Repl.) 96, *428*.

(3) *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 3 C.L.R. 1066; 25 L.T.O.S. 272; 3 W.R. 573; 10 E.R. 950, H.L.; 21 Digest (Repl.) 485, *1714.*

(4) *D'Arcy* v. *Tamar, Kit Hill, and Callington Rail. Co.* (1867), L.R. 2 Exch. 158; 4 H. & C. 463; 36 L.J.Ex. 37; 14 L.T. 626; 30 J.P. 792; 12 Jur.N.S. 548; 14 W.R. 968; 10 Digest (Repl.) 1243, *8750.*

Appeal by the defendant in the action under the provisions of the Irish Common Law Procedure (Amendment) Act, 1856, from a decision of the Court of Exchequer Chamber in Ireland in an action brought by the respondent company, through their official liquidator, against the appellant, as public officer of the National Bank, to recover a sum of £3,970 lodged in the bank by parties who had applied for shares in the company.

The bank alleged that they had paid out the money upon cheques drawn, or purporting to be drawn, by the directors of the company, but the plaintiff contended that the persons who drew the cheques were not authorised to do so, and had not been duly appointed to be directors of the company. The case was tried before Monahan, C.J., in the sittings after Trinity Term, 1870, when, on the jury's answers to questions left to them the judge directed a verdict to be entered for the company, giving leave to the bank to move to set it aside, and to enter a verdict for him. In May, 1871, the Irish Court of Common Pleas accordingly ordered a verdict to be entered for the bank, but their decision was reversed by the majority of the Irish Exchequer Chamber. From this decision the present appeal was brought. The judges were summoned, and Kelly, C.B., Blackburn, Mellor, Brett, and Grove, JJ., and Pollock, B., attended.

Benjamin, Q.C., and *Wheeler* for the appellant.
Miller, Q.C., and *Webb, Q.C.* (of the Irish Bar), for the respondents.

July 6, 1875. Kelly, C.B., informed their Lordships that the judges had come to a unanimous opinion adverse to the judgment of the Court of Exchequer Chamber, and in favour of restoring that of the Court of Common Pleas.

Their Lordships took time for consideration.

July 12, 1875. The following opinions were read.

LORD CAIRNS, L.C.—The East Holyford Mining Co., Ltd., was incorporated on July 17, 1866, its memorandum and articles of association being registered on that day. Some time before its incorporation a prospectus had been issued giving the names of Wadge, McNally, Hoare, and Lewis as directors, and of Wall as secretary, and stating that the offices were at 12, Grafton Street, Dublin. The result of this prospectus was that considerable sums, amounting to nearly £4,000, were paid into the National Bank, partly before, and partly after July 17. These sums were placed to the credit of the company, and it is for the recovery of them that the action out of which this appeal arises was brought by the liquidator. The bank admits the receipt of the moneys, but they claim to discharge themselves by showing payment of nearly the whole in answer to cheques drawn, as they say, on behalf of the company, and the question is whether these cheques were drawn in such a way and under such circumstances as to have made it proper for the bank to have acted upon them as the cheques of the company.

The articles of association provided that the directors should not be less than three or more than five (cl. 52), that the first seven persons who signed the articles, or a majority of them, should appoint the first directors (cl. 53), and that the business of the company be managed by the directors (cl. 55). By cl. 4 the directors were authorised to commence business as soon after incorporation as they thought fit; by cl. 58 they were to cause the banking account of the company to be kept in the name of the company, and sums paid in behalf of the company were to be paid by cheque on the bankers, signed and countersigned as might from time to time be directed by the board. Clause 85 provided that all acts done by any

A board or committee of directors should, notwithstanding it might be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly qualified and appointed to be a director. The first seven persons who signed the articles were Hoare, Wall, Tully, McKenna, Murphy, Hughes, and McNally. These articles are the expression of B the power delegated by the company to those who were to represent them as their executive. They contemplated that an executive was forthwith to be formed; that it was to commence business; that payments would require from time to time to be made by the bankers; and they indicate, on the one hand, to the bankers, the quarter to which they were to look for their authority, and, on the other hand, to the shareholders, the fact that there was to be an immediate C executive of the company, managing its affairs, and commanding its money, to be constituted and put in motion by a majority of the seven persons whose names I have mentioned.

On July 21, 1866, the bank received the following letter:

"12, Grafton St., Dublin,
D July 21, 1866.

East Holyford Mining Co.

Sir,—Subjoined I beg to hand you a copy of a resolution passed this day relative to the banking account. Mr. Wadge's and Mr. McNally's signatures accompany this, and Mr. Hoare's will be sent as soon as he returns on Monday.

E Yours faithfully, Charles H. Wall,
Secretary.

That the National Bank be entrusted to pay all cheques signed by either two of the following three directors, viz.: Thomas McNally, E. Harvey Wadge, and John Hoare, and countersigned by the secretary. Signatures attached of E. F Harvey Wadge and Thomas McNally."

The bank acted on the faith of this letter, and paid away from time to time upon cheques signed in the manner mentioned in the letter moneys to an amount nearly approaching the whole balance of the company, and it is not disputed that, if these payments were properly made, they, together with certain commissions and a small G sum paid to the official liquidator, discharge the bank from the whole of the deposits placed to the account of the company. There is now no doubt that this company was what is called a "bubble" company; that none of the persons signing the memorandum and articles of association had any real interest in the company; and that no regular meetings of shareholders or directors were ever held. It appears that McKenna, Murphy, Hughes, and Tully were in constant attendance at the H office of the company in Grafton Street, as were also Hoare, Wadge, and Wall, and that all the business of the company was transacted at those offices. With regard to McNally, who does not appear to have attended at the office, he appears to have signed as director the cheques drawn upon the bank, and cannot, therefore, be held to say that he did not act as a director of the company. It is not pretended that any other persons than Wadge, McNally, and Hoare acted as directors.

I Under these circumstances it becomes necessary to consider how far the bank were justified in paying the cheques. They were informed by Wall, who was attending at the only office of the company as its secretary, that a resolution had been passed authorising cheques to be signed by two of the three directors, McNally, Wadge, and Hoare, and countersigned by the secretary. Undoubtedly McNally, Wadge, and Hoare were acting as directors of the company, and no person else was professing or claiming to act as director, and it was necessary that some persons should act as directors, or the business of the company could not be carried on. Undoubtedly McKenna, Murphy, Hughes, and Tully were aware that Wadge,

Hoare, and McNally were acting as directors, for they were acting as clerks under them, and they made no opposition to their so acting. It appears to me that under these circumstances the bank were justified in accepting the statement of Wall, who as secretary of the company was clearly the proper person to make the communication, that McNally, Wadge, and Hoare were the directors, and would sign the cheques. It is suggested that they might have inquired into the accuracy of Wall's statements. But suppose they had done so, and that he had shown them a resolution appointing these persons as directors, the document so shown might have been false or spurious, just as Wall's letter is said to have been false, and the bank could have had no certainty of the truth of what was stated to them, unless they had themselves attended the meeting of the directors, and heard what was done at it, a course which I need hardly say would be impossible.

It appears to me that this is exactly such a case as cl. 85 of the articles of association is meant to meet. There is no regular appointment of directors, and the persons so acting may, perhaps, have been disqualified, but the acts done by them are to be taken as being as valid as if they had been duly appointed and qualified. I should have had no doubt whatever that this was the true view of the case had it not been somewhat embarrassed by the finding of the jury. They have found that the bank altogether acted on the faith of Wall's letter believing it to be accurate, and so far their finding is, I think, satisfactory and clear. They have also found that no four of the seven persons who signed the articles of association ever agreed to the appointment of directors, or assented to Wadge, Hoare, and McNally acting as such; and that no resolution was passed, as stated by Wall in his letter to the bank. They probably meant in these findings to state that there had been no joint assent or agreement by any four of the seven persons to the appointment of directors, and in this they probably were justified by the evidence. But it is also plain from the evidence, and, as I think, consistent with the finding of the jury, that six of the persons who signed the memorandum knew that two of their number and Wadge were acting as directors, and were the only acting directors, and that the business of the company was conducted and managed by them, and that they never, in any way repudiated their Acts, or dissented from their occupying the position they had assumed. I agree with the learned judges who advised your Lordships that the learned judge at the trial ought to have called the attention of the jury to this view of the case, and inasmuch as your Lordships are free to consider, under the reservation of the judge, what questions ought to have been submitted to the jury, and to draw such inferences of fact as in your opinion the jury ought to have drawn, I have no hesitation in advising your Lordships, in accordance with the opinion of the learned judges who have attended the hearing of this case, that your Lordships should now hold that, there having been de facto directors of the company, who were suffered and permitted by the majority of those who signed the articles of association to occupy the position of and act as directors, and the bank having, in the full belief that these persons were directors, as they were represented to be, honoured the cheques drawn by them, the payment of these cheques is an answer to the action of the liquidator, and that judgment in the action ought to be entered for the defendants, and the present appeal allowed.

LORD CHELMSFORD.—The only question to be determined upon this appeal is whether upon the finding of the jury the verdict ought to be entered for the plaintiff or for the defendants.

The Holyford Mining Co. may not improperly be described as a "bubble" company, but it was brought out in the usual mode by which joint stock companies are formed. A memorandum of association stating the object for which the company was established was signed by seven persons, and was duly registered on July 17, 1866, upon which the company became incorporated. Articles of association were agreed upon, and were signed by the same seven persons who signed the memorandum, and prospectuses were issued of the usual character describing the

advantages likely to be derived by persons joining the undertaking. These prospectuses contained the names of the directors and secretary of the proposed company, and of the National Bank, Dublin, as the bankers. There is no evidence of the particular mode in which the account was opened between the bank and the company, but it may be fairly assumed that the prospectuses at least, if not the other documents connected with the foundation of the company, were communicated to the bank before the opening of the account. Money was paid into the bank before the registration of the memorandum of association by intending shareholders to the account of the company. If the company had not been formed these sums must have been returned to the persons who paid them in, but on the formation of the company the account could only be operated upon by the persons authorised by the articles of association.

We have a right to assume that the bank, acting with proper caution before they commenced transactions with the company, referred, as they were bound to do, to the articles of association to ascertain in what manner the account which had been opened was to be drawn upon. Beyond the particulars of the objects of the company, and information as to the mode in which the account was to be dealt with, which alone the bank was concerned to know, I do not consider that any more preliminary inquiries were necessary. Upon referring to the articles of association, they would have found by cl. 58 that every sum paid on behalf of the company amounting to £10 or upwards, was to be paid by cheque to be signed and countersigned as might from time to time be directed by the board. With this intimation the bank must have been prepared to receive a communication on behalf of the company as to the persons who were to sign and countersign the cheques. On July 21, 1866, they received the expected letter from Wall, the person already introduced to them through the prospectus as the secretary of the company. That letter was in terms already mentioned by the Lord Chancellor. There can be no doubt that at this time there had been no such resolution, and attention was called in argument to the terms of the letter which does not state that the resolution had been passed by the directors. I do not think that the bank receiving this letter were bound to go inside the offices of the company to satisfy themselves that such was the case. And although upon a close and critical examination of the letter with eyes of suspicion, it may be discovered that all mention of directors in connection with the resolution had been perhaps intentionally avoided, yet it is not at all likely, where no concealment was suspected, that the letter would be so nicely scanned by the bank, and it might honestly be received, as I have no doubt it was, as a communication in regular course from the secretary, of a resolution passed by persons duly authorised, in pursuance of cl. 58 of the articles of association.

More than one of the learned judges in the Exchequer Chamber attributed negligence, if not something worse to the bank in becoming the bankers of the company; but with great respect I cannot think that the bank in its transactions with the company has deserved this severe censure. As far as I can discover the idea of any impropriety on the part of the bank in opening the account with the company never occurred to anyone till the case was in the Exchequer Chamber. But it having been more than insinuated that the bank, for its own interest, had lent itself to the fraudulent scheme of the directors, every transaction with the funds in their hands is regarded with an eye of suspicion. I feel bound to say that I find nothing throughout the evidence to justify any suspicion of the integrity of the bank in their transactions with the company. They appear to be of an ordinary banking description. Nothing in the facts proved was calculated to awaken suspicion that the scheme was a fraudulent one, nor, in my opinion, was it any part of the duty of the bank to inquire into the solvency of the promoters of the company.

The Lord Chief Justice in his judgment in the Exchequer Chamber expressed his opinion that the finding of the jury that the bank altogether acted on the faith of Mr. Wall's letter believing it to be accurate, could not be maintained, and that the first and second findings were all that remained in the case. The first finding

of the jury is that no four of the seven persons who signed the articles of association ever agreed to the appointment of directors, or assented to Wadge, Hoare or McNally acting as such. If it is now open to the bank to question this finding it may be said that, although there was no evidence of four of the persons who signed the articles of association, formally meeting and agreeing together to such appointment, yet there was ample proof that not four of the seven merely, but all the seven had assented to the three persons named acting as directors. The three named persons attended the offices of the company as directors, and the other four who signed the memorandum of association were in attendance in the offices as clerks. If the question had been put to the jury, as I think it ought to have been, whether in these circumstances the shareholders of the company had assented to the acting of the directors, they must have answered in the affirmative. Secondly, the jury found that no such resolution as that set out in the letter of July 21, 1866, was ever passed. But even allowing the first and second findings of the jury to stand, I think that the third finding [that the bank had acted on the faith of the letter of July 21, 1866, believing it to be accurate] is sufficient to entitle the bank to a verdict. FITZGERALD, J., indeed, says: "I cannot find in the whole of the case one particle of evidence that the bank acted on the faith of Mr. Wall's letter, nor one particle of evidence affirmatively applied to it." But with great submission, the cheques themselves paid by the bank furnish the clearest evidence that the bank acted on the faith of the letter. For they are all drawn in the form mentioned in the letter, signed by two of those whose names were sent to the bank as the persons who would sign cheques, and countersigned by Wall as the secretary. The bank, therefore, having acted bona fide, and dealing with persons acting as directors, without any reason to believe they were not authorised so to act, and this being found by the jury, they are, in my opinion, entitled to judgment, notwithstanding the two other findings as to the non-appointment and absence of assent to the appointment of directors and to there being no such resolution by the directors as that mentioned in Wall's letter. I think judgment ought to be entered for the defendants.

LORD HATHERLEY.—It appears to me also that the judgment in this case should be entered for the defendants.

It is a point of very great importance that those who are concerned in joint stock companies, and those who deal with them, should be aware of what is essential to the due performance of their duties both as customers or dealers with the company, and as persons forming the company, and dealing with the outside world respectively. On the one hand, it is settled by a series of decisions of which *Ernest* v. *Nicholls* (1) is one, and the *Royal British Bank* v. *Turquand* (2), a later one, that those who deal with joint stock companies are bound to take notice of that which I may call the external position of the company. Every joint stock company has its articles of association, and nearly every one has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents; after that the company, entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which by its articles and deed it appears to possess. All that they do with reference to what I may call the indoor management of their own concern is a thing known to them only, subject to this observation, that no person dealing with them has a right to suppose that anything has been done, or can be done, which is not permitted by the articles or by the deed.

This being the case, a banker dealing with a company must be taken to be acquainted with the manner in which, under the articles, the moneys of the company may be drawn out of his bank for the purposes of the company. My noble and learned friend on the Woolsack has read those articles by which in this case the bank were informed that cheques might be drawn by three directors of the

company. The bank must also be taken to have had knowledge from the articles of the duties of the directors, and the mode in which they were to be appointed. But after that, when there are persons conducting the affairs of the company in a manner which is perfectly consonant with the articles of association, supposing all to have been rightly done by those who had the management of the company internally, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function. Of course the case is open to any observation arising from gross negligence or fraud. I pass that by as not entering into the consideration of the question at the present time.

Outside persons when they find that there is an act done by a company will, of course, be bound in the exercise of ordinary care and precaution to know whether or not that company is actually carrying on business, or whether it is a company which has been stopped and wound-up, and which has parted with its assets, and the like. All those ordinary inquiries which mercantile men would, in the course of their business, make, I apprehend would have to be made on the part of persons dealing with the company. But what do the bank find in the case now before us? They find how the directors are to be appointed. They find both by the articles of association and by the prospectus which was issued that the place of business was 12, Grafton Street. That was an external fact upon which they might well acquaint themselves. They go to 12, Grafton Street, and they find there an office, and they find there a person acting as secretary, who is the same person as the person described as secretary in the prospectus. They find there certain persons in constant attendance, namely, six out of the seven persons who signed the articles of association. Finding then a certain number of persons acting as directors who had been represented to them to be directors, and finding four other persons who might well have elected them to be directors, having the authority and the power to do so, on the spot daily, sitting by and seeing them performing those functions, what conclusion could they come to but that those directors had been duly appointed? And I apprehend that cl. 85 of the articles of association covers any defect there might have been in that appointment.

Then the bank gets a notice from a gentleman who calls himself the secretary and says he gives them a resolution under which the cheques are to be drawn. The mode of providing for the drawing of cheques is treated of in the articles, and it is there laid down that the duty is to be performed by directors. The bank was furnished with the names of three so-called "directors," who sent their signatures in order that the bank might have an opportunity of verifying the signatures upon any cheques that might be drawn. If the bankers went there and found the secretary sitting there as the evidence tells us he did all day long, performing the duties of a secretary, and if they found some of these other gentlemen sitting there performing the duties of directors, and if they saw those four other gentlemen who might have appointed them as directors sitting there also, witnessing them performing the duties of directors, I must ask what more could be required on the part of those dealing with the company, who had obtained all the external information they could upon the subject? If we are not now to hold that the bank is to be protected in honouring the drafts of these three persons who, they were informed, were authorised to draw cheques, I do not know how any person dealing with a company can be safe against being bound to inquire into all the minute transactions which may have taken place indoors, and any defect in which it appears to me cl. 85 of the articles in this case, independently of any general law upon the subject, was intended to cover.

If the question came to be which of two innocent parties was to suffer loss I apprehend that in point of law what must be considered in cases of that kind is

which of the two parties was bound to do, or to avoid, any act by which the loss has been sustained? I think that in this case there can be no doubt that the shareholders of the company were the persons who were bound to see that nobody usurped or assumed the office of director without that office having been properly conferred upon him. The shareholders were persons some of whom had received the prospectus originally. When they received it they must have seen those persons named, at all events they knew that if the company was to be carried on at all there must be some acting body, and they must have known that expenditure would necessarily go on upon the business of the company. Whose business was it to see that this was properly done? It was the business of the company, and if they allowed this duty to be assumed by persons who had no title to it at 12, Grafton Street, the place where the office of the company was described in the prospectus as being; if they allowed persons who were not entitled to do it to carry on all the business of the company there, to act as directors and secretary especially; if they allowed them to perform the most important business of drawing cheques; if there is a fault on one side or the other, it is on the side of those who allowed all these transactions to take place, if they were not conducted by persons legitimately appointed on the part of the company. On the other hand, on the part of the bank, I see no possible mode by which they might have pursued their inquiries in the manner contended for at the Bar without requiring all the minute books of the company to be produced to them, and without conducting a detailed investigation into all the transactions of the company as to the appointment of directors and the like, a duty which they were not called upon to perform, and which if it was objected to, they could not have insisted upon performing.

I apprehend that the bank, having done all that was strictly their duty to do, there can be no doubt that they are not in any default whatever, and that the cheques must be taken as between them and the company to have been properly drawn, and the company must be held liable to the loss. Two cases were cited in the argument in which a fraudulent use was made of the seal of a company by the secretary, who had been entrusted with that seal: *Bank of Ireland* (*Governor & Co.*) v. *Evans' Charities Trustees* (3), and *D'Arcy* v. *Tamar, Kit Hill, and Callington Rail. Co.* (4). Those cases, however, can have no bearing upon the present case, for they are simply cases of forgery. I do not think any other authority has been cited for the purpose of showing that the bank in this case ought to be held responsible for matters which were not in any way under their control, and which they were not bound to inquire into.

LORD PENZANCE.—The circumstances of this case, and the law applicable to those circumstances, have been so very fully dealt with and handled by your Lordships who have preceded me, that I shall feel it necessary to occupy your Lordships' attention but a very short time.

I may say at the outset that I do not differ in the slightest degree from any of the principles that I have heard enunciated, or from the application which has been made of those principles to the circumstances of this case. Neither do I in any way differ from the conclusion at which the learned judges have arrived. But I wish to place my opinion in this case upon a single ground, which I think is one worthy of being maturely considered and adopted on account of its general bearing upon the dealings of public companies. I allude to the ground that is taken in *Royal British Bank* v. *Turquand* (2). JERVIS, C.J., in giving judgment in the Court of Exchequer Chamber in that case said (6 E. & B. at p. 332):

> "We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statutes and the deed of settlement, but they are not bound to do more, and the party here on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a

resolution, he would have the right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done."

In the present case the articles of association would, no doubt, fall in the same category as "the statutes and the deed of settlement." I conceive that that is a very important principle, and I have not heard anything said in the course of the argument in the present case which should induce your Lordships to depart from it.

I now propose to apply that principle to the present case. From the time when this company came into existence, that is, after the registration of the articles of association, three persons usurped the position of directors and another person usurped the office of secretary. This they did in the face of the subscribers to and shareholders in the company, as well as of persons dealing with the company; and both before the company was legally formed, and after it was formed, they publicly advertised themselves in the prospectus as directors and secretary respectively. They occupied the offices designated in the prospectus, and they opened an account with the bank therein named. During the six months following they assumed, to the exclusion of all others, the executive functions of the company; neither subscribers, nor shareholders, nor strangers dealt with anyone else, and no one questioned their authority. Therefore, during the whole of the time that this company was acting as a company these persons were ostensibly directors and secretary respectively, and they were the de facto directors and secretary. In that state of things the de facto secretary writes a letter to the bank with reference to the mode of drawing cheques, which, according to the articles of association might be drawn by any number of directors according to the regulations to be made by the directors under a proper resolution. In this letter he states that a resolution had been come to, and that certain directors were to be appointed to draw the cheques, and he sends the signatures of those directors for the guidance of the bank in recognising the cheques which were to be honoured. Thereupon the cheques are drawn, and the money is paid out by the bank upon them. Therefore, we have this simple state of things—a de facto acting secretary of a company forwarding to the bank which has the account of the company the names of directors who are said, according to a resolution, to be the persons authorised to draw out the money, and from that moment we have everything regularly done in accordance with that letter.

I think it is a question of very great importance in reference to all companies whether the bank was or was not justified in stopping at that point and acting upon that authority. The suggestion of the respondents here is that the bank was bound to inquire, not whether this person was the acting secretary, but whether he was the legally constituted secretary. In order to do that, the bank would have to inquire, in the first place, whether the directors had appointed him, because under the articles of association, which they were bound to know, they would see that the directors were to appoint the secretary. Then the bank would have further to inquire whether the directors themselves were properly appointed. Under the articles of association the first directors were to be nominated by the first seven signatories of those articles. The bank would, therefore, have to inquire into everything that had been done from the commencement of the company, and, although this was a "bubble" company, the same thing would have had to be done if it had been a perfectly solvent one. The question is a very broad one whether a bank, under such circumstances, having a written authority of a de facto secretary, is bound before it acts upon that authority to ascertain whether he is the properly constituted secretary of the company or not, and not only that, but whether any resolution of which he forwards a copy was properly passed by the company. *Royal British Bank* v. *Turquand* (2) distinctly lays down the proposition that the bank is not bound to make any such inquiry, but that it is justified in acting upon a letter such as that to which reference has been made, provided that the transaction which appears upon that letter is one which might legally

have taken place and been legally consummated under the articles of association. Upon this simple ground it seems to me that your Lordships would be perfectly justified in directing the judgment in this case to be entered for the defendants.

I will only advert to one point more. I have not heard any argument which has satisfied me that cl. 85 of the articles was not sufficient to cover the defect of appointment of these directors. The words of that clause are extremely large; the substance of it is that if the directors act, and third persons deal with them, the acts of the directors shall be valid, although they have not been properly appointed. In this case, no doubt, they were not properly appointed, but nevertheless they would seem to have their acts validated under cl. 85.

Appeal allowed.

Solicitors: *Tatham & Son*, for *M. Larkin*, Dublin; *Bell, Broderick & Gray*, for *H. Oldham*, Dublin.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

HENDERSON AND OTHERS *v.* STEVENSON

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley and Lord O'Hagan), May 31, June 1, 1875]

[Reported L.R. 2 Sc. & Div. 470; 32 L.T. 709; 39 J.P. 596]

Carriage of Passengers—Condition excluding liability for injury—Need of clear evidence that exclusion was brought to knowledge of, and assented to by, passenger—Notice on back of steamship ticket.

The respondent, a passenger in a steamer of the appellants from D. to W., on paying his fare received from the clerk of the appellants a ticket on the back of which was printed a notice exonerating the appellants from liability for loss, injury, or delay to the passenger or his luggage, whether arising from the act, neglect, or default of the appellants, or their servants or otherwise. There was nothing on the face of the ticket drawing the respondent's attention to this condition, nor was his attention directed to a printed notice to the same effect hanging up in the ticket office. He stated in evidence that he was not aware of the condition at the time he took the ticket. During the voyage the steamer was wrecked by the negligence of the servants of the appellants, and the respondent lost his luggage and suffered other damage and inconvenience. In an action by him to recover in respect of this damage,

Held: as common carriers the appellants were under a duty to convey a passenger and his goods with all due precaution, care, and diligence, and any condition of the carriage excluding such liability could not be established without clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it; the mere delivery to a passenger of a ticket with conditions endorsed on its back was not sufficient to bind the passenger; and, therefore, the respondent was entitled to succeed.

Notes. Considered: *Harris* v. *Great Western Rail. Co.* (1876), 1 Q.B.D. 515. Distinguished: *Parker* v. *South Eastern Rail. Co.*, *Gabell* v. *South Eastern Rail. Co.* (1877), ante p. 166; *Burke* v. *South Eastern Rail. Co.* (1879), 5 C.P.D. 1. Considered: *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178; *Sugar* v.

A *London, Midland and Scottish Rail. Co.*, [1941] 1 All E.R. 172. Referred to: *Woodgate* v. *Great Western Rail. Co.* (1884), 49 J.P. 196; *Richardson, Spence & Co.* v. *Rowntree*, [1891–4] All E.R.Rep. 823; *Acton* v. *Castle Mail Packets Co.* (1895), 73 L.T. 158; *Incandescent Gas Light Co.* v. *Cantelo* (1895), 12 R.P.C. 262; *Ryan* v. *Oceanic Steam Navigation Co.*, *O'Connell* v. *Same*, *Scalon* v. *Same*, *O'Brien* v. *Same*, [1914] 3 K.B. 731; *Cooke* v. *Wilson* (1915), 85
B L.J.K.B. 888; *Penton* v. *Southern Rail. Co.*, [1931] 2 K.B. 103.

As to variation of the common law contract of carriage, see 4 HALSBURY'S LAWS (3rd Edn.) 154–166, 185–190; and for cases see 8 DIGEST (Repl.) 39 et seq., 106–117, 136–140.

Cases referred to:

C (1) *Stewart* v. *London and North Western Rail. Co.* (1864), 3 H. & C. 135; 4 New Rep. 64; 33 L.J.Ex. 199; 10 L.T. 302; 10 Jur.N.S. 805; 12 W.R. 689; 159 E.R. 478; 8 Digest (Repl.) 138, *896.*

(2) *Zunz* v. *South Eastern Rail. Co.* (1869), L.R. 4 Q.B. 539; 10 B. & S. 594; 38 L.J.Q.B. 209; 20 L.T. 873; 17 W.R. 1906; 8 Digest (Repl.) 58, *380.*

Also referred to in argument:

D *Austin* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1852), 10 C.B. 454; 7 Ry. & Can. Cas. 300; 21 L.J.C.P. 179; 19 L.T.O.S. 256; 16 Jur. 763; 138 E.R. 181; 8 Digest (Repl.) 146, *933.*

Carr v. *Lancashire and Yorkshire Rail. Co.* (1852), 7 Exch. 707; 7 Ry. & Can. Cas. 426; 21 L.J.Ex. 261; 19 L.T.O.S. 124; 17 Jur. 397; 155 E.R. 1133; 8 Digest (Repl.) 146, *933.*

E *M'Manus* v. *Lancashire and Yorkshire Rail. Co.* (1859), 4 H. & N. 327; 28 L.J.Ex. 353; 33 L.T.O.S. 259; 24 J.P. 4; 5 Jur.N.S. 651; 7 W.R. 547; 157 E.R. 865, Ex. Ch.; 8 Digest (Repl.) 63, *416.*

Behrens v. *Great Northern Rail. Co.* (1861), 6 H. & N. 366; 30 L.J.Ex. 153; 9 W.R. 338; affirmed sub nom. *Great Northern Rail. Co.* v. *Behrens* (1862), 7 H. & N. 950; 31 L.J.Ex. 299; 8 L.T. 328; 8 Jur.N.S. 567; 10
F W.R. 389; 158 E.R. 756, Ex. Ch.; 8 Digest (Repl.) 54, *357.*

Hodgman v. *West Midland Rail. Co.* (1864), 5 B. & S. 173; 4 New Rep. 397; 33 L.J.Q.B. 233; 10 L.T. 609; 28 J.P. 693; 10 Jur.N.S. 673; 12 W.R. 1054; 122 E.R. 796; affirmed (1865), 6 B. & S. 560, Ex. Ch.; 2 Digest (Repl.) 367, *467.*

Peninsular and Oriental Navigation Co. v. *Shand* (1865), 3 Moo.P.C.C.N.S.
G 272; 6 New Rep. 387; 12 L.T. 808; 11 Jur.N.S. 771; 13 W.R. 1049; 2 Mar.L.C. 244; 16 E.R. 103, P.C.; 8 Digest (Repl.) 139, *897.*

Appeal by the defenders in the action from a decision of the Second Division of the Court of Session (the Lord Justice Clerk (LORD MONCRIEFF) and LORD COWAN, LORD BENHOLME and LORD NEAVES), affirming a decision of the Lord Ordinary (LORD GIFFORD), in favour of the respondent.

H The appellants carried on business under the name of the North British Silloth Steam Packet Co., and were owners of a steamer called the *Countess of Eglinton*, plying between Dublin and Silloth, and the intermediate ports, for the carriage of passengers and goods. In July, 1871, the respondent, an officer in the army, took a ticket at the booking office of the appellants in Dublin, from Dublin to Whitehaven. The ticket had on one side the initials N.B.S.S.P.C., and the
I words "Dublin to Whitehaven." On the other side was printed as follows:

> "This ticket is issued on the conditions that the company incur no liability in respect of loss, injury, or delay to the passenger, or to his or her luggage, whether arising from the act, neglect, or default of the company or their servants, or otherwise. It is also issued subject to all the conditions and arrangements published by the company."

There was a printed notice to the same effect hanging up in the booking office, but the respondent swore that he had not seen it, and was not aware of the

endorsement on the ticket. He embarked in the *Countess of Eglinton* and proceeded on his voyage, but the next day, in a fog, the ship ran upon the Castleton Rocks, in the Isle of Man, and became a wreck. The respondent landed in the Isle of Man, whence he was forwarded, by the appellants, free of expense, to Whitehaven, but he lost his luggage and suffered other inconveniences in respect of which he brought the present action. It was admitted that the wreck was caused by the fault of appellants' servants, but the appellants disclaimed any liability, relying on the notice endorsed on the ticket.

Milward, *Q.C.*, and *Clarkson* for the appellants.

Colton, *Q.C.*, and *Thesiger*, *Q.C.*, for the respondent, were not called on to argue.

LORD CAIRNS, L.C.—Two questions have been argued before your Lordships on this appeal, the first being whether the contract between the pursuer (the respondent) and the company (the appellants) was one incorporating in it certain conditions printed on the back of the ticket. The other, being a question which arises only upon the supposition that these conditions were incorporated into the contract, was whether they were legal conditions in themselves, and what was their proper construction. Upon the second question I do not propose to make any observations, as the answer to the first appears to me sufficient to dispose of the case.

On the face of the ticket which was handed to the pursuer are the name of the steam packet company and the words "Dublin to Whitehaven." If the matter rested there, that would clearly be evidence of a contract on the part of the company to carry the person to whom the ticket was handed, in consideration of the money which he had paid to them, from Dublin to Whitehaven, and to use all reasonable care in the course of their undertaking so to carry him. But on the back of the ticket a condition and reference to "all the conditions and arrangements published by the company." There were hung up in the company's ticket office a time bill, a list of fares, and a general notice, which I need not further refer to, as no evidence was given that the pursuer saw, read, or, indeed, had an opportunity of reading it. The question arises: What was the effect of handing to him a ticket having the words which I have mentioned upon the face of it, and the condition on the back? With regard to the knowledge of the pursuer of what was printed upon the back of the ticket, your Lordships have his own evidence, which is not controverted, and upon which he does not appear to have been cross-examined, that in point of fact he did not read and did not know what was upon the back of the ticket. There was nothing upon the face referring him to the back, and there was nothing said, as appears by the evidence, by the clerk who issued the ticket directing his attention to what was printed upon the back of it. Your Lordships may take it, therefore, as a matter of fact, that he was not aware of that which was printed upon the back of the ticket. Consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligently to have agreed to the terms printed upon the back of the ticket.

The question, therefore, resolves itself simply into this. Is the mere fact of handing a ticket of this kind to an intending passenger, at the time that he pays his fare, sufficient to hold him so affected by everything which is printed upon the back of it that, even without seeing or knowing what is printed there, he is to be held to have contracted upon the terms indicated upon the back of the ticket? I asked, with some anxiety, what was the authority for the proposition that a member of the public was to be supposed to have contracted under those circumstances in that way; and I have listened with great attention to all the authorities that have been cited. A great number of them are cases where there was no question at all arising as to what the nature of the contract was. They were cases in which it was assumed either by the admission of both sides, or by

A the pleadings, that terms similar to those which I have read in the present case formed part of the contract. Those cases, therefore, have no relation whatever to the present. There were a considerable number of other cases in which, for the conveyance of animals, or of goods, a ticket or paper had been issued actually signed by the owner of the animals or goods. With regard to those cases there might indeed be a question what was the construction of the contract, or how B far the contract was valid. But there could be no question whatever that the contract was assented to by the person who received the ticket.

Of all that were cited, there was only one case (*Stewart* v. *London and North Western Rail. Co.* (1)), which could be said to approach the present. That was a case that was tried in the Passage Court of Liverpool, with regard to a ticket issued upon the occasion of an excursion train. Even with regard to that case, C when it is examined, it is not an authority on which to decide the present case. There a ticket had been issued to the excursionist which had upon the face of it, "Ticket as per bill." Therefore, upon that part of the ticket which the excursionist must have seen he was referred to some bill or other upon the subject of the ticket. It was in evidence, moreover, by the admission of the excursionist himself, that he had seen and had read in the office a large bill on the subject D of the arrangements with regard to the excursion, and that in that large bill he had seen a reference to some smaller bill or bills, but he had not referred to the smaller bills which were so mentioned. In that state of things, although the jury found, and probably found rightly, that the excursionist was not aware of the contents of the smaller bills, the court above, having leave to draw inferences of fact, came to the conclusion that, under the circumstances, he must E be taken to have submitted himself to all the terms contained in the smaller bills, and to have been content to do that without reading in detail what those terms were.

I express no opinion upon that decision beyond saying that it does not in any way govern or cover the present case. The present case is one in which there was no reference whatever upon the face of the ticket to anything other than F that which was written on the face. Upon that which was given to the passenger, and which he read, and of which he was aware, there was a contract self-contained and complete, without reference to anything dehors. Those who were satisfied to hand to the passenger such a contract complete upon the face of it, and to receive his money upon its being so handed to him, must be taken, as it seems to me, to have made that contract, and that contract only, with the passenger; G and the passenger on his part, receiving the ticket in that form, and without knowing of anything beyond, must be taken to have made a contract according to that which was expressed and shown to him in that way. It seems to me that it would be extremely dangerous, not merely with regard to contracts of this description, but with regard to all contracts, if it were to be held that a document complete upon the face of it can be exhibited as between two con- H tracting parties and, without any knowledge of anything beside, from the mere circumstance that upon the back of that document there is something else printed which has not actually been brought to, and has not come to, the notice of one of the contracting parties, that contracting party is to be held to have assented to that which he has not seen, of which he knows nothing, and which is not in any way ostensibly connected with that which is printed or written upon I the face of the contract presented to him.

I am glad to find that there is no authority for such a proposition in any of the cases which have been cited, and I agree entirely with the observation of the Lord Ordinary in the present case, where he says in his note :

> "It has not been shown that the pursuer's attention was called either to the bills in the office or to the notice on the back of the ticket, or that he knew either of the one or of the other. There is no reason to doubt his word when he says he never read the conditions on the back of the ticket. It seems fixed

that in a case like this mere notice not brought home to, and assented to, by the pursuer is not enough." A

I apprehend that the words "mere notice" mean not notice to the pursuer, for there was no notice to him, but that mere printed notice to anyone who might have a ticket given to him upon the back is not sufficient. The question in the present case does not depend upon any technicality of law, or upon any careful examination of decided authorities. It appears to me to be a question simply B of common sense. Can it be held that any person, unless he is in default, unless something is said to him referring him to some place where he will find terms applicable to the contract he is entering into, has entered into a contract containing terms which de facto he does not know, and as to which he has received no notice that he ought to inform himself upon them? It appears to me impossible that that can be held. The interlocutor of the Lord Ordinary, affirmed as it was C in all respects by the Second Division of the Court of Session, appears to me to have been entirely correct; and I, therefore move your Lordships that this appeal be dismissed with costs.

LORD CHELMSFORD.—The sole question in this appeal is whether the appellants are exonerated from all liability to the pursuer in this action by reason D of the notice on the back of the ticket delivered to him at the time of paying his passage money? The Lord Ordinary held that there was no proof that the respondent assented to this notice, and, therefore, that the appellants were responsible for the loss of his luggage, the vessel in which he was a passenger having been wrecked by the default of the appellants' servants. The Lord Justice Clerk and Lord Benholme also thought there was no assent to the notice. Lord E Cowan and Lord Neaves both thought that the terms and conditions endorsed on the back of the ticket must be held to have been assented to, and to have formed part of the contract between the parties. But the whole of the judges of the Second Division of the Court of Session held that the loss sustained by the respondent by the termination of the voyage before the vessel reached her destination, owing to the default of the appellants, was not embraced by the F words of the notice.

The company was established for the conveyance of passengers, passengers' luggage, live stock, and goods. Their liability by law to a passenger is to carry and convey him with reasonable care and diligence, which implies the absence on the part of the company of any carelessness and negligence. Of course, any person may enter into an express contract with them to dispense with this G obligation, and to take the whole risk of the voyage on himself, and this contract may be established by a notice excluding liability for the want of care, or negligence, or even the wilful misconduct of the company's servants, if assented to by the passenger. But by a mere notice, without such assent, they can have no right to discharge themselves from performing what is the very essence of their duty, which is to carry safely and securely, unless prevented by unavoidable H accidents. I think that such an exclusion of liability cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger, and of his having expressly assented to it. The mere delivery of a ticket with the conditions endorsed upon it is very far, in my opinion, from conclusively binding the passenger.

The Lord Chief Justice, in *Zunz* v. *South Eastern Rail. Co.* (2), thought him- I self bound by the authorities to hold that when a man takes a ticket with conditions printed on it he must be presumed to know the contents of it, and must be bound by them. I was extremely anxious to be referred to the authorities which influenced his judgment, but although numerous authorities were cited, none of them goes the length of establishing that a presumption of assent is sufficient. Assent is a question of evidence, and the assent must be given before the completion of the contract. The company undertake to convey passengers in their vessels for a certain sum. The moment the money for the passage is paid

and accepted their obligation to carry and convey arises. It does not require the exchange of a ticket for the passage money, the ticket being only a voucher that the money is paid; or if a ticket is necessary to bind the company, the moment it is delivered the contract is completed, before the passenger has had an opportunity of reading the ticket, much less the endorsement. It may be a question whether, if a passenger were to read the endorsement and decline to agree to the terms, the company could refuse to take him as a passenger. Holding themselves out as undertaking to convey passengers by their vessels, it might be held that they are bound to carry upon the terms of their common law liability alone, unless a special contract be entered into by the passenger.

But it is unnecessary to consider this point. I have expressed a view of the case which places the right of the respondent to an interlocutor in his favour on a different ground from that which was assumed by the Court of Session, but I agree in the reasons which led them to their conclusion, because I think that a limitation of the legal liability of the steam packet company as carriers ought to be most strictly construed, as well as the assent to it distinctly proved. Therefore, I agree with my noble and learned friend that the interlocutor ought to be affirmed and the appeal dismissed with costs.

LORD HATHERLEY.—I entirely concur. There are two questions, and two questions only in this case. The first is: Has there been in fact any negligence on the part of the defenders? That is a point on which both the Lord Ordinary and the judges of the Court of Session are perfectly clear, and as to which we should have very great hesitation in differing from them if there was any doubt on the subject; but as we can have none upon the evidence before us, it is not necessary for me to pursue the point.

The other point was whether the pursuer had entered into a contract by which he agreed to be his own insurer—so to express it—not only against loss occurring in the course of the passage, but even against any neglect or default on the part of the servants or agents of the defenders with whom he contracted. He entered into a contract for the conveyance of himself and his luggage from Dublin to Whitehaven. In the absence of any restriction assented to by him to his right, he was entitled to consider himself assured of that passage in safety, except, of course, so far as an obstacle might have arisen from any unavoidable accident. The carriers were obliged to use all due precaution and due care and diligence in carrying him and his luggage when once they had completed a contract as common carriers for the purpose of so conveying him. They delivered to him a ticket, he having in the first place paid his money for the passage. I agree with the observation that was made by my noble and learned friend, that, the money having been paid and the ticket having been taken up, a contract was completed upon the ordinary terms of conveyance for himself and his luggage, unless it can be made out that he had entered into any special contract to the contrary. A ticket is in itself nothing more than a receipt for the money which has been paid. Of course, terms may be imposed by the carriers, and parties may agree to such terms in derogation of their right.

Numerous authorities were cited by the counsel for the appellants, but all of them either showed an actual signature by the party, binding him somewhat stringently to certain conditions, or they were cases in which the pleading had been that whether there had been a signature or not there was an agreement, and that was admitted, and the case turned, and was decided, upon that admission, which was, of course, as good as if a contract had been signed. The only exception among the authorities was that noticed by the Lord Chancellor, *Stewart* v. *London and North Western Rail. Co.* (1), with regard to an excursion train, and I do not think it necessary to add any further observation upon that case. In the present case, the company having received the pursuer's money and having given him a receipt for that money in the shape of a ticket which bore upon the face of it simply a heading with the initials of the title of the company,

and the words "Dublin to Whitehaven," what was his position? He was entitled to consider that he had got a good and valid contract from common carriers to carry him upon the ordinary terms from Dublin to Whitehaven. That was his position, unless it can be shown that he had in some way agreed to vary it by a special contract. In this case, fortunately, there can be no doubt whether he did or did not read or inquire further into those conditions which were on the back of the ticket. He positively swears in one part of his examination to not having read the notice printed on the back of his ticket, and in his cross-examination he is in nowise shaken on that subject. Not only that, your Lordships have one of the defenders themselves called on the other side, and this question is put to him in his cross-examination: "Did you give any instructions as to directing passengers' attention to these conditions?"—He says: "Yes; a large notice embodying the conditions appears on the bills we issue each month." Then he is asked: "Did you give any instructions to the clerk who issued the tickets on your behalf to direct the attention of passengers to what is printed on the back?" His answer is: "No." Then we have the clerk himself called, and he says: "I was not in the way of drawing the attention of passengers to the condition on the back of the ticket, or to the notice." That is clearly an admission that it was not his habit to call the attention of passengers to that which the defenders seek to set up as part of the contract. It is an admission that the condition not being printed on the face of the ticket, but on the back of it, he did not actually see to the passengers' attention being in any way called to it.

We have here a very clear case, plainly set forth in all its circumstances, and it is a very wholesome rule, and one which, I think, should be understood to have been decided and acted upon by this House, that a contract cannot be made in this fashion, by simply printing on the back of a ticket delivered to a passenger something by which the company may seek for themselves a better contract than that by which he with whom they engaged conceives himself to have been bound.

LORD O'HAGAN.—Two questions have been raised in this case, but in the view which I take of it the ruling of the first will dispense with any consideration of the second.

The respondent's loss by the default of the appellants is plain and undisputed. The appellants rely upon a contract relieving them from liability, but the respondent says that he never entered into such a contract; that the terms of it were never in fact made known to him; and that his assent to them was neither asked nor given. The question is one of evidence. Did the respondent enter into such a contract? I am of opinion that he did not, and I have reached that conclusion substantially for the reasons which have been stated, and which it is not needful to repeat. Proof of the respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of them might not be permissible; in others, a jury or a court might be satisfied of their existence from antecedent dealings, notoriety of custom, publication of notices, verbal communications, and so forth; but I agree with the Lord Chancellor that mere receipt of a ticket under such circumstances, and with such an endorsement as we have before us, is not shown by the authorities cited at the Bar to furnish, per se, sufficient evidence of such assent or knowledge. We have positive and uncontradicted testimony that they did not exist; and in declining to discard that testimony on the strength of a false presumption, your Lordships will act in the spirit of the legislation which would have pronounced the contract we are asked to enforce void, if the case had come within the statute. Of course, as it does not, we must deal with the facts as we find them; but it is satisfactory that we are enabled to decide in harmony with the policy of Parliament which has relaxed the stringency of judicial decisions in the interest of the public, and limited the power of companies to escape the proper consequences

of their own misconduct or neglect [e.g. Railway & Canal Traffic Act, 1854, s. 7 (19 HALSBURY'S STATUTES (2nd Edn.) 695)].

We were asked in the course of the argument what more the appellants could have done to furnish notice of the terms on which they proposed to contract; an answer was supplied by some of the cases cited, in which the signature of the passenger or consignor demonstrated conclusively his conscious and intelligent assent to the bargain by which it was sought to bind him. When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that these terms shall be distinctly declared and deliberately accepted, and that the acceptance of them shall be unequivocally shown by the signature of the contractor. So the legislature have pronounced in cases of canals and railways, scarcely distinguishable in substance and principle from that before us, and if the effect of your Lordships' affirmation of the interlocutor of the Lord Ordinary be to compel some precaution of this kind, it will be manifestly advantageous in promoting the harmonious action of the law and in protecting the ignorant and the unwary. The appeal, in my opinion, should be dismissed, with costs.

Appeal dismissed.

Solicitors: *Thomas Cooper*, for *Maconochie & Hare*, Edinburgh; *Grahames & Wardlaw*, for *Hope, Mackay & Mann*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

PARKER (PUBLIC OFFICER OF NATIONAL BANK) *v.* McKENNA AND OTHERS

[COURT OF APPEAL (Lord Cairns, L.C., James and Mellish, L.JJ.), November 12, 17, 18, 19, 20, December 10, 11, 14, 1874]

[Reported 10 Ch. App. 96; 44 L.J.Ch. 425; 31 L.T. 739; 23 W.R. 271]

Agent—Duty to account—Profit from transaction within scope of agency—"Inflexible rule"—Company—Director—Duty of director to account for unauthorised profit—Executory contract—Sale of newly issued shares—Shares taken back by director—Sale at profit.

It is a rule founded on the highest and truest principles of morality, and one which is inflexible and will be applied inexorably by the court, that an agent will not be allowed to put himself into a position in which his interest and his duty will be in conflict. No agent in the course of his agency and in the matter of his agency can be allowed to make any profit without the knowledge and consent of his principal. It is immaterial whether or not the principal in fact suffers any injury by reason of the dealing of the agent. In the case of a contract entered into by the agent for the sale of property of the principal, so long as the contract remains executory and the agent has power either to enforce it or to rescind or alter it, he cannot re-purchase the property from the purchaser except for the benefit of his principal. In the event of a breach of the rule the court will direct an account to be taken and order the repayment by the agent to the principal of the amount of the profit made by the agent without the knowledge and authority of the principal.

Accordingly, where the directors of a company, resolutions having been passed by the shareholders to increase the capital by the issue of new shares,

entered into an agreement with a purchaser by which he agreed to take a number of the shares at a premium, and the purchaser later found himself unable to take up so many shares, whereupon the directors took from him certain of the shares which they sold at a profit,

Held: the directors were trustees for the company of the profit they had so received, and were liable to account to the company for the amount of that profit with interest.

Notes. Applied: *Nant-y-glo and Blaine Ironworks Co.* v. *Tamplin* (1876), post; *Bagnall* v. *Carlton* (1877), 6 Ch.D. 371. Distinguished: *Municipal Freehold Land Co.* v. *Pollington* (1890), 2 Meg. 307. Explained: *Percival* v. *Wright*, [1902] 2 Ch. 421. Applied: *Delves* v. *Gray*, [1902] 2 Ch. 606. Considered: *Regal (Hastings), Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378. Referred to: *Re Canadian Oil Works Corpn., Hay's Case* (1875), 10 Ch. App. 593; *Re West Jewell Tin Mining Co. Weston's Case* (1879), 48 L.J.Ch. 425; *Re Fitzroy Bessemer Steel, etc., Co.* (1884), 50 L.T. 144; *Re Postlethwaite, Postlethwaite* v. *Rickman* (1888), 59 L.T. 58; *Salford Corpn.* v. *Lever* (1890), 25 Q.B.D. 363; *Williams* v. *Scott*, [1900] A.C. 499; *Armstrong* v. *Jackson*, [1916–17] All E.R.Rep. 1117; *Wright* v. *Morgan*, [1926] All E.R.Rep. 201; *A.-G.* v. *Goddard* (1929), 98 L.J.K.B. 743; *Harrods, Ltd.* v. *Lemon*, [1931] All E.R.Rep. 285.

As to the receipt by an agent of secret profits, see 1 Halsbury's Laws (3rd Edn.) 190–194; and for cases see 1 Digest (Repl.) 539–543. As to directors as trustees of the company's property, see 6 Halsbury's Laws (3rd Edn.) 299–306; and for cases see 9 Digest (Repl.) 512 et seq.

Appeal by the defendants in the action from a decision of Bacon, V.-C., in an action brought on behalf of the National Bank of Ireland, a company formed under the Country Bankers Act, 1826, by one Parker, the public registered officer of the bank against Sir Joseph Neale McKenna, Philip Vanderbyl, John Harvey Lewis, and Frazer Bradshaw Henshaw, former directors of the company.

The bill prayed, first, a declaration that the issue of 9,778 new shares in the company to one Thomas Osborne Stock was a fraud and breach of trust on the part of the defendants, that they were jointly and severally liable for the moneys which would have been received by the bank if such shares had been properly issued and disposed of, and that they might be decreed, jointly and severally, to make good the same, or, at all events, that the plaintiff might have the relief thereafter prayed, viz., secondly, that it might be declared that the defendants were trustees for the bank of all moneys which they received from the sale or disposition of any of the said 9,778 shares, and that they might be decreed to pay to the bank the amounts which should be found due from them, with interest; thirdly, that it might be declared that the defendants were trustees for the bank of all moneys which they had derived from the sale or disposition of any bonus shares issued to themselves or their nominees in respect of any of the said 9,778 new shares, and that they might be decreed to pay the same to the bank with interest.

The National Bank was established in 1835, and its capital (£1,000,000) was divided into 20,000 shares of £50 each, all of which in the year 1864, prior to the transactions which were the subject of the suit, had been subscribed for, and of which the sum of £30 per share was at that time paid up. In 1864 the shares had become worth about £83 per share. The deed of settlement of the bank conferred ample powers on the directors for the management of its affairs. It contained also special provisions respecting the allotment and transfer of the shares and the increase of capital. Among other things it was provided that no person should become the proprietor of any share until he should have paid the price, or so much as should be required at the time of taking his shares, and that upon such payment being made the directors should cause his name to be entered on the share register. The business was carried on by a board of directors. There was also a committee which sat daily, and a committee of management. The

four defendants, at the time of the transactions complained of, were members of each of these bodies, the defendant McKenna being the managing director.

About the end of 1863, it was thought by the directors that it would be advantageous to increase the capital of the bank, it being considered that such increase would enable the company to extend its business to London, the principal business being at that time in Ireland, and that by issuing new shares at a premium, a large amount of money would be brought into the bank. A special court of the directors was held on Feb. 16, 1864, to consider the proposal of the increase of capital, whereat three resolutions were passed by the board, viz.:

"1. That two special general meetings of the proprietors be called for Mar. 23 and 24 proximo to consider the propriety of increasing the capital of the society by the creation and sale at a premium of 20,000 new shares of £50 each and the manner in which such new shares shall be created and disposed of and to determine the amounts which shall be payable in respect of such new shares including the premium and when same shall be paid and if the premium so created be added to the reserved fund of the society or otherwise . . . 2. That the committee of management be authorised to enter into a provisional agreement with solvent and respectable applicants to sell to same at the price of £30 premium per share all such shares as may be offered to the shareholders at the price of £25 per share premium but which shall not have been accepted by such shareholders Provided nevertheless that the committee of management shall exact as conditions of such provisional agreement that the intending purchasers shall lodge a sum of £25,000 with the bank as a guarantee that they will duly fulfil their part of such contract if it ceases to be provisional and become absolute and that they will take up such shares at the rate of not less than 1,000 shares per month previously paying for same in addition to the sum of £25,000 which is to continue a guarantee in the hands of the bank until all the shares shall have been fully taken up and paid for. 3. The third resolution related to the advertisements to be issued."

After the passing of these resolutions, and before the general meetings took place, a meeting of the board of directors was held, at which the following letter from Thomas Osborne Stock, a shipowner and insurance broker, was read:

"To the Directors of the National Bank London.

Gentlemen—I will to-day hand you £25,000 which you will please place on deposit account in the joint names of myself and any director of your bank on the most favourable terms as to interest your rules from time to time allow and it is understood that the said deposit shall stand as a guarantee and indemnity in your hands that I will for myself alone or with others take up from you at a premium of £30 per share all the new shares in the capital of your bank which may not be accepted by the present proprietors on the condition on which the same are first offered to them it being also understood that I am to have all the shares declined by or not taken up by proprietors of original shares and that I am to take up and pay for the same at the rate of 1,000 shares per month as a minimum rate of liquidation.

T. O. Stock."

The following reply was on the same day sent to Stock by Mr. Power, the secretary of the company:

"Sir—I am instructed by the directors to acknowledge the receipt of your letter of this date tendering the sum of £30 per share premium for the shares of the proposed new issue which may not be taken up by the shareholders of the National Bank on the terms first offered to them and agreeing to lodge the sum of £25,000 (say twenty-five thousand pounds) as indemnity for your carrying out said contract at the rate of 1,000 shares per month and I have to

say that the offer is accepted subject to this condition that the directors shall have the right to decline delivering such shares except to parties whose names shall have been previously submitted to and approved by them. The deposit of £25,000 shall bear the maximum rate of interest allowed from time to time by the bank."

On the same day the sum of £25,000 was deposited by Stock with the bank, and was held to the joint credit of, and in the names of Stock and the defendant Harvey Lewis.

On Feb. 24, 1864, the secretary issued the following circular to the shareholders:

"The directors have long felt the important advantage to the bank to be derived from augmenting the capital and reserve fund and you will find in a few days an advertisement in the GAZETTE the effect of which is to call together the shareholders to confirm if agreeable to them (as no doubt it must be) a proposition for increasing the paid-up capital and reserved fund by the issue at a premium of £25 per share of 20,000 new £50 shares which in the first instance will be offered to the present proprietors of the bank in the proportion of one new to every one old share now held by them. Upon the allotment to present proprietors the payment of £30 per share will be required of them viz. £25 premium and £5 the first instalment of the amount to be called up thereupon as capital. The premium will be applied to the increase of the reserved fund.

"At present the amount of the calls and the intervals at which they are thereafter to be made are not fixed but they are not to exceed £5 each nor are the intervals to be less than three months. On this point the directors can further merely state that the amount to be called up on the new shares must from time to time be the subject of careful deliberation and the board will be guided therein by the circumstances of the period one cardinal consideration of the directors being to preserve in its present prosperous state the value of the present stock. Foreseeing that some of our proprietors whose pecuniary arrangements are of a fixed character will be unable or unwilling to take up the new shares offered to them the directors have entered into a provisional arrangement with certain capitalists here who are bound to take over every unaccepted new share at an extra premium of £5 making the total premium upon the share as it will be taken up by them £30.

"The directors do not propose that the bank shall also add this extra £5 per share to the reserved fund, but that those present proprietors who whether from choice or other causes do not take up their allotments of the new shares shall be entitled to receive in respect of every new share so unaccepted by them a cash bonus of £5. I enclose a copy of letter addressed by Mr. McKenna to a shareholder in reply to an inquiry upon the subject and therein you will find an illustration of the working of the arrangement under which it is proposed to effect the augmentation of our capital and reserved fund."

The letter referred to was addressed to Mr. Smithwick, one of the directors, and the material part was as follows:

"London Feb. 22, 1864.

"I have your note. The board have voted the increase and it will be in the GAZETTE and sent to the proprietors by circular. The project is to offer to present proprietors 20,000 new shares £5 paid up at a premium of £25 that is to say £30 for each share. There is no engagement on the bank to call up at any specified rate, but we cannot call up more than £5 at a time nor at intervals of less than three months. The interest will be payable on the amount of capital paid up. At first there will be £5 only bearing interest and if no more than that were called up the dividend would be only 6s. 8d. half-yearly per share when £10 is called up the half-yearly dividend will be 13s. 4d. and so when £15 is called the half-yearly dividend will be £1. Whether the

A new shares are dear or cheap will depend upon whether we can call up rapidly or not.

"As, however, we will not call up unless we can do so with perfect safety to present shareholders it must be a good thing for them as we secure an addition to the reserved fund of £500,000. And as we have managed to secure from parties here an offer of £30 premium for all the rejected shares and as a B portion of our project is to give the shareholders who decline the new shares the benefit of the £5 profit no one is under a disadvantage and all have the means of securing a present benefit. We do not desire to discourage any one in Ireland from taking up the new shares if he is strong enough to do so without speculation or borrowing, but we should defeat the best interests of the bank in the project if the shares are to be issued not against real money paid into C us but as against discounts or loans. Moreover we want London shareholders and London money to work the bank in London and if we secure our existing shareholders a cash bonus of £5 per share I think we shall have accomplished a great movement in their favour."

Special general meetings of shareholders were held on Mar. 23 and 24, 1864, at D which all the defendants were present. The following resolutions, with others, were passed:

"(i) That the original capital of the society (being £1,000,000 divided into 20,000 shares of £50 each) be increased by the creation and sale at a premium of 20,000 new shares of £50 each of which the sum of £5 per share in addition to the premium shall be paid at the time of the allotment or delivery thereof E and of which the further sum of £25 per share (making with the £5 first paid a total of £30 per share and being equal to the amount per share now paid up of the original capital) shall be paid by such instalments and at such times as shall from time to time be ordered and called for by the court of directors, but so that no such instalments shall exceed £5 and so that there be an interval allowed of not less than three calendar months between instalments.

F "(ii) That after the payment of £30 per share in respect of each new share all further calls (if any) on account of the remaining £20 per share shall be made equally upon all the shares of the company old and new.

"(iii) That the new shares shall in the first instance be offered to the present proprietors respectively at a premium of £25 per share in the proportion of one new for each old share and that such of the new shares as shall not on or G before the 9th day of April next have been accepted by the present proprietors respectively on the terms of these resolutions (including the payment of the first £5 and of the premium) shall be sold by the directors to any other person or persons at a premium of £30.

"(iv) That such premium shall be added to the reserve fund of the society to the extent of £25 per share.

H "(v) That the excess of premiums to the extent of £5 per share beyond £25 per share obtainable on shares not taken up as aforesaid by the proprietors shall be payable to the shareholders who decline or omit to take up such shares in the ratio of £5 for every share not taken up."

The arrangement contained in the letters between Stock and Power, the secretary, was not communicated to the shareholders at the meetings.

I On Mar. 26, 1864, a copy of the resolutions was sent to each shareholder, with the following note:

"Sir—I hand you annexed copy of resolutions which have been passed at two special general meetings of the proprietors of this bank held respectively on Mar. 23 and 24 instant. The principal effect of these resolutions is to sanction the issue of 20,000 new shares at a premium of £25 per share on which £5 capital shall in the first instance be paid up. You are by these resolutions entitled to demand the delivery to you of as many new shares as

you hold of the old issue at the above price on payment by you at the London office of this bank of £30 per share on or before April 9. Should you on that day or earlier after the receipt of this notice desire it you can receive £5 per share on foot of any shares you decline to take up the directors having made provisional arrangements with parties here to take at £30 per share premium such new shares as may be declined by the present proprietors and of which excess premium the shareholder declining to take up his share shall have the advantage. Should you decide to take up some of the new shares and to decline others the manager of our branch in your vicinity will afford you all the requisite formal facilities for doing so. The resolutions passed in other respects are chiefly of a formal and technical character and have been passed under the advice of the bank's solicitor.—Yours respectfully."

On April 5, 1864, the following circular was addressed to the shareholders:

"I take leave again to call your attention to the terms of the annexed resolutions of the two special general meetings of the 23rd and 24th ultimo and to advise you that Saturday the 9th instant is the last day on which the shareholders of this bank have the right to receive an allotment of new shares at £25 per share premium. And I beg to certify to you that unless the sum of £30 per share in respect to new shares claimed by you shall have been paid into this office or into one of the branches of the bank on your behalf on or before the last mentioned date your right to take up such new shares will have expired and same shall be sold to other parties at a premium of £30 per share in accordance with the resolution.—Yours faithfully.

M. J. Power Secretary.

"P.S. This notice is sent to all the shareholders without reference to the fact of whether they may or may not have already dealt with the offer through any of our branches. In the event of your having done so you will take no notice of this circular."

On the same day a copy of this circular was sent to each of the managers of the various branch banks of the company, with the following note:

"Note for the Manager of the Branch.

"No payment is on any account to be received from proprietors after the 9th instant in respect of the deposit and premium payable on the acceptance of the new shares and the manager is requested to return by the mail of the 11th inst. in an envelope addressed to the secretary marked N. S. all the forms marked A and B remaining unused and if not previously returned the list of registered proprietors of the 23rd ultimo. The circular subjoined has been addressed this day to every proprietor of the bank. M. J. P."

The forms A and B were the forms to be filled up by the shareholders on applying for or declining to take new shares.

At the time when these notices were sent, some of the shareholders were abroad, some dead, and the addresses of others not accurately known. It appeared that some, who had not been able to make their application by April 9, applied shortly after, but were not allowed to take up the new shares, and were told by the secretary that they were too late, and that all the shares had been allotted under the resolutions. The result was that 9,557 new shares only were taken up by the shareholders, leaving 10,443, which according to the agreement with Stock, were to be allotted to him, and this number was accordingly allotted to him by a resolution of April 19, 1864. A part of these shares (665) was shortly after transferred to other persons, leaving 9,778, as to which Stock appeared as the allottee in the shareholders' ledger. No relief was sought by the bill as to the 665 shares. Stock's name was not on any shareholders' register as owner of the shares. In order to provide for the deposit of £5 per share upon those allotted to Stock, the £25,000 which had been deposited by Stock as a guarantee for his fulfilling his contract

A was (by the direction of the defendant McKenna, who alleged that he was authorised by the board) transferred to the capital account of the new shares, and the balance of the deposit was made up for the most part out of a sum of £20,000 borrowed from the bank by the defendant Lewis, which was paid into the Union Bank to Stock's credit, and subsequently drawn out by Stock and paid to the National Bank. By means of certain accounts opened in the books of the B company credit was given by the bank for the whole of the sum then due on the 9,778 shares allotted to Stock, until after the shares had been parted with by him and payment had been made by the various purchasers. It appeared also that the bonus of £5 per share payable to the old shareholders in respect of the new shares not taken up by them was paid out of the moneys of the bank.

Of the 9,788 shares still remaining in Stock's name as allottee, the defendants C subsequently became the owners of a large portion, which was thus explained by the defendant McKenna in his answer:

> "Even after the number of the new shares which had to be allotted to the said Thomas Osborne Stock as aforesaid had been reduced to 9,778 he was still very desirous of finding persons to relieve him of a considerable number of those shares. It was as to those shares also very important to him that the D persons to take them should be persons of such position from their connection with the bank or commercial standing that they would not be likely to throw them upon the market at once and thus come into competition with him in the sale of the rest of the shares remaining on his hands. Under these circumstances the said Thomas Osborne Stock applied to me and also to the other directors of the bank to take some of the shares from him ourselves and also E to assist him in finding good men to become purchasers of a portion of the shares and he offered to let us and any such purchasers have the shares at the £35 per share (namely the £30 premium and the first payment of £5 by way of call) which he had to pay to the bank although from other persons he would have expected a larger premium so as to realise a profit."

F Ultimately the defendant McKenna took 1,750 of the shares, Lewis 1,750, Vanderbyl 500, and Henshaw 300, at the price of £35 per share. It appeared from the evidence that the shares were at the time worth more than £35 in the market. The shares, or some of them, were subsequently sold by the defendants, who made large profits thereby, the shares being increased in value in consequence of an issue having been made of bonus shares of £30 paid-up, which were added G to the shares at the rate of one bonus share to every four new shares. As regarded two parcels (1,600 and 900), other parts of the 9,778 shares, there was a conflict of evidence as to the manner in which they had been disposed of, but the result of the evidence in the view of the court was, that they had been sold for the joint benefit of the defendant McKenna and one Fox. The rest of the shares allotted to Stock were subsequently transferred in parcels to various persons, and H as the money on these sales was received, the original price of £30 per share was paid into the bank to the credit of the account which had been opened in respect of the shares, as above stated.

The bill, which was filed in June, 1870, alleged that the transactions mentioned were the result of a preconceived and secret arrangement between the defendants and Stock in order that the defendants might get the benefit thereof, and prayed I (i) that it might be declared that the issue of the 9,778 shares to Stock was a fraud and breach of trust on the part of the defendants, that they were jointly and severally liable for the moneys which would have been received by the bank if those shares had been properly issued and disposed of, that the amount of such moneys might be ascertained, and that the defendants might be decreed jointly and severally to make good the same; (ii) that it might be declared that the defendants were trustees for the bank of all moneys which they received from the sale or disposition of any of the 9,778 shares, and were liable to account to the bank for all such moneys, that the amount of such moneys might be ascertained,

and that the defendants might be decreed to pay to the bank the amount which should be found due from them in respect of such moneys, together with interest thereon; (iii) that a similar declaration and decree might be made as to moneys received by the defendants from the sale of bonus shares issued in respect of any of the 9,778 shares. The general defence, apart from the dispute as to facts was, that the defendants had not acted corruptly or exceeded their authority; that the company was cognisant of and had authorised what had been done by the body of directors; that, although the defendants had, as they admitted, made large profits by the sale of the shares which they had taken from Stock and re-sold, they had violated no trust thereby, being bona fide purchasers; and, further, that the full amount of £35 per share having been paid to the bank, no claim on the part of the bank could arise against the defendants.

Bacon, V.-C., made a decree containing declarations in the terms of paras. (ii) and (iii) of the prayer and a declaration that the defendant McKenna was liable for one half of the profits made by the sale of the 1,500 and 900 shares. An account was directed, against each defendant, of all profits made by the sale of the shares taken by him from Stock, with interest at £4 per cent. on such profits from the time of receiving them, and the defendants were ordered to pay the costs of the suit. The defendants appealed.

Glasse, *Q.C.*, and *Ford North* for the defendant, Sir Joseph McKenna.
Fry, *Q.C.*, and *Horace Davey* for the defendant, Harvey Lewis.
Everitt for the defendant, Henshaw.
Bristowe, *Q.C.*, and *Tahourdin* for the defendant, Vanderbyl.
Kay, *Q.C.*, *Lindley*, *Q.C.*, *Graham Hastings* and *Armstrong* for the plaintiff.

Cur. adv. vult.

Dec. 14, 1874. The following judgments were read.

LORD CAIRNS, L.C.—The decree which is appealed against in this case in substance makes the defendants accountable to the bank under three different heads. In the first place it makes the defendant McKenna accountable for profits made by him in respect of 1,750 shares; Lewis, for profits made by him in respect of 1,750 shares; Vanderbyl, for profits made by him in respect of 500 shares; and Henshaw, for profits made by him in respect of 300 shares. In the second place it makes the defendants responsible for all moneys which they have received in respect of certain shares, called bonus shares, allotted in respect of the shares that I have already mentioned, and in the third place it makes McKenna alone responsible in respect of his profits upon a joint or partnership transaction with one Fox, as regards 2,500 shares. The four defendants are made severally responsible for their respective profits on these shares, and they are made jointly liable for the whole costs of the suit. From that decree they all appeal. I propose to state in the first place, as shortly as I am able to do, the narrative which alone appears to me material as regards the decree to be made, and the relief which can be given in this suit, and I leave for subsequent consideration the observations which have been made as to the magnitude to which the proceedings in the cause have been swelled, and the costs which have been thereby occasioned.

It was determined in the year 1864 to increase the capital of the National Bank by shares which would amount to a million of money, and on Feb. 16, resolutions for this purpose were passed by the court of directors. The second resolution deals with the terms upon which it was proposed to issue the new shares. It was resolved by this second resolution:

> "That the committee of management be authorised to enter into a provisional agreement with solvent and respectable applicants to sell to the same at the price of £30 premium per share all such shares as may be offered to the shareholders at the price of £25 per share premium, but which shall not have been accepted by such shareholders, provided nevertheless that the committee of management shall exact, as conditions of such provisional agreement, that the

A intending purchasers shall lodge a sum of £25,000 with the bank as a guarantee that they will duly fulfil their part of such contract if it ceases to be provisional and becomes absolute, and that they will take up such shares at the rate of not less than 1,000 shares per month, previously paying for same in addition to the sum of £25,000 which is to continue a guarantee in the hands of the bank until all the shares shall have been fully taken up and paid for."

B Those resolutions or the substance of them would, of course, require confirmation by a general meeting, and preparatory to the general meeting which was to be summoned, a circular was issued to the shareholders explaining the nature and the details of the arrangement connected with the increase of capital. Part of that circular was in these words:

C "Foreseeing that some of our proprietors, whose pecuniary arrangements are of a fixed character, will be unable or unwilling to take up the new shares offered to them, the directors have entered into a provisional arrangement with certain capitalists here, who are bound to take over every unaccepted new share at an extra premium of £5, making the total premium upon the share, as it will be taken up by them, £30. The directors do not propose that the D bank shall also add this extra £5 per share to the reserved fund, but that those present proprietors who, whether from choice or other causes, do not take up their allotments of the new shares, shall be entitled to receive in respect of every new share so unaccepted by them a cash bonus of £5."

With that circular before the shareholders, two meetings were held on Mar. 23 and 24, at which resolutions were passed authorising the increase of capital, and E providing by the third resolution:

"That the new shares shall in the first instance be offered to the present proprietors at a premium of £25 per share in the proportion of one new share for each old share and that such of the new shares as shall not on or before April 9 next have been accepted by the present proprietors . . . shall be sold by the directors to any other person or persons at a premium of £30."

F In the meantime letters had been exchanged between the board of directors and the person who was pointed at by the references which I have read—Mr. Stock—as to parties who were willing to take up the unaccepted shares. Those letters are dated Feb. 23, 1864. Mr. Stock's letter is in these words:

G "I will today hand you £25,000, which you will please place on deposit account in the joint names of myself, and any director of your bank, on the most favourable terms as to interest your rules from time to time allow, and it is understood that the said deposit shall stand as a guarantee and indemnity in your hands, that I will for myself alone, or with others take up from you at a premium of £30 per share, all the new shares in the capital of your bank which may not be accepted by the present proprietors on the condition on H which the same are first offered to them, it being also understood that I am to have all the shares declined by or not taken up by proprietors of original shares, and that I am to take up and pay for same at the rate of 1,000 shares per month as a minimum rate of liquidation."

That letter was accepted by Mr. Power on behalf of the board of directors, with I this additional qualification, that the directors shall have the right to decline delivering the shares except to parties whose names shall have been previously submitted to, and approved of by them. Those documents, therefore, contain, on the one hand, the authority of the board of directors to make a contract with Stock of this description, and, on the other hand, the expression of the terms of the contract with Stock.

I have entertained some doubt whether the contract as made with Stock was altogether warranted by the authority conveyed to the directors by the general meeting, but it is not necessary to decide the point, and I will assume for the

purpose of what I have to say that the contract with Stock in its terms was intra vires the directors.

What passed afterwards was this. On April 13 the £25,000, the guaranteed deposit, was paid in in the joint names of Stock and Lewis. On April 16 another sum of £25,000 was paid into the bank. A certain return was made from those two sums, but I will speak of the sums as they were originally paid in round numbers. On April 19, 9,778 shares, which was the number of shares that ultimately were unaccepted by the old shareholders, or undisposed of to other persons, were allotted to Stock, in pursuance of the contract with him. It is necessary at this point to observe what was the position of Stock in this matter. The contract at this point was clearly an executory contract. It was a contract of a very peculiar description, running over a considerable time—possibly ten months at the least. It was a contract with regard to the performance of which the interests of the bank required to be watched with the greatest jealousy and vigilance. There was the guarantee deposit to be maintained as a guarantee deposit to the end of the transaction; there were the stipulations as to the proportions in which the shares were to be taken up; there was the stipulation that no delivery was to be made until payment was made; there was the approval of the names of persons sent in for shares, which was to come from the directors; and there was the question, of very great importance in a speculation of this kind, how and at what times the calls should be made upon these shares by the directors. The essence, in fact, of the transaction, as I view it, and of the bargain with Stock was that Stock was to take all the risks of the market with regard to the disposal of these shares, and the object to be secured was the fixed payment of £30 a share.

I ask the question: In the fulfilment and execution of this contract, who was to watch the interests of the bank? Undoubtedly the directors of the bank. They were the agents of the bank for this purpose. If they did not watch the fulfilment of the contract, there was no person else to do it. Their agency would not come to an end with regard to these shares until the contract was completely fulfilled; and their agency at the date which I have referred to, namely the allotment to Stock, not only had not come to an end, but was actually only in reality commencing.

That being the position of Stock and the position of the directors, I turn next to the narrative of what the directors, or the four defendants who were directors, actually did in this matter, and I take the narrative from their own words. This is what Sir Joseph McKenna states in his second answer:

> "Even after the number of new shares which had to be allotted to Stock had been reduced to 9,778 he was still very desirous of finding persons to relieve him of a considerable number of those shares. It was as to those shares also very important to him that the persons to take them should be persons of such position from their connection with the bank or commercial standing that they would not be likely to throw them upon the market at once, and thus come into competition with him in the sale of the rest of the shares remaining on his hands. Under these circumstances Stock applied to me and to the other directors of the bank to take some of the shares from him ourselves, and also to assist him in finding good men to become purchasers of a portion of the shares, and he offered to let us and any such purchasers have the shares at the £35 per share (namely the £30 premium and the first payment of £5 by way of call) which he had to pay to the bank, although from other persons he would have expected a larger premium so as to realise a profit."

Then he states that in the first instance he and others were unwilling to accede to this request of Stock's, but ultimately he says:

> "I believe that under these circumstances Vanderbyl agreed to take 500 out of the 9,778 shares from Stock at £30 premium, and that Henshaw agreed to take 300, and that Lewis agreed to purchase 1,000 shares. Down to the

time when they agreed to purchase those shares, I had not taken or agreed to take any of the new shares from Stock, but had actually refused to do so, and though I had no doubt of the success of the operation I should not have taken any of those shares from him at all if it had not been impressed upon me that my refusal would be misconstrued, and imply that I had no confidence in the result."

Then he says:

"After Lewis had agreed to purchase 1,000 new shares from Stock, and on or about April 27, Stock came to me and said that if he could not effect sales of 2,500 shares more than he had already placed, the burthen would destroy his peace of mind, and a great deal more to that effect, and he pressed me to purchase 1,000 of the new shares from him at the price he had to pay for them. I told him that if I agreed to purchase 1,000 from him as he asked, he would still have 1,500 in excess of what he wished to have, to disturb his mind and make him anxious, or some words to that effect; but after some conversation, I told him that if the defendant Lewis, whom I knew to be a rich man, would take 1,750 in lieu of the 1,000 he had agreed to take, and thus leave Stock with 1,750 only of the 2,500, I would buy the whole of that parcel of 1,750 shares, but that I would not do so unless Lewis or some equally good man would take the other 750 shares. Lewis was not present on that occasion; and, at the request of Stock, I put my offer in writing and handed it to him."

Then he says that as a memorandum of the agreement by him to purchase 1,750 shares, Stock signed this document:

"I have this day sold to McKenna 1,750 of the National Bank new shares, at the same price at which I have obtained same, say at a premium of £30 per share, deliverable to him, and payable at the same ratio at which I am to pay for same."

I will add to that statement of McKenna this only—his own opinion as to the advantage of having these shares at this time, contained in a letter written by him on April 20 to Anthony Fox, who wished to have 100 shares. He said:

"My dear Anthony, if you write to me a note, apply for 80 shares from any friend of mine who holds them, and you tell me whether you want them to sell or not, say for the next nine months, I will try to carry out a good affair for you, such as I spoke of. There is no use asking me for more than 80. I thought to get 100 for you, but I am short, or rather over my calculations. I hope you are sure I do my best for real friends."

Mr. Lewis says with regard to his share of this transaction in his answer:

"On or shortly before April 16, 1864, and therefore nearly two months after the arrangement had been made with Stock, he applied to me and informed me that so unexpected a number of shares had been thrown upon him, that he found himself in a difficulty about them, and urged me to take as many as I could off his hands."

This was two days before the actual letter of allotment to Stock.

"Ultimately, but with some reluctance, I agreed to purchase from Stock 1,000 shares out of the number which he had taken by his contract at the same price which he was to pay to the bank. Towards the end of April Stock again applied to me, and urged me to take a further number of shares, as he was in difficulty about them. I consulted McKenna on the subject, who confirmed Stock's representations to me, and stated that unless Stock could at once dispose of some of his shares, he might be obliged to throw a large quantity of the shares on the market. I consented to purchase in all 1,750 shares from Stock, being the same number which McKenna informed me that

he proposed to take. However, I did so with great reluctance, and solely in order to support and promote the interests of the bank, and protect my own property invested in it, and because, after much anxious reflection, it appeared to me necessary that I should do so. Accordingly, I believe Stock handed to me a contract note for the 1,750 shares, by which I rendered myself personally liable to pay to him the premium or purchase money of £30 per share on all the shares. I made it a condition of my contract with Stock that he should sell the shares from time to time on my account and at my risk; and should out of the proceeds of such sales retain the purchase moneys which I had contracted to pay him, and also pay the calls which should become due to the bank in respect of the shares, before the sale thereof."

Vanderbyl says in his answer:

"During the year 1864 I purchased bona fide from Stock and paid him for 500 of the shares allotted to him. I purchased those 500 shares at £30 per share premium, besides the calls. I procured 100 of the said 500 shares to be registered in my own name, and the remaining 400 of the 500 shares in the names of mortgagees from whom I had taken up loans."

Then he says that all those shares were ultimately re-sold by him. It is observable that Mr. Vanderbyl here does not assign to us any precise date when his purchase was made, but I find from his cross-examination, which has been read, that he very frankly states that he was present at the board and heard the conversations which went on there as to the number of shares to be taken by the different directors, and that he himself urged a director who is now dead (Mr. Usborne) to take some of the shares for the purpose of lessening those that would remain in the hands of Stock. I, therefore, think that the inference must be that the shares which he did purchase were purchased at the same time that McKenna and Lewis purchased theirs.

Mr. Henshaw says in his answer:

"In or about the month of April, 1864, and some time after the arrangement had been made with Stock, McKenna spoke to me and represented that Stock had more shares thrown on his hands than had been expected, and was anxious, in consequence of his heavy responsibility, to get rid of a large number of them at the same price which he was to pay to the bank, and without deriving any profit from the sale thereof. McKenna further stated that unless Stock could at once dispose of some of his shares, he might be obliged to throw a large quantity of the shares on the market at one time, or possibly might be unable to carry his contract into effect, as the new shares were then saleable only at a nominal minimum premium, and that in either of those cases, the bank, which was one of unlimited liability, would be brought into discredit and danger, and the interests of the shareholders greatly prejudiced. Under these circumstances McKenna pressed me to buy some of Stock's shares. . . . I ultimately consented to purchase 300 new shares from Stock at the premium of £30 per share. Accordingly, in the month of July, 1864, Stock transferred forty shares into my name, and I paid him £1,200, being the premium thereon, and paid or accounted for a like sum to the bank in respect of the calls on the 40 shares."

A transaction a little more complicated occurred with regard to the other 260. They were part of a lot of 300 shares that Stock had on mortgage to a company in Liverpool, and that company accepted Mr. Henshaw as their debtor in place of Stock. Therefore, in substance, although complicated in its details, the transaction was just the same as if it had taken place directly with Stock.

That is the narrative told in the words of each of the four defendants themselves, and the conclusion which I draw from it is that in the result nearly one-half of the interest of Stock was assigned to these four defendants. It is true that the transaction is throughout called by them a purchase of shares from Stock;

but Stock had no complete property in any shares to sell. All that he could sell, and all that he did sell, appears to me to have been the right to stand in his place quoad these 4,300 shares, which was the total amount of the shares taken by the four defendants. It is true that Stock was not in any way released from the performance of his contract; but, it may be asked, how could the directors possibly enforce against Stock the performance of the contract quoad these 4,300 shares when the enforcing of the contract against Stock would, as to those shares, be really the enforcing of it against themselves. For, as Stock would be liable to the bank, so these four defendants would be liable each for his own shares to Stock.

What happened in the result is just what might have been expected. Very considerable latitude, or more than latitude, was allowed to Stock in the fulfilment of the contract. The strict condition as to the delivery of shares, or rather negativing any delivery until payment, was relaxed—relaxed I agree only as to certain parcels, and for a certain number of days, but relaxed in that way as to all in turn. The condition as to the guarantee was also relaxed. Entries were made attributing the £25,000 to the shares in such a way as enabled a settling day to be obtained on the Stock Exchange, but in that way the £25,000 no longer stood in the position in which it stood when it originally was paid in. The shares were given over into the hands of Stock for the purpose of disposal on the market for a certain number of days without payment, and upon credit; and in fact the question may again be asked: How could it have been possible for the directors to have held Stock to the letter of the contract without at the same time enforcing the contract in all its rigidity against themselves? They may have been right in the relaxations they made. Those relaxations may or may not have been necessary for the welfare of the bank, and involved in that welfare there may have been the fulfilment of the contract by Stock, but it appears to me that it was utterly impossible for the directors, after the transaction upon which they themselves had entered, to exercise an independent and unbiased judgment upon the subject of these relaxations. The bank was practically to a very great degree running the risk which alone ought to have been the risk of Stock, for it is obvious that, if the market had fallen very considerably, there would, to say the least of it, have been very great danger as to whether the contract could have been fulfilled by Stock.

The rule of this court, as I understand it, as to agents, is not a technical or arbitrary rule. It is a rule founded upon the highest and truest principles of morality. No man can in this court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict. If Stock had bought these shares and paid for them, and became the absolute owner of them, the directors were as free as any person in the market to go to Stock and to become the purchasers from him of those shares. The agency in that case would have been over, and there would have been no longer any conflict between interest and duty. Here the agency had not terminated. The court will not inquire, and is not in a position to ascertain, whether the bank has lost or has not lost by the acts of the directors. All that the court has to do is to examine whether a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency, and the court finds, in my opinion, that these agents in the course of their agency have made a profit, and for that profit they must, in my opinion, account to their principal. These observations dispose of the question with regard to the 4,300 shares taken by the four defendants from Stock. The answer to the question as to the bonus shares must be the same as to the 4,300 shares, for the bonus shares were allotted in respect of the 4,300 shares.

[His Lordship referred to allegations in the bill which, he said, were without any foundation]; and said that the course which ought to be taken with a suit so circumstanced was that all that part of the bill which was open to the observations that he had made, ought to be dismissed with costs; and concluded: The result will, therefore, be that, subject to the opinion of the lords justices, the decree should be altered to run in this way:

"This court doth, firstly, declare that the defendants respectively are trustees for the National Bank of all moneys which they respectively received by the way of profit from the sale or disposition of any of the 9,778 shares in the bill mentioned, and that the defendants respectively are liable to account to the bank for all such moneys, and for interest thereon at the rate of 4 per cent. per annum, from the receipt by them respectively of such moneys; and doth, secondly, declare that the defendants respectively are trustees for the bank for all moneys which they respectively received as aforesaid [that is, by way of profit] from the sale or disposition of any bonus shares,"

as the second declaration now stands. Then would come an inquiry whether the defendant Sir Joseph McKenna had any and what beneficial interest in the 1,600 new shares of the National Bank comprised in the bought and sold notes stated in the bill, or in the 900 shares in the bank comprised in the bought and sold notes also stated in the bill; and declare, thirdly, that the defendant Sir Joseph Neale McKenna is a trustee for the National Bank of all profits received by him from or by reason of such, if any, beneficial interest, and is liable to account to the bank for all such moneys, and for interest on the amount thereof at the rate aforesaid, from the date of the receipt by him of such profits. There will be an account in the form in which it is at present, under the first and second heads, except only and after "received" the words "as aforesaid." The decree will continue in this way: "And it is ordered that in case it shall appear that the defendant Sir Joseph McKenna had any beneficial interest in the 1,600 and 900 shares before mentioned or any of them, then that the defendant Sir Joseph McKenna do pay to the plaintiff, or other the public officer for the time being of the National Bank, so much of his costs of this suit up to and including the hearing as relates to the said 1,600 and 900 shares, and the costs of the said inquiry; such costs to be taxed by the taxing master."

JAMES, L.J.—I desire to add but little to what the Lord Chancellor has said. I do not think it is necessary, but it appears to me very important, that we should concur in laying down again and again the general principle that in this court no agent in the course of his agency, and in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; and that that rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument, whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that. There is, however, further on the other side a general principle as to the costs of the suit. It is not because a person has made himself liable to proceedings in equity or proceedings at law that the adverse litigant is entitled to make this court the place, and the proceedings of this court the means, by which personal spite or party hostility is enabled to indulge itself in unfounded aspersions upon character. In my opinion, that has been done here. Unfounded aspersions have been wantonly and recklessly made, and the consequence of that is that this court is obliged to give effect to what it has so often said it would do—make persons so dealing with the proceedings of this court pay, and pay fully, in costs for it. I am of opinion, therefore, that the plaintiff must pay the costs of so much of the proceedings as the Lord Chancellor has pointed out, and that he has so mixed that up with the rest of the suit that he has forfeited, in my opinion, his title to the costs which he otherwise would have been entitled to receive. I am of opinion, therefore, that the decree proposed by the Lord Chancellor is right in both those respects.

MELLISH, L.J.—I also entirely agree with the decree which is proposed by the Lord Chancellor. The main question appears to me to depend upon this—how far a trustee or agent for sale is precluded from purchasing from his own purchaser

A the property which he is entrusted to sell. In my opinion, as long as the contract remains executory and the trustee or agent has power either to enforce it or to rescind or alter it, he cannot re-purchase the property from his own purchaser, except for the benefit of his principal. It appears to me that that necessarily follows from the established rule that he cannot purchase the property on his own account. There may, of course, be cases of agents for sale who, when they have B once made the contract, have concluded their agency, such as the case of an auctioneer—when he has knocked the estate down and made the written contract, it may be said that his agency has terminated. I should suppose that even in that case the court would look with considerable suspicion on a re-purchase by such an agent as an auctioneer from the person to whom he sold the estate, because it would always be extremely difficult to find out whether there had not been C some previous concert and understanding between them. But that is not the case before us. In the case before us it is quite clear that up to the time when the shares were actually registered in the names of bona fide purchasers from Stock, the directors had full power on behalf of the company either to enforce the contract against Stock, or to decline to enforce it, or they had power to modify it. That appears to me to cover the case of all the defendants. I think it was D argued on behalf of Mr. Vanderbyl that in May a transaction took place, namely, a loan by the bank to Mr. Stock of the sums which it was necessary for him to pay for the premium and the calls on the shares, the shares being mortgaged by him as security to the bank, and from that time the contract was completely executed. In my opinion, that would be no answer to Mr. Vanderbyl, because I think the result of the evidence is that he made his contract in the month of April for the E purchase of his 500 shares at the same time that the other directors made their contracts. But perhaps with reference to the purchase of the 1,600 and 900 shares it may be necessary to consider whether the contract did really cease to be executory on that alleged loan being made. With respect to that, I think there is very slight evidence—it is by no means satisfactory evidence—that those entries were anything more than mere entries in account. But even if they were, it seems F to me quite clear that the shares never were at that time completely delivered. If Stock had been insolvent, the shares would have remained in the hands of the bank. If he had been unable to complete, and these shares had so fallen that he could not have completed his contract, the shares would have remained in the bank, and it would still have been in their power to sell them or allot them for the benefit of their principals. Therefore, I am clearly of opinion that even in G September and October the whole contract still remained executory, and that the directors could not be allowed in this court to purchase any shares from Stock except for the benefit of their principals. I also entirely agree with what has been proposed by the Lord Chancellor respecting costs.

Solicitors: *Murray & Hutchins*; *Tathams, Curling & Pym*; *C. & R. J. Tahourdin*; *William Tatham & Son.*

H [*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HOBBS AND WIFE *v.* LONDON AND SOUTH WESTERN RAIL. CO.

[COURT OF QUEEN'S BENCH (Cockburn, C.J., Blackburn, Mellor and Archibald, JJ.), January 14, 15, 1875]

[Reported L.R. 10 Q.B. 111; 44 L.J.Q.B. 49; 32 L.T. 252; 39 J.P. 693; 23 W.R. 520]

Contract—Breach—Damages—Remoteness of damage—Damage proximate, direct, probable, necessary, and natural consequence of breach—In contemplation of parties as possible result of breach—Inconvenience as distinct from mere vexation.

In assessing damages for a breach of contract the injury for which compensation is sought must be one which is the proximate, direct, probable, necessary, and natural consequence of the breach, and so may fairly be taken to have been contemplated by the parties at the time of their making the contract as a possible result of a breach. In assessing the damages personal inconvenience of a substantial character, as distinct from mere vexation, can be taken into account.

Hadley v. *Baxendale* (1) (1854), 9 Exch. 341, applied.

The plaintiffs, a husband and his wife, accompanied by two young children, took tickets at the Wimbledon station of the defendant company's railway to be conveyed to Hampton Court. The train did not go to Hampton Court, and the plaintiffs had to get out at Esher and walk home, a distance of between four and five miles, owing to their inability to get a conveyance or accommodation for the night at an inn. The night was wet, and the wife, having caught cold, was laid up for a time with illness, which necessitated her husband incurring medical expenses, and prevented her from assisting him in his business. In an action against the railway company to recover damages for the breach of contract, the jury gave the plaintiffs £8 in respect of the personal inconvenience suffered by them in having to walk home, and £20 in respect of the consequences of the wife's illness.

Held: the £8 damages in respect of the personal inconvenience suffered by the plaintiffs was properly recoverable, being the direct and natural result of the defendants' breach of contract, but the £20 given in respect of the wife's illness was too remote from the breach and so was not properly recoverable.

Contract—Breach—Damages—Remoteness of damage—Question of law for judge.

Per BLACKBURN, J.: The question of remoteness of damage is one which should never be left to the jury. It is always a question of law for the court.

Notes. Considered: *Lilley* v. *Doubleday*, [1881–5] All E.R.Rep. 406. Distinguished: *McMahon* v. *Field* (1881), 7 Q.B.D. 591. Applied: *Bailey* v. *Bullock*, [1950] 2 All E.R. 1167. Referred to: *Le Blanche* v. *London and North Western Rail. Co.* (1876), 1 C.P.D. 286; *Coldman* v. *Hill* (1918), 34 T.L.R. 486; *Ruffy-Arnell etc. Co.* v. *R.*, [1922] 1 K.B. 599; *Mehmet Dogan Bey* v. *Abdeni & Co.*, [1951] 2 All E.R. 162.

As to remoteness of damage, see 11 HALSBURY'S LAWS (3rd Edn.) 268 et seq.; and for cases see 17 DIGEST (Repl.) 114 et seq.

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

(2) *Hamlin* v. *Great Northern Rail. Co.* (1856), 1 H. & N. 408; 26 L.J.Ex. 20; 28 L.T.O.S. 104; 5 W.R. 76; 156 E.R. 1261; sub nom. *Hamblin* v. *Great Northern Rail. Co.*, 2 Jur.N.S. 1122; 17 Digest (Repl.) 103, *175*.

(3) *Burton* v. *Pinkerton* (1867), L.R. 2 Exch. 340; 36 L.J.Ex. 137; 17 L.T. 15; 31 J.P. 615; 15 W.R. 1139; 2 Mar.L.C. 694; 17 Digest (Repl.) 118, *301.*

(4) *Gee* v. *Lancashire and Yorkshire Rail. Co.* (1860), 6 H. & N. 211; 30 L.J.Ex. 11; 3 L.T. 328; 6 Jur.N.S. 1118; 9 W.R. 103; 158 E.R. 87; 17 Digest (Repl.) 117, *292.*

Also referred to in argument:

Woodger v. *Great Western Rail. Co.* (1867), L.R. 2 C.P. 318; 36 L.J.C.P. 177; 15 L.T. 579; 15 W.R. 383; 8 Digest (Repl.) 155, *979.*

Davis v. *Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 8 Digest (Repl.) 14, *65.*

Lee v. *Riley* (1865), 18 C.B.N.S. 722; 34 L.J.C.P. 212; 12 L.T. 388; 11 Jur.N.S. 527; 13 W.R. 751; 144 E.R. 629; 2 Digest (Repl.) 312, *155.*

Powell v. *Salisbury* (1828), 2 Y. & J. 391; 148 E.R. 970; 17 Digest (Repl.) 114, *271.*

Lawrence v. *Jenkins* (1873), L.R. 8 Q.B. 274; 42 L.J.Q.B. 147; 28 L.T. 406; 37 J.P. 357; 21 W.R. 577; 2 Digest (Repl.) 303, *103.*

Sneesby v. *Lancashire and Yorkshire Rail. Co.* (1874), L.R. 9 Q.B. 263; 43 L.J.Q.B. 69; 30 L.T. 492; affirmed (1875), 1 Q.B.D. 42; 45 L.J.Q.B. 1; 33 L.T. 372; 40 J.P. 36; 24 W.R. 99, C.A.; 36 Digest (Repl.) 36, *174.*

Hill v. *New River Co.* (1868), 9 B. & S. 303; 18 L.T. 355; 36 Digest (Repl.) 39, *190.*

Mullett v. *Mason* (1866), L.R. 1 C.P. 559; Har. & Ruth. 779; 35 L.J.C.P. 299; 14 L.T. 558; 12 Jur.N.S. 547; 14 W.R. 898; 2 Digest (Repl.) 405, *733.*

Greenland v. *Chaplin* (1850), 5 Exch. 243; 19 L.J.Ex. 293; 15 L.T.O.S. 185; 155 E.R. 104; 17 Digest (Repl.) 125, *355.*

Fletcher v. *Tayleur* (1855), 17 C.B. 21; 25 L.J.C.P. 65; 26 L.T.O.S. 60; 139 E.R. 973; 17 Digest (Repl.) 95, *120.*

Rule Nisi for an order to reduce the damages awarded to the plaintiffs in an action against the defendant railway company for breach of a contract to carry them as passengers to the agreed destination.

The first count of the declaration alleged that the female plaintiff became a passenger in one of the defendants' carriages to be by them carried from Wimbledon to Hampton Court by a train which the defendants represented was about to proceed to Hampton Court, and it, thereupon, became the duty of the defendants to carry her thither, but they carried her in another direction, viz. to Esher Station, far distant from Hampton Court Station, and there left her, whereby the female plaintiff suffered great exposure, inconvenience, and fatigue, and through consequent illness had been unable to attend to domestic affairs and business, and to her children. Under this count the plaintiffs claimed £300. The second count of the declaration alleged that the male plaintiff was deprived of the comfort and services of his wife, and was put to expense in providing nursing and medical attendances upon her by reason of the premises in the first count mentioned. The plaintiff claimed under this count £100. The defendants pleaded payment into court of £2; to which the plaintiffs replied that they had sustained damages to a greater amount, on which replication issue was joined.

The case was tried at the Kingston Spring Assizes before KELLY, C.B., when the following facts were proved in evidence. The male plaintiff, who lived at New Hampton, on the night of Aug. 12, 1873, took tickets for himself, his wife, and two children (aged five and seven years) at the Wimbledon Station of the defendants' line of railway, to be conveyed to Hampton Court. The train started at midnight, and, proceeding by a different branch from that which led to Hampton Court, stopped at Esher, a station further distant from the plaintiffs' house than the Hampton Court Station by between two and three miles. An attempt to get a carriage and other conveyance to take them home, a distance of between four and five miles, proved ineffectual, as did also an attempt to get accommodation for the night at an inn. The result was that the plaintiffs with their children had

to walk the whole way home, and, as the night was wet, the female plaintiff caught cold and was laid up with illness for some time, and expenses were incurred for medicines and medical attendance. Further, the male plaintiff was for a time deprived of the assistance which his wife had previously been in the habit of rendering to him in his business.

The jury returned a verdict for the plaintiffs, giving £8 damages in respect of the personal inconvenience suffered by the plaintiffs from their having to walk home, and £20 damages in respect of the wife's illness. Pursuant to leave reserved at the trial, the present rule nisi was obtained by the defendants.

Digby Seymour, Q.C., and *G. Shaw* showed cause.
Serjeant Parry and *C. W. Wood*, Q.C., supported the rule.

COCKBURN, C.J.—I am of opinion that this rule should be made absolute as regards the £20 damages given in respect of the wife's sufferings resulting from her having caught cold on this walk from Esher to Hampton; but that it should be discharged as regards the £8 damages given in respect of the personal inconvenience suffered by the husband and wife in consequence of their not being put down at the proper place.

We think that the two heads of damage must be kept distinct, and I propose to deal with them as distinct subjects. With regard to the first, there can be no doubt whatever upon the facts that the plaintiffs were put to personal inconvenience. They had to walk at twelve o'clock at night a long distance; the wife suffered fatigue from it; they had to carry their children, who were fatigued and exhausted; and there is no doubt that they themselves suffered personal fatigue and inconvenience, and that that inconvenience was the immediate consequence and result of the breach of contract on the part of the defendants. The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, and they tried to get a conveyance, but failed, so that they had no alternative but to walk. It cannot, therefore, be doubted that the inconvenience was the necessary consequence of the breach of contract by the defendants. Inasmuch, then, as there was a distinct personal inconvenience suffered by the plaintiffs, I am at a loss to see why that should not be compensated by damages in such an action as this. It has been endeavoured to be argued, on principle and on authority, that it is not so; that the personal inconvenience was more or less imaginary, depending on the strength and constitution of the parties and other circumstances, and that it must not be taken that a walk of this distance is such a thing as persons would dislike or from which they would suffer inconvenience. There might, no doubt, be circumstances under which such a walk would not have such results, but that must depend on the circumstances of each particular case, and if the jury have come to the conclusion that in this particular case personal inconvenience did result to the plaintiffs, there is no reason that I can see why it should not be compensated for.

Hamlin v. *Great Northern Rail. Co.* (2) was cited to show that no damages should be awarded for personal inconvenience, but the case seems to me to fall very far short of that proposition. It appears to me to amount only to this, that if a person failed to arrive at a place where he had appointed to arrive at a particular time, and thereby lost customers and sustained pecuniary damage, that would be loss too remote for damages in an action for breach of contract. That may be perfectly true, for in each case you would have to go into the question whether there was a loss arising from the breach of contract before you could assess the loss. According to the principle laid down in *Hadley* v. *Baxendale* (1) the damage must be such as was in the contemplation of the parties as likely to result from the breach of the contract; and it could not be that railway companies should have in their minds all the possible circumstances which might result from any of their passengers being detained on the journey owing to each man's particular employment. I am very far from saying that *Hamlin* v. *Great Northern Rail. Co.* (2) was wrongly decided; but if it is understood to decide that the personal

A inconvenience of a passenger, however serious, is never to be taken into account in the damages for breach of contract, I should not be disposed to follow such an authority. I do not think that decision applicable to the present case at all. There is no authority to show that personal inconvenience, where it is sufficiently serious, should not be compensated in damages in an action like the present.

As to the £8, then, I think the verdict should stand; as to the second head of B damage, the case stands on a very different footing. I see very great difficulty indeed in coming to any other conclusion than that the £20 is not recoverable, and when we are asked to lay down some general principle as a guide in all such cases, I quite agree with my brother BLACKBURN as to the infinite difficulty there would be in laying down any rule which would be a guide in every case. I think, as was laid down in *Hadley* v. *Baxendale* (1) that, to entitle a person to damages C for breach of contract, the injury for which compensation is asked should be one that may fairly be taken to have been contemplated by the parties as a possible result of the breach of contract. We must, therefore, have something flowing immediately out of the breach of contract, something immediately connected with it, and not connected with it merely through a series of causes intervening between the breach of contract and the damage suffered. I cannot take a better D illustration of this than the case now before use. Suppose that a passenger by railway is turned out in the middle of the night at a wrong station, and, having to walk a considerable distance, catches cold which results in a fever, and he is laid up for a couple of months, and through that loses an offer of employment which would bring him in a handsome salary. No one who understood the law would say that such a loss was so connected with the breach of contract as to render E the railway company liable. Here I think it cannot be said that the catching cold by the plaintiff's wife is the immediate or necessary effect of the breach of contract, or is a consequence which could fairly be said to have been in the contemplation of the parties.

As my brother BLACKBURN pointed out, so far as the immediate inconvenience of the walk home is concerned, that must be taken to have been in the contempla- F tion of the parties, because if a carrier undertakes to put down a passenger at a certain place, and does not put him down at that place, but puts him down somewhere else, it must have been in the contemplation of the parties that the passenger must, in such a case, obtain some other means of getting home. If he can get other means he may take them and make the carrier liable for the expense so incurred by him; but if no other means can be found, then the carrier must compensate him G for the personal inconvenience which the absence of those means has caused. Supposing, then, there is nothing in the present case to make it an exception to this rule, the personal inconvenience suffered by the plaintiffs must be held to be a fair subject-matter for damages.

But the second head of damages, as I have already said, does not stand on the same footing. The illness of the plaintiff's wife was, no doubt, an effect of the H breach of contract by the defendants, but it is an effect removed one stage; it is not a primary but a secondary effect; and if a party could recover damages for a cold caught under such circumstances, it would be necessary to hold that in two cases which were mentioned in the course of the argument the party injured would be entitled to recover also; but it is admitted that in those cases, according to our law, the party injured would not be entitled to recover. One was the case of a I person who, having to walk home on a dark night, stumbled, and fell, and broke a limb or otherwise injured himself. Everybody would agree that an injury so caused would be damage too remote and such a consequence as the carrier would not be liable for, for a person might walk a hundred times, or indeed a great many more times, from Esher to Hampton Court without falling down and breaking a limb. Therefore, such an injury would not be the necessary or natural consequence of the carrier's breach of contract. Again, the passenger who is put down at the wrong station would be entitled to take a carriage to convey him home. Suppose the carriage which he took broke down or overturned, and so caused bodily

injury, could it be urged by him in an action: "If you had put me down at the proper place I should not have been obliged to take the carriage which occasioned the accident and caused the injury." Such an injury would clearly be too remote.

I think the same is the case here. It is not the necessary, nor even probable consequence of a person being put down at an improper station and having to walk home that he should either sustain an injury or catch a cold. Therefore, that cannot be said to have been within the contemplation of the parties as the probable consequence of a breach of the contract to carry. I think then, as regards the £20 damages given by the jury in respect of the illness of the plaintiff's wife, that it is not properly recoverable from the defendants, the injury being too remote. The rule must, therefore, be made absolute to reduce the damages by that amount.

BLACKBURN, J.—I am of the same opinion. I think the rule should be made absolute to reduce the damages to £8 beyond the £2 paid into court by the defendants, but not any further. The action is in reality on a contract, or on a duty arising out of a contract. The contract was to carry the plaintiff, his wife, and two children to Hampton Court. That contract was, in fact, broken because the defendants landed them at Esher and not at Hampton Court. The defendants contracted to supply a conveyance to Hampton Court, and it was not supplied by them.

The general rule, where there is a contract to supply a thing and it is not supplied, is that the measure of damages for breach of the contract is the difference between the price of that which should have been supplied and that which you have to pay for getting another thing of the same kind, or, if that is not attainable, the difference between the price of the thing and that of the best substitute for it which you can get. It was said, on the authority of *Hamlin* v. *Great Northern Rail. Co.* (2) that the rule did not apply here, and that, though, if the plaintiffs had at Esher hired a carriage or any other vehicle for which they had paid money, they could recover the money so paid from the defendants, yet since no conveyance could be got, and the plaintiffs were compelled to walk home, no damages could be recovered from the defendants, because no money was actually paid out of pocket by the plaintiffs. *Hamlin* v. *Great Northern Rail. Co.* (2) was cited to show that there must be an actual pecuniary disbursement. This, however, seems to me not to be sound reasoning. If what the passenger is entitled to recover is the difference between what the defendants contracted to supply and what the plaintiffs were able to get, and they were not able to get a conveyance at all, I do not see what better rule there can be than that which the learned judge laid down for the jury in this case, namely, that they were to see what inconvenience the plaintiffs suffered in having to walk home, when they could not get a carriage.

Taking that view of the matter, I think something was recoverable for the personal inconvenience so occasioned to the plaintiffs, and if it was left to me to determine its amount, I might possibly think that £10 was too much, but that is not the question which we have to decide. The question is whether the plaintiffs are entitled to recover anything, and I think they are. I think that when *Hamlin* v. *Great Northern Rail. Co.* (2) is looked at, it will be found that there was there no inconvenience at all. The plaintiff was going to Hull where he was to stop that night. He had to stop the night at Grimsby, and went on to Hull next day; and what he sought to recover in the action against the railway company was damages for the loss of the customers whom he had appointed to meet. That was held to be too remote, and he was held entitled only to five shillings—how that amount was arrived at I do not know. The inconvenience which he suffered by having to sleep at Grimsby instead of at Hull was nothing, and there was no substantial ground on which he could recover what he sought. I do not understand that case to decide that nothing but money paid out of pocket can be recovered by the passenger in such a case; but, if it did decide that, *Burton* v. *Pinkerton* (3) is quite the other way, for all the judges there held that the plaintiff was entitled to recover something for the inconvenience of being left at Rio de Janeiro, the only question

in the case being as to another point, namely, the claim for damages for his imprisonment there which the majority of the court thought could not be taken into consideration by the jury. I think, therefore, that the plaintiffs were entitled to something for the personal inconvenience suffered by them, and I do not see that we can reduce the amount of damages below what the jury have found.

Then comes the further question whether the damages awarded in respect of the illness of the wife can be recovered by the plaintiffs, and I think they cannot, because they are too remote. On the subject of damages being too remote, it was long ago laid down that damages too remote cannot be recovered; but it has been left in great doubt what damages are too remote. LORD BACON said (Max. Reg. 1):

> "It were infinite for the law to judge the causes of causes and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

Though it is impossible to give an exact definition, I agree with my Lord that it makes it a little more precise to say that damages may be recovered, for whatever the parties may be taken to have had in their contemplation as a possible result of the breach of contract. For my own part I cannot bring myself nearer to a definition than that. As has been said, it is like having to determine the exact amount of twilight which intervenes between day and night. There are, however, many cases as to which no doubt exists that they are on the one side or on the other of the dividing line, and I think that that is so here.

I do not see the analogy of the case suggested where a railway company from want of reasonable care breaks the legs of a passenger, because from such a breach of the contract to carry safely the most direct and immediate consequence is that the passenger should be injured. Though the contract broken is, in the present case, the same, namely, a contract to carry the passenger safely, the nature of the breach is different, and it is in respect of that that the damages are recoverable. Suppose the declaration in each case was expanded thus: You, the defendants, contracted to carry me safely to Hampton Court; you negligently upset the carriage and dashed me on the ground, whereby I became ill. Such a consequence of the breach of contract is clear and immediate. The other case would be this: You contracted to carry me to Hampton Court; but you went to Esher and put me down there, and as I could get no conveyance to take me to Hampton Court I was obliged, as the only means of getting there, to walk; and because it was a cold and wet night, and I was a sickly woman, I caught cold and became ill. In this latter case one sees a great many "causes of causes and their impulsions one of another." As to the two instances put by my Lord, of a man stumbling in the dark and breaking his leg, and of a man hiring a carriage which breaks down and injures him, they are both, and more obviously than the present case, on the remote side of the line; but I should draw the line so as to exclude the present case also, though I think it is not so clear as in the other two cases. I do not think it is any one's fault that the matter cannot be put more definitely, and that it must be left vague where the line is to be drawn. In each case the court must say whether it is on one side or the other of the dividing line, and I think that the question of remoteness is one which should never be left to the jury, for that would be in effect to say that there should be no rule at all on the subject. It is always a question of law for the court whether the damage in a particular case is too remote or not. The rule must be made absolute to reduce the damages to £8 beyond the amount paid into court.

MELLOR, J.—I am entirely of the same opinion. I quite agree that for mere inconvenience, the result of the temper and annoyance or vexation at something not occurring which a person sets his mind upon, there being no real physical inconvenience, damages cannot be recovered. Such an inconvenience might be a merely sentimental one for which no possible measure of damages could be fixed. But when it is admitted that where you are put down by a railway company at a

place where you ought not to be put down, you are entitled to hire a carriage or other conveyance to take you to your destination, which the railway company would be liable to pay for, I cannot see why it should not follow that where from a similar cause you suffer any personal inconvenience of a substantial character, such as having to walk a long distance home, that inconvenience should not also be capable of being assessed in damages, for the reason why you may hire a conveyance, and charge the company with it is simply in order to mitigate the inconvenience which you would otherwise have to suffer.

As to the other point I confess I should have felt great alarm if we could not see our way to hold that the damages given in respect of the illness of the wife were not properly recoverable. I should feel great alarm as to the extent to which a different rule might be applied. I think, therefore, it is necessary to see whether there is any rule which would enable us to divide the damages by the measure of inconvenience suffered on the one side, and by the fact that they are too remote on the other. I think that which was said by WILDE, B., in *Gee* v. *Lancashire and Yorkshire Rail. Co.* (4) is, with one change of expression, applicable to the present case. He said (6 H. & N. at p. 220):

> "The damage which as a matter of law must be considered as a measure of damages is such as arises naturally [I would add 'and directly'] from the breach of contract, or such as both parties might reasonably have expected to result from a breach of the contract."

In the present case it happened that the night was dark and wet, and, consequently, the inconvenience was greater than it would have been on any other night, and the cold caught by the wife was the result of the wet. But all that was accidental. If in walking home, she had put her foot into a pool of water, and when she got home, had omitted to take proper means to prevent her catching cold in consequence, to say that she could recover damages from the railway company for an illness so caused would be to lay down a very dangerous rule indeed.

I do not pretend to be able to lay down a rule which would be applicable to all cases; for even the rule laid down in *Hadley* v. *Baxendale* (1) is not applicable to all cases. There must exist variations and exceptional circumstances which must leave many cases in a state of uncertainty. In the present case I have come to the same conclusion as my Lord and my brother BLACKBURN that the rule should be made absolute to reduce the damages to the sum of £8 beyond the sum of £2 which has been paid into court.

ARCHIBALD, J.—I am of the same opinion, and I entirely concur in the reasonings and as to the illustrations used by the other members of the court. I will only add, without laying down any precise rule, that the damages recoverable in an action for breach of contract should be the proximate, probable and natural consequences of the breach, which may be fairly taken to have been in the contemplation of the parties at the time of making the contract. Applying that principle here, I think the personal inconvenience to the plaintiffs from their having to walk home from Esher was such an inconvenience as the parties to the contract must be taken to have contemplated as a natural consequence of the breach of it, and this inconvenience appears to me capable of being estimated in a pecuniary way. It is admitted that, if a conveyance could have been procured by the plaintiffs, the expenses incurred by the plaintiffs, could be recovered as damages from the defendants. It would be rather hard if, no conveyance being to be found, the plaintiffs should have nothing to compensate them for the inconvenience they sustained. It is not a case of mere vexation, but one of physical inconvenience which can in a sense be measured by money value, and the parties here have had the fair measure of that inconvenience in the damages awarded by the jury.

As to the second head of damage, I think it is too remote. It does not fall within the same category as the other. There are too many speculative elements to be taken into account—the wet night, the state of health of the wife—things

which cannot be considered to have been in the contemplation of the parties when the contract was entered into. This head of damage, therefore, falls beyond the line. The rule as to damages being too remote prevents this head of damages being recoverable. The rule must, therefore, be made absolute to reduce the damages to £8 beyond the sum paid into court.

Rule accordingly.

Solicitors: *Guillaume & Sons*; *L. Crombie.*

ROSSITER AND OTHERS *v.* MILLER

[HOUSE OF LORDS (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan, Lord Blackburn and Lord Gordon), July 18, 19, 22, 1878]

[Reported 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865]

Sale of Land—Contract—Memorandum—Parties—Need to specify by name—Indication by description—"Proprietors" of property described and offered for sale.

The parties to a contract for the sale of land, which, by s. 4 of the Statute of Frauds, 1677 [now s. 40 of the Law of Property Act, 1925], must be in writing, must be specified, but they need not be specified by name. If they are so indicated by description as to be certainly ascertainable, the exigence of the statute in that respect is satisfied. Where, therefore, the terms and conditions of the sale of real property, after speaking of the site, the supply of water, and drainage, used the term "proprietors" to denote the owners of the property who were offering it for sale,

Held: a sufficient description to comply with the statute.

Sale of Land—Enforcement—Terms agreed in correspondence—Stipulation that terms be embodied in formal contract.

If, on the construction of correspondence which has taken place between the parties to a contract for the sale of land, all the particulars essential for the finality and completeness of a contract, with reference to the premises, parties, price, and conditions and stipulations, are found, there is a completed and enforceable contract sufficient to satisfy the requirements formerly to be found in s. 4 of the Statute of Frauds, 1677 [now s. 40 of the Law of Property Act, 1925], and the mere fact that the parties have stipulated that there shall afterwards be prepared a formal agreement embodying the terms agreed on is immaterial and does not affect the matter.

Chinnock v. *Marchioness of Ely* (1) (1865), 4 De G.J. and Sm. 638, distinguished.

Notes. Distinguished: *Donnison* v. *People's Café Co.* (1881), 45 L.T. 187. Considered: *Shardlow* v. *Cotterell* (1881), 18 Ch.D. 280; *Hawkesworth* v. *Chaffey* (1886), 55 L.J.Ch. 335; *Jarrett* v. *Hunter* (1886), 34 Ch.D. 182; *Gray* v. *Smith* (1889), 43 Ch.D. 208; *Pattle* v. *Anstruther* (1893), 69 L.T. 175; *Lloyd* v. *Nowell*, [1895] 2 Ch. 744. Applied: *Filby* v. *Hounsell*, [1895–9] All E.R.Rep. 427. Considered: *Cook* v. *Williams* (1897), 13 T.L.R. 481; *North* v. *Percival*, [1898] 2 Ch. 128; *Walters* v. *Le Blanc* (1899), 15 T.L.R. 426; *Lovesy* v. *Palmer*, [1916–17] All E.R.Rep. 1034. Followed: *Love and Stewart* v. *Instone* (1917), 33 T.L.R. 475.

Considered: *Rossdale* v. *Denny*, [1921] 1 Ch. 57; *Chillingworth* v. *Esche* (1923), 92 L.J.Ch. 461; *Fay* v. *Miller, Wilkins & Co.*, [1941] 2 All E.R. 18. Referred to: *Henderson* v. *Montague L. Meyer, Ltd.* (1941), 85 Sol. Jo. 166; *Abdul Karim Basma* v. *Weekes*, [1950] 2 All E.R. 146; *Sociedade Portuguesa de Navios Tanques, Ltda.* v. *Hvalfangerselskapet Polaris A/S*, [1952] 1 T.L.R. 220.

As to the requirements for a valid contract for the sale of land, see 34 HALSBURY'S LAWS (3rd Edn.) 205–210; and for cases see 40 DIGEST (Repl.) 11 et seq. For the Law of Property Act, 1925, see 20 HALSBURY'S STATUTES (2nd Edn.) 427.

Cases referred to:

(1) *Chinnock* v. *Marchioness of Ely* (1865), 4 De G.J. & Sm. 638; 6 New Rep. 1; 12 L.T. 251; 29 J.P. 279; 11 Jur.N.S. 329; 13 W.R. 597; 46 E.R. 1066, L.C.; 40 Digest (Repl.) 15, *40.*

(2) *Ridgway* v. *Wharton* (1857), 6 H.L.Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 4 Jur.N.S. 173; 5 W.R. 804; 10 E.R. 1287, H.L.; 12 Digest (Repl.) 154, *985.*

Also referred to in argument:

Potter v. *Duffield* (1874), L.R. 18 Eq. 4; 43 L.J.Ch. 472; 22 W.R. 585; 40 Digest (Repl.) 27, *121.*

Sale v. *Lambert* (1874), L.R. 18 Eq. 1; 43 L.J.Ch. 470; 22 W.R. 478; 40 Digest (Repl.) 29, *134.*

Fowle v. *Freeman* (1804), 9 Ves. 351; 32 E.R. 638; 40 Digest (Repl.) 36, *191.*

Kennedy v. *Lee* (1817), 3 Mer. 441; 36 E.R. 170, L.C.; 12 Digest (Repl.) 102, *597.*

Thomas v. *Dering* (1837), 1 Keen, 729; 6 L.J.Ch. 267; 1 Jur. 211; 48 E.R. 488; 12 Digest (Repl.) 93, *527.*

Skinner v. *M'Douall* (1848), 2 De G. & Sm. 265; 17 L.J.Ch. 347; 11 L.T.O.S. 411; 12 Jur. 741; 64 E.R. 120; 40 Digest (Repl.) 44, *271.*

Heyworth v. *Knight* (1864), 17 C.B.N.S. 298; 4 New Rep. 288; 33 L.J.C.P. 298; 10 Jur.N.S. 866; 144 E.R. 120; 12 Digest (Repl.) 101, *596.*

Lewis v. *Brass* (1877), 3 Q.B.D. 667; 37 L.T. 738; 26 W.R. 152, C.A.; 12 Digest (Repl.) 95, *547.*

Crossley v. *Maycock* (1874), L.R. 18 Eq. 180; 43 L.J.Ch. 379; 22 W.R. 387; 12 Digest (Repl.) 93, *529.*

Bonnewell v. *Jenkins* (1878), 8 Ch.D. 70; 47 L.J.Ch. 758; 38 L.T. 581; 26 W.R. 294, C.A.; 12 Digest (Repl.) 95, *549.*

Morris v. *Wilson* (1859), 33 L.T.O.S. 56; 5 Jur.N.S. 168; 12 Digest (Repl.) 22, *88.*

Shortrede v. *Cheek* (1834), 1 Ad. & El. 57; 3 L.J.K.B. 125.

Williams v. *Byrnes* (1863), 1 Moo.P.C.C.N.S. 154; 2 New Rep. 47; 8 L.T. 69; 9 Jur.N.S. 363; 11 W.R. 487; 15 E.R. 660, P.C.; 12 Digest (Repl.) 145, *911.*

Ogilvie v. *Foljambe* (1817), 3 Mer. 53; 36 E.R. 21; 40 Digest (Repl.) 36, *198.*

Waldron v. *Jacob* (1870), 5 I.R.Eq. 131; 12 Digest (Repl.) 151, **616.*

Hood v. *Lord Barrington* (1868), L.R. 6 Eq. 218; 40 Digest (Repl.) 30, *139.*

Commins v. *Scott* (1875), L.R. 20 Eq. 11; 44 L.J.Ch. 563; 32 L.T. 420; 23 W.R. 498; 40 Digest (Repl.) 30, *137.*

Beer v. *London and Paris Hotel Co.* (1875), L.R. 20 Eq. 412; 32 L.T. 715; 40 Digest (Repl.) 37, *201.*

Catling v. *King* (1877), 5 Ch.D. 660; 46 L.J.Ch. 384; 36 L.T. 526; 41 J.P. 692; 25 W.R. 550, C.A.; 40 Digest (Repl.) 30, *138.*

Brogden v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, H.L.; 12 Digest (Repl.) 55, *300.*

Morgan v. *Holford* (1852), 1 Sm. & G. 101; 20 L.T.O.S. 177; 17 Jur. 225; 1 W.R. 101; 65 E.R. 45; 40 Digest (Repl.) 25, *106.*

Winn v. *Bull* (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 26 W.R. 230; 12 Digest (Repl.) 94, *544.*

A *Skelton* v. *Cole* (1857), 1 De G. & J. 587; 44 E.R. 850, L.JJ.; 40 Digest (Repl.) 27, *125*.

Thomas v. *Brown* (1876), 1 Q.B.D. 714; 45 L.J.Q.B. 811; 35 L.T. 237; 24 W.R. 821; 40 Digest (Repl.) 30, *145*.

Hinde v. *Whitehouse* (1806), 7 East, 558; 3 Smith, K.B. 528; 103 E.R. 216; 12 Digest (Repl.) 156, *992*.

B *Smith* v. *Webster* (1876), 3 Ch.D. 49; 45 L.J.Ch. 528; 35 L.T. 44; 40 J.P. 805; 24 W.R. 894, C.A.; 12 Digest (Repl.) 177, *1173*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (Lord Coleridge, C.J., James and Baggallay, L.JJ.), reported 5 Ch.D. 648, reversing a decision of Sir George Jessel, M.R., in favour of the plaintiffs.

C The action was brought to compel the specific performance by the respondent of an agreement to purchase plots of land belonging to the appellants, and the main question was whether letters which had passed between the agent of the vendors and the respondent constituted a binding contract within the meaning of the Statute of Frauds.

H. Davey, *Q.C.*, and *Carson* for the appellants.

D *Chitty*, *Q.C.*, and *Phear* for the respondent.

Their Lordships took time for consideration.

July 22, 1878. The following opinions were read.

LORD CAIRNS, L.C.—After a careful and anxious consideration of this case, I E regret to say I am not able to look at it in the point of view in which it has presented itself to the learned judges of the court below.

The appeal arises in an action for specific performance brought by the vendors of certain property against the purchaser, and in that action three questions have been raised—one principal question, and two others which are to some extent subordinate. The main question in the case is whether there was in point of fact a concluded F contract between the parties. The two subordinate questions are (i) whether in the view of the enactment of the Statute of Frauds, the vendors were sufficiently described in writing by the term "proprietors", and (ii) whether the person who affected to act as agent for the vendors had authority to bind them. Those being the three questions which have been raised, it was upon the first of them that the case was determined by the Court of Appeal. Their Lordships, all of them as I G understand, thought that there was no contract actually concluded in the case. James, L.J., said that in his opinion it was not a question of the Statute of Frauds, but a question whether there was any contract; and Lord Coleridge, C.J., and Baggallay, L.J., both founded their decisions upon *Chinnock* v. *Marchioness of Ely* (1), the decision in which was that there there was no contract. Therefore, I understand that all the learned judges in the Court of Appeal proceeded on the H principle that in the present case no contract has been actually concluded.

In order to consider the first question, I will remind your Lordships that there was here a certain property in the county of Surrey, which had been bought by some persons, eight in number, upon a speculation with a view to re-selling it, and they had the property conveyed to two of their number, entering at the same time into an agreement among themselves as to the manner in which the speculation I should be conducted. The property was to be vested as regards the legal estate in the two persons mentioned, but there was to be no notice of the trust upon the title. The two were to have, on the title, the power of leasing and of selling; but as between them and the other proprietors they were not to lease or sell without the sanction of their co-proprietors, and that sanction was to be given by the majority. Meetings were to be held, five of the number constituting a quorum, and the questions being decided by the majority of the meeting. They then took a course which is not unusual in such cases. As the object was to sell in lots of considerable size, in July, 1871, they had a map prepared of the property for

circulation, and they had printed upon the map certain terms and conditions upon which the sales were to be made.

I must call your Lordships' attention particularly to the nature of those terms. The map speaks of the site, of the supply of water, and of the drainage. It speaks then of the roads, and it uses the term "proprietors" to denote the owners of the property, who are offering it for sale. The first of the conditions is as to the price of the plots, title, and conveyance; then there is a second head as to the dimensions of the plots, a third as to building lines, and where fences are to be erected, a fourth as to fences, a fifth as to the value of buildings to be put upon the plots, a sixth as to forbidding brickmaking, a seventh reserving certain rights as to control of the roads and the drainage, and an eighth in which there is a return to the question of title and conveyance.

> "Each purchaser, on completing his purchase to execute a deed of covenant embodying the above rules and stipulations, and providing for their due performance mutually by such purchaser and vendors. Application for purchase to be made to Messrs. White and Sons, estate agents, Dorking."

In the event of more than one application being made during the first day's sale, it is provided who should be the purchaser, and then it concludes with this sentence:

> "Each purchaser will be required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit at the rate of 10 per cent. on the amount of the purchase money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided by the first stipulation."

I pause there to point out to your Lordships that in these conditions there are to be found the detailed terms of a contract such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. There is a stipulation that the purchaser would be required to sign a contract embodying these conditions. That is an obvious and natural term, because the contemplation is that persons will come in, and make offers of the price which is required for the plots and at that point the persons so offering will not be bound by anything. It will be necessary to bind them, and, therefore, they are told beforehand that at the time when their offer is accepted, or along with the acceptance of the offer, the matter will not be allowed to rest in dubio, or without legal obligation, but that they will be required to sign something which will bind them. They are told what they will be required to sign; it will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract as to which the vendors are content beforehand to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape. That is what is stated to the purchasers by this printed form of conditions.

That being the scheme by which this property was offered to the public, it appears that some sales were made in 1871 and in 1873, as to which no question arises, but in 1875 there was still some part of the property unsold. It was in that year that the respondent made an offer for one or more of the plots of unsold land. The manner in which the offer was made is detailed in an affidavit, and there appears to be no controversy as to that part of the case. It was a verbal offer, which would not become binding upon him until some writing had passed; but it was an offer as to the terms of which there is, I believe, no controversy. It was an offer which, after the statement which has been made by Mr. White (who was acting as agent for the vendors for the purpose of receiving offers and communicating with intending purchasers) of the way in which it was made, must be taken to be an offer of £1,000 for the particular plots, on the terms and conditions in the printed paper of July, 1871. That offer having been made, Mr. White submitted it to a meeting of the persons beneficially interested, and, having received the authority

A of that meeting to accept that offer, he wrote a letter to the respondent on April 21, 1875, in these words:

> "The proprietors have this day agreed to accept your offer of Saturday last, conveyed to them through me, viz., to purchase for £1,000 plots 33, 34, and 35, on the original estate plan, dated July, 1871, and lot 1 in the sale particulars of August, 1873, subject to the conditions and stipulations printed on the plan first-named. It was taken into consideration by them in reducing the published price that you intended building at once, which, of course, they wish to encourage. I have requested Messrs. Hart and Marten to forward you the agreement for purchase."

I will put aside for the moment the mention here that it had been taken into consideration by the proprietors in reducing the published price that Mr. Miller intended building. That introduced an element which became the subject of another letter. Putting that aside, your Lordships have here a rehearsal or repetition by Mr. White of the terms, stating the price and the property to be purchased, and that the purchase was made subject to the conditions and stipulations printed upon the plan of July, 1871. Taking that in connection with that plan, it is, so far as this letter is concerned, an acceptance by the vendors, by their authorised agent, in writing, of an offer clear and distinct, upon the terms of that paper and, so far as the vendors were concerned, I am at a loss to conceive any words which could have more clearly or distinctly expressed the form of the agreement by which they were content to be bound. Mr. White adds:

> "I have requested Messrs. Hart and Marten to forward you the agreement for purchase."

What did that mean? At the time this letter was written it was an absolute necessity that something should be signed by Mr. Miller, for up to that time he had signed nothing, he had made no offer in writing, and he was not in any way bound. It was, therefore, not only natural for Mr. White, but it was his duty in accepting the offer, and recording the acceptance of the vendors in writing, to take immediate steps to obtain a correlative acceptance in writing by the purchaser. The natural way in which he would obtain that acceptance would be by calling on the purchaser to sign the agreement which he was told in these conditions of sale he would be asked to sign, and, accordingly, Mr. White says so in his letter. It is not in any way the suspending of the making of a contract until an agreement is determined upon and arranged. It is a letter recording the conclusion of a contract so far as the vendors are concerned, which letter at the same time takes notice that the purchaser is not yet bound by the signature which is required under the Statute of Frauds, and he is, therefore, called upon to place himself under the obligation under which the vendors were already content to lie.

Mr. Miller replied to the letter I have read, without waiting for the agreement. He said:

> "I am in receipt of yours of yesterday's date, in which you say: 'It was taken into consideration by them, in reducing the published price that you intended building at once, which, of course, they wish to encourage.' I cannot be bound to build at any given time, or at all. Therefore, as you say the reduction in price was in consequence of your undertaking that I should build at once, the offer had better be re-considered, unless you are prepared to leave me at liberty to do as I may think best."

What is the meaning of that letter? It is, of course, to be read in juxtaposition with, and in continuation of, the letter to which it is an answer. He speaks of his offer as Mr. White had spoken of it in the letter written to him. The writer of the first letter and of the second are, therefore, at one as to what the offer was—as to the property to be sold, the price, the terms, and conditions. Mr. Miller, therefore, puts his signature to a letter in which he affirms his assent to the description of the offer which he had found in the letter addressed to him, but then, in consequence

of the sentence in the letter addressed to himself which had implied that the vendors expected him to build at a particular time, he very properly, to avoid any misunderstanding, states that he would not come under any terms of that kind. Therefore he says, "the offer had better be re-considered, unless you are prepared to leave me at liberty to do as I may think best." I apprehend that means this: My offer is still before you, you have described my offer correctly in your letter. I repeat it. I ask you again to consider it; but let there be no misunderstanding with regard to the question of building immediately—that is not included in my offer; but, supposing that is rightly understood, and my offer is accepted pure and simple, I am content that it should be so. It, therefore, comes at this point of the case to a clear and distinct offer made by a person who has confirmed it in writing, and the only question is: Was that letter accepted? On April 22, Mr. White replies:

> "Mine to you of yesterday's date was not intended to convey a conditional acceptance of your offer therein defined. I gathered from your remarks that you intended to build shortly, but it is not the wish of the proprietors or myself to bind you in any way to do so. In developing an estate like this every house that is built increases the value of the remaining land; this I laid before the proprietors. Your offer I take to be based simply upon the stipulations of July, 1871, so that, in your own words, 'you are at liberty to do as you may think best.'"

I have only to say that, but that I have found the learned judges of the Court of Appeal, for whose opinion I have the greatest respect, taking a different view, I should have said that a clearer and simpler case of an offer made and accepted by a correspondence consisting of no more than three letters I have seldom seen. Every term is made clear by reference to an elaborate scheme of conditions under which the sales were to be made. The offer is recognised in terms by the person who made it under his hand, and it is accepted without the possibility of doubt or cavil by the persons to whom it was made. The reference to the agreement in the first letter is, I think, exactly what you might have expected to find. I have pointed out that the purchaser was at that time in no way bound, and, therefore, it was right of the vendors to call upon him for the signature of the agreement which he was bound to sign. But, as regards any legal consequence, the moment he had himself written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1871, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was, to my mind, perfectly indifferent whether they did so or not. If they did so, it must be an agreement exactly to the effect of the terms and conditions of the paper of 1871, and no other terms and conditions could have been introduced. If other terms and conditions had been introduced, the vendors would have had a perfect right not only to refuse to accept those other terms, but to insist on an agreement in the original terms of the paper of 1871.

I, therefore, come to the conclusion that there is here clearly and distinctly a concluded contract with the terms expressed in this letter, subject to the observation which I have yet to make upon what I call the second part of the case, in reference to the use of the word "authorised." Let me here say that I am at a loss to understand upon what principle *Chinnock* v. *Marchioness of Ely* (1) was supposed to bear upon the present case. The letter upon which the whole of that case turned was this:

> "We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you in a few days."

There Lord Westbury, L.C., uses these words:

> "I entirely accept the doctrine contended for by the plaintiff's counsel, that, if there had been a final agreement, and the terms of it are evidenced in a

manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or, although it may be an express term, that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of a final mutual assent by the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent, lawfully authorised, there exist all the materials which this court requires to make a legally binding contract."

Up to that point it appears to me that these words exactly describe the case which your Lordships have before you; but the words which were relied upon by the learned judges in the Court of Appeal are the words which follow:

"But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me; for I am clearly of opinion that the true and fair meaning and legal effect of the letter may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into.' I take the letter, therefore, either as a conditional acceptance of the plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement."

I can only say that I am willing to accept every word of LORD WESTBURY as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction; and I entirely acquiesce in what he says, that, if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind, there is a clear offer and a clear acceptance; there is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made. It is a satisfaction to think that, before the judgment of the parties in this case became somewhat obscured by the controversy which arose between them, the view which I certainly must take of the case was the view which was taken by the respondent himself and by his legal advisers; and I greatly regret that the advice of his solicitors was not taken by him.

The other two points in the case really are very small. As to the use of the term "proprietors," I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale, not merely by auction, but by private contract, in which it is stated that the sale is made sometimes by the "owners," and sometimes by the "mortgagees," and a form of contract is annexed in which an agent signs for the vendors, and no other specification on the vendors' part is inserted; and I never heard up to this time that a contract under those circumstances was valid. In point of fact, the question is: Is there any certainty which is described in the legal maxim, Id certum est quod certum reddi potest? I enter into a contract "on behalf of my client," "on behalf of my principal," "on behalf of my friend," "on behalf of those whom it may concern"; in all those cases there is no such certainty, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being an agent, enter into a contract to sell Blackacre, "on behalf of the proprietor of Blackacre," or to sell the house, No. 1, Portland Place, "on behalf of the owner of the house, No. 1, Portland Place," there, I apprehend, is a statement of matter of fact as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise. I should be

surprised if any authority could be found, and certainly none has been produced, to say that a contract under those circumstances would not be valid.

[On the question as to the authority of Mr. White, the agent HIS LORDSHIP said that Mr. White undoubtedly had the authority of the appellants, he concluded:] I, therefore, move your Lordships that the order appealed from be reversed, and that the decree made by the Master of the Rolls be restored, and that the respondent pay to the appellants their costs, both in the Court of Appeal and in your Lordships' House.

LORD HATHERLEY.—I quite concur in the view which has been taken of this case by my noble and learned friend on the Woolsack. I at once say that I shall pass over altogether the question with regard to the word "proprietors," as to which I have not the slightest hesitation in coming to the same conclusion as that which has been already mentioned. Upon the other question, whether or not the authority of Mr. White was good, I think it was justly stated by my noble and learned friend that there can be no doubt upon that subject when you consider the meetings of the proprietors that were held ratifying that which had been done in their name.

As regards the main question of the agreement itself, I certainly should very much regret, in the case of any contract which appears to me so plainly expressed as this is, to break into a uniform line of decisions, whether it may or may not have been approved of by all the judges before whom the question has come. It has been established for far too long a time, and by some precedents in your Lordships' House among others, that, if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, though not set forth in the form in which a solicitor would do it if he were instructed to draw an agreement in writing, that will not the less constitute an agreement in the full sense between the parties if the letters say that the agreement is to be put into due form by a solicitor. If it is stated in so many plain and express terms (and in *Chinnock* v. *Marchioness of Ely* (1) that was the ground on which the case proceeded), that one of the very terms of the agreement itself was that it should not be a concluded agreement until a solicitor intervened, and drew a formal agreement. If you find that to be a term of the agreement itself, well and good; if not, the agreement stands. Both parties may desire that it should be put into a formal shape by a solicitor, who in that case will not be able to vary the agreement on either side, but only to put into a more formal and professional shape the agreement which has been completely formed with unity of purpose, with reference to the sale and purchase by the two parties to the contract.

In the present case although, of course, we ought to hesitate a little after the judgment which has been pronounced by the learned judges in the court below, still it does seem to me that Mr. White wished to make what he was about extremely clear. He had had a conversation with the respondent, and he places distinctively in writing before the gentleman with whom he had had the verbal agreement what his conception of that agreement is, and he receives a letter from that gentleman to whom he has so stated the agreement acknowledging it to be a correct exposition of the agreement between them. It is very clear that the respondent made an offer intending that to be the agreement he was about to come to; he was making an offer to purchase for £1,000 this property upon the conditions he had been talking about with Mr. White, namely, the terms and conditions of the paper of July, 1871; and when you come to Mr. White's letter, which is the foundation of what we have in writing evidencing the agreement, you will find that he puts it extremely correctly. He had promised Mr. Miller that he would lay the offer before the proprietors. We find, in fact, that the proprietors do meet soon after, and, there being a quorum, they come to a resolution that the offer be accepted, and thereupon Mr. White writes to the respondent the letter which has been read. I have already made an observation upon what has been urged with regard to the statement that a solicitor would be directed to prepare a formal agreement. That in no way varies

or alters the offer already made, if that offer was accepted simpliciter. Mr. Miller finds, no doubt, that the letter very carefully represents the offer he had made; but, very properly, in order that there may be no mistake about the matter, says that he cannot be bound with regard to building at a particular time. That induces me to be bold enough to say that it is as clear an acknowledgment and acceptance, in writing, of the proposition which had been made verbally as can well be conceived in any case, for this gentleman is very particular all through. He had evidently studied the statement made to him, and he finds no fault whatever with the statement made by Mr. White of what the offer was. He does think it necessary to call attention to the passage in the letter which says that the proprietors, in reducing the price, had been influenced by the notion that he was going to build at once upon the property, and he says in effect: "That was no part of the agreement, I do not agree to that, and I do not intend to agree to it, and therefore, if that is your intention, you had better allow the offer to be at once reconsidered, unless you are prepared to leave me at liberty to do as I may think best." That means: "If you allow me to do as I think best I do not want the offer to be reconsidered. There is the offer; you have stated it rightly to me. I made it before, and I repeat it now; but I find a new term in your letter. I cannot quite make out whether it is a term which you propose, or whether it is merely a suggestion or hint that you are giving me; but I do not acknowledge it as any part of the agreement whatsoever, and unless you can make up your minds to leave me entire liberty in that matter you had better re-consider the offer." They told him they did give him entire liberty. What more could be said?

I do not think it necessary to go farther into detail on the subject of the agreement; and with regard to *Chinnock* v. *Marchioness of Ely* (1) I think that has no bearing on the present case. If we do not consider that these parties had entered into an agreement we should grievously break the long-established course of authority, without any grounds that I can discover in the present case beyond that of a proposal that the agreement should be formerly reduced into shape by a solicitor. JAMES L.J., comments at considerable length upon the difficulty which the proprietors might have been in if it had been the other way; that is to say, supposing it was Mr. Miller who was wishing to enforce this agreement against Mr. White's principals. In doing that it is said that it might be very hard upon the proprietors to find themselves bound down by an onerous condition of sale. But it is perfectly clear that on their part they were intending to do that. There is no doubt whatever that they intended that whoever bought any of their land should buy it upon those conditions of sale, and that, both on the part of the proprietors and on that of the intending purchaser, the purchase should be subject to those conditions. I do not think there was ever any doubt or hesitation in anybody's mind as to that part of the case. The part of the case as to which there was hesitation was whether the acceptance was such as to enable the parties to say that this was a treaty, and not an agreement. We are bound to decide between a treaty and an agreement, and the side of agreement must prevail. The treaty was completely exhausted and at an end when Mr. White informed the intending purchaser that he had mistaken him if he supposed that he had introduced an additional term into the agreement with regard to building. Thereupon the agreement which had been made verbally, and had thus been acknowledged in writing by Mr. Miller, came fully and completely into existence.

LORD O'HAGAN.—In this case two points have been submitted to your consideration, the first regarding the sufficiency of the contract as a final and binding agreement, and the second its sufficiency within the operation of the Statute of Frauds. As to the agent's authority I think the matter too plain for argument.

On the second point all the judges in both the courts below have been of one opinion in favour of the appellants, and I have no doubt that that opinion is correct. The parties to a contract in writing must no doubt be specified, but it is not necessary that they should be specified by name. The whole course of decision and

practice shows that it is not. If they are so indicated by description as to be certainly ascertainable, the exigence of the statute in that respect is satisfied. Here the vendors are called "the proprietors," and described as proprietors in possession. There could be no mistake as to their ownership of the premises to be conveyed, and their identity for all practical purposes was as clearly and unequivocally established as if their names and designations had been set out in the conditions of sale. It is of common experience that transactions continually occur, and have been repeatedly validated by judicial decision, under circumstances in which business is habitually conducted, on the assumption that such a description is legally satisfactory. No inconvenience has arisen; and I agree with JAMES, L.J., that it would be a very bad thing if the question which has been so conveniently settled should now be re-opened without necessity or advantage. Your Lordships will probably affirm without difficulty the unanimous opinion of the learned judges on the second point.

On the first point, but for the view adopted by the Court of Appeal, I should think the case as clear as on the second; and I should be quite content to rest on the reasons already so fully given, if my high respect for the learned members of that court did not make it becoming that I should very briefly vindicate for myself the grounds of my opinion. It seems to me that the contract of which we have evidence in the letters was a completed contract, and conclusively bound the parties to it. The contract was approved, and the sole condition of its completion was made the leaving the respondent at liberty to build or not to build, as he pleased. The agent of the vendors announced immediately that he had meant to make no condition, and there was no ground whatever for the objection, and that the respondent should have all the liberty he desired. Thereupon I think that the contract was complete; everything essential to the completion of it appears on the written documents—the parties, the premises, the conditions, and the price; an offer is made, those who had full power to accept it accept it in terms by their fully authorised agent; the purchaser thinks they are making conditions, they answer that they are not, and again accept it simply and absolutely as he had asked them to do. I cannot conceive that anything remained but to carry out the bargain which was then and there consummated.

We have had a great deal of ingenious reasoning founded on the statement in Mr. White's letter that he requested Messrs. Hart and Marten to forward "the agreement for purchase." It has been said that until the execution of that agreement the transaction was inchoate and incomplete. Undoubtedly, if any prospective contract involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embraces all the particulars essential for finality and completeness, and is such that, when it is reduced to legal shape by a solicitor in a formal contract, those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical arrangement which remains to be made. *Chinnock* v. *Marchioness of Ely* (1) differs from the case before us, because there the treaty for a sale was pending, and not concluded, and the formal contract was to ascertain the terms on which the vendor was prepared to act. But here the negotiation had come to an end, the terms were distinctly ascertained, as I have said, with reference to premises, parties, price, and conditions and stipulations, which by reference were as plainly made part of the contract as if they had been repeated in it word by word. In that state of facts, if I correctly represent it, the judgment of LORD WESTBURY appears to me to be strongly in favour of the appellants. He says:

> "If there has been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement will be binding, though the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although there may be an express term that a formal agreement shall be prepared and sign deby the parties."

In my apprehension the contract in this case was final, and did satisfy the Statute of Frauds, and the agreement for purchase promised by Mr. White was merely formal, and could only contain the terms already fully fixed between the parties.

I do not trouble your Lordships with any observations as to subtle distinctions which have been taken at the bar between "intention" and "contract." I am unable, on the undisputed evidence in the case, to see any reason for doubt that what the parties did in completing the sale they fully intended to do. The offer by the respondent was intended, the acceptance by the appellants was intended; and, although the respondent, for reasons of his own, changed his mind, he did not venture to say that the contract, which at all risks he declined to carry out, did not fully express the intention with which he had originated and concluded it. It seems to me impossible to hold that he did not intend to buy, and that the appellants did not intend to sell on the very terms which he now endeavours to repudiate. The correspondence gives no colour to the suggestion that the contract was not final, and was not considered to be final by all the parties to it, because the formal agreement embodying its already settled terms had not been finished. I concur with my noble and learned friends that the appeal should be allowed and the judgment reversed, with costs.

LORD BLACKBURN.—I also concur in the judgment proposed. I quite agree with the lords justices that, wholly irrespective of the Statute of Frauds, it is a necessary part of the appellants' case to show that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation, either party may retract, and, although the parties may have agreed on all the cardinal points of the intended agreement, yet, if some particulars essential to it still remain to be settled afterwards, there is no contract. The parties in such a case are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall be a formal agreement prepared afterwards embodying the terms, which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence, and determining whether the parties have really come to a final agreement or not, but as soon as the fact is established of the final mutual assent of the parties, so that those who draw up the final agreement have not the power to vary the terms already settled, I think the contract is complete. That is what I understand to be the meaning of LORD CRANWORTH, L.C., in *Ridgway* v. *Wharton* (2), and this is in the same case stated by LORD WENSLEYDALE in terms assented to by LORD ST. LEONARDS. Parties often do enter into a negotiation meaning that when they have come to one mind the result shall be put into formal shape, and then signed and become binding, but that each party is to reserve to himself the right to retire from the contract if on looking at the formal contract he finds that, though it may represent what was said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held to be bound till they have executed the formal contract. If I thought with BAGGALLAY, L.J., that the letters left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement, I should also think that the plaintiff failed; but I cannot put that construction on the letters. If I understand JAMES, L.J., rightly, he thinks that in practice persons who really meant only to enter into such a preliminary negotiation are held bound contrary to their intention, and I do not doubt that this sometimes happens. I infer that he wishes it to be a canon of construction that whenever there is a stipulation for a further and more formal agreement, the previous arrangements should be held to be only of this preliminary nature. I doubt whether such a canon of construction would not defeat the intention of the parties as often, at least, as the present; but I think it is too late now to introduce it. I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up. In the

present case I think the whole is a question of what is expressed in the three letters, and the conditions therein referred to. The contract mentioned in the last of the conditions was to be one embodying the foregoing conditions, and making provision for the payment of 10 per cent. deposit. Nothing new could be introduced into it, and the purchaser, if he signed such a contract as is stipulated for there, would not have agreed to anything more than he had already agreed to, and there is nothing that I can find postponing the final assent till the agreement was seen and signed. Unless, therefore, such a new canon of construction as I have alluded to is to be introduced, I think the parties were bound as soon as both assented to those terms expressed in the conditions.

On the other points raised I have very little to add. I cannot understand the objection made to the evidence of White's authority; and although the construction by which it is held that there can be no memorandum of the agreement unless the writing shows who the parties are, is now inveterate, it is not necessary that they should be named. It is enough, if the parties are sufficiently described, to fix who they are, without receiving any evidence of the character which SIR JAMES WIGRAM calls "evidence to prove intention as an independent fact." In the present case, without receiving any such evidence, there is ample to show that the plaintiffs were those designated by the description of "the proprietors."

LORD GORDON concurred.

Appeal allowed.

Solicitors: *Duncan, Warren & Gardner*, for *Hart, Hart & Marten*, Dorking; *Prior, Bigg, Church & Adams*, for *Drummonds, Robinson & Till*, Croydon.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

RHODES *v.* FORWOOD AND ANOTHER

[HOUSE OF LORDS (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley, Lord Penzance and Lord O'Hagan), May 4, 1876]

[Reported 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078]

Agent—Agency—Termination—Sale by principal of business—Impossibility of agent earning commission—Liability of principal.

The respondents agreed with the appellant, a colliery owner, "in consideration of the services and payments to be mutually rendered," to act as his agents at L. for the sale of his coal for the term of seven years. It was stipulated that the appellant should not employ any other agent at L., and that the terms on which and the prices at which the coal was to be sold were to be subject to the approval of the appellant. The respondents undertook not, during the continuance of the agreement, to act as agents for the sale of any other coal without the appellant's permission. It was further provided that, if the respondents should not have sold 50,000 tons of coal on the appellant's account in any year, the appellant could determine the agency by a six months' notice, and the respondents were empowered in like manner to determine the agency in the event of the appellant not being able to supply 75,000 tons in any year. Before the expiration of the seven years the appellant sold the colliery, and, consequently, was unable to supply any more coal to the respondents. In an action by the respondents against the appellant for damages for breach of the agreement,

Held: in the absence of an express provision in the agreement that the appellant would not disable himself from supplying coal to the respondents, e.g., by selling the colliery, such a provision could not be implied, and, therefore, the respondents' action must fail.

Notes. Distinguished: *Turner* v. *Goldsmith*, [1891-4] All E.R.Rep. 384; *Turner* v. *Sawdon* (1901), 70 L.J.K.B. 897. Followed: *Northey* v. *Trevillion* (1902), 18 T.L.R. 648. Distinguished: *Ogdens* v. *Nelson*, *Ogdens* v. *Telford*, [1903] 2 K.B. 287; *Devonald* v. *Rosser & Sons*, [1904–7] All E.R.Rep. 988. Considered: *Measures* v. *Measures*, [1910] 2 Ch. 248. Followed: *Lazarus* v. *Cairns Line of Steamships* (1912), 106 L.T. 378. Distinguished: *Re Newman*, *Raphaels Claim*, [1916] 2 Ch. 309; *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*), *Ltd.*, [1918–19] All E.R.Rep. 143. Considered: *Re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315; *Re Comptoir Commercial Anversois* v. *Power*, [1920] 1 K.B. 868; *Warren* v. *Agdeshman* (1922), 38 T.L.R. 588. Distinguished: *Geo. Trollope & Sons* v. *Martyn Bros.* (1934), 50 T.L.R. 544. Considered: *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper*, [1941] 1 All E.R. 33. Distinguished: *Bauman* v. *Hulton Press, Ltd.*, [1952] 2 All E.R. 1121. Referred to: *Re South African Trust and Finance Co.*, *Ex parte Hirsch* (1896), 74 L.T. 769; *White* v. *Turnbull Martin & Co.*, [1895–9] All E.R.Rep. 270; *Re Royal Aquarium and Summer and Winter Garden Society* (1903), 20 T.L.R. 35; *Joynson* v. *Hunt* (1905), 21 T.L.R. 692; *Re Windsor Steam Coal Co.* (*1901*), *Ltd.* (1928), 140 L.T. 80; *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw*, [1940] 2 All E.R. 445; *Kahn* v. *Aircraft Industries Corpn.*, *Ltd.*, [1937] 3 All E.R. 476.

As to the termination of an agency on the termination of the principal's business, see 1 HALSBURY'S LAWS (3rd Edn.) 243, 244; and for cases see 1 DIGEST (Repl.) 629–637.

Cases referred to:

(1) *Stirling* v. *Maitland* (1864), 5 B. & S. 840; 5 New Rep. 46; 34 L.J.Q.B. 1; 11 L.T. 337; 29 J.P. 115; 11 Jur.N.S. 218; 13 W.R. 76; 122 E.R. 1043; 1 Digest (Repl.) 631, *2116*.

(2) *M'Intyre* v. *Belcher* (1863), 14 C.B.N.S. 654; 2 New Rep. 324; 32 L.J.C.P. 254; 8 L.T. 461; 10 Jur.N.S. 239; 11 W.R. 889; 143 E.R. 602; 12 Digest (Repl.) 691, *5313*.

(3) *Shaw* v. *Lawless* (1838), 5 Cl. & Fin. 129; 7 E.R. 353, H.L.; 44 Digest 288, *1195*.

Also referred to in argument:

Burton v. *Great Northern Rail. Co.* (1854), 9 Exch. 507; 23 L.J.Ex. 184; 2 W.R. 257; 156 E.R. 216; 12 Digest (Repl.) 703, *5368*.

Re English and Scottish Marine Insurance Co., *Ex parte Maclure* (1870), 5 Ch. App. 737; 39 L.J.Ch. 685; 23 L.T. 685; 18 W.R. 1123, C.A.; 1 Digest (Repl.) 632, *2119*.

Churchward v. *R.* (1865), L.R. 1 Q.B. 173; 6 B. & S. 807; 14 L.T. 57; 30 J.P. 213; 2 Mar.L.C. 303; 122 E.R. 1391; 12 Digest (Repl.) 689, *5288*.

Appeal from a decision of the Court of Exchequer Chamber in an action brought by the respondents against the appellant to recover damages for the breach of an agreement to employ them as his agents for the sale of coals at Liverpool, and for commission.

The respondents were shipowners, ship brokers, and general agents in Liverpool, and the appellant was, up to March, 1873, the owner of the Risca colliery in South Wales. On Sept. 20, 1869, the appellant, being desirous of introducing the Risca colliery coal into Liverpool, entered into the following agreement with the respondents:

"... in consideration of the services and payments to be mutually rendered and made, as hereinafter provided, it is hereby agreed between the parties

hereto, as follows, namely: (1) For the term of seven years from the first day of November next Messrs. Forwood, Paton & Co. [the respondents] or such of them as shall continue to carry on business in the name of that firm at Liverpool, shall and will be the agents of Mr. Rhodes [the appellant] at Liverpool for the sale of the coals of all kinds produced at the Risca collieries, subject, nevertheless, to the determination of such agency in manner hereinafter mentioned. (2) During the continuance of such agency Mr. Rhodes will not employ any other agent for the sale of coal in the port of Liverpool, save in respect of contracts now existing, all of which are expressly exempted from this agreement. (3) The rates at which coal is to be sold, and all special terms with respect thereto, and the purchasers, and the amount of credit in the case of sales other than for cash, are to be subject to the approval of Mr. Rhodes, as are also the rates to be charged for shipping or delivery of coals. (4) Messrs. Forwood, Paton & Co. will not, during the continuance of this agreement, act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes, to be obtained for each transaction. (5) The commission for the agency hereby created, shall be at the rate of £3 per cent. on all approved sales . . . (6) The agent's accounts for commission are to be settled quarterly . . . (7) In case, during the first or any subsequent year of the agency hereby created, reckoning from Nov. 1 to Nov. 1, Messrs. Forwood Paton & Co. shall not have bona fide sold 50,000 tons of coal on Mr. Rhodes's account, in conformity with the terms of this contract, it shall be lawful for Mr. Rhodes at any time prior to May 1 in the then ensuing year to determine the said agency at the expiration of six months from the delivery of a notice in writing to that effect, either personally or by sending the same by registered post letter, to the office for the time being of Messrs. Forwood, Paton & Co. And in the event of Mr. Rhodes not being able to supply with due dispatch the quantity and quality of coal, not exceeding 75,000 tons in all in any one year, which may have been sold on his account, in conformity with the terms of their contracts (saving the case of strikes or inevitable accident), it shall be lawful for Messrs. Forwood, Paton & Co. in like manner to determine their agency, the notice in such case to be delivered personally or sent by registered letter to the colliery office at Risca. . . ."

From the time when the agreement came into operation, and up to Mar. 22, 1873, the respondents sold under the agreement large quantities of the Risca Colliery coal, and received their commission in pursuance thereof. On Mar. 1, 1873, the appellant contracted to sell his Risca Colliery to Messrs. Watts & Co., who took possession on Mar. 22, 1873, and from that date the appellant ceased to have any control over the sale of coals raised at the Risca Colliery, and from that time ceased to employ the respondents. The appellant sold his colliery without informing the respondents, and without providing with the purchasers for the agreement set out. He only informed the purchasers that the respondents were his Liverpool agents in connection with the Risca Colliery, to which they replied that they might as well have the respondents as agents as anyone else. They, however, would not employ them on the terms of the agreement.

By the first count of the declaration the respondents set out the agreement of Sept. 20, 1869, and said that they were always ready and willing to do all things necessary to entitle them to the performance by the appellant of the agreement, and to maintain the action for the breaches thereof, but the appellant, before the expiration of the agreement had disabled himself from any longer carrying out the agreement and continuing the respondents as agents for the sale of coal produced at the Risca colliery. The appellant denied liability.

The cause came on for trial before DENMAN, J., at the Liverpool Spring Assizes in 1874, when it was agreed that the verdict should be entered for the plaintiffs, subject to the opinion of the court upon a Special Case stated by an arbitrator. A Case was, accordingly, stated, and after argument the court (BRAMWELL and

CLEASBY, BB.), gave judgment for the defendant. On appeal to the Exchequer Chamber, this decision was reversed by LORD COLERIDGE, C.J., LUSH and ARCHIBALD, JJ., KEATING and QUAIN, JJ., dissenting. The case was then brought up on error to the House of Lords.

Benjamin, Q.C., and *Patchett* for the appellant.
Manisty, Q.C., and *Bigham* for the respondents.

LORD CAIRNS, L.C.—I do not think that any of your Lordships can have any doubt as to the decision which the House ought to give in the present case. [HIS LORDSHIP stated the facts, and continued:] The sale of the colliery, of course, was a very considerable hardship upon the respondents. The expense which would fall most heavily upon them would be the expense in the earlier part of the employment, and they were deprived of the commission which they might have earned during the later years, which would have been the most productive part of their employment. But, although that is a hardship upon them which naturally one would regret to see occur, still the question remains: What was the contract entered into between the parties, and has there been, in what has been done, any violation of that contract?

It is not contended that there has been any violation of any express term in any part of the contract. There is no express term in the contract from beginning to end that the appellant would send any coal to Liverpool, or any particular quantity of coal to Liverpool, or that he would continue for any particular length of time to send coal to Liverpool. There is a complete absence of anything of that kind. But it is contended that there is an implied contract under which the appellant was bound to send coal to Liverpool, and that he has disabled himself from performing that implied contract by selling the colliery out of which the coal would have come. That requires your Lordships to look at the whole contract, and to discover, if you can, whether there is any such implied contract as is suggested. The general effect of the contract is this. It commences in this way, that

> "for the term of seven years, Paton and Forwood, or such of them as shall continue to carry on business in the name of that firm at Liverpool, shall and will be the agents of Mr. Rhodes at Liverpool for the sale of the coals of all kinds produced at the Risca Collieries."

I stop there for the purpose of saying that that obviously is, and, indeed, was admitted to be, not a contract that they would be the agents of Rhodes for a sale of Risca coal of all kinds, wherever the sale should take place, but that they would be the agents for the sale in Liverpool of such of the coal as was sold in Liverpool; and further, that it is obviously a contract that they will be the agents of Rhodes for the sale of coal which is produced at the Risca Colliery while the Risca Colliery is his property, because if it is the property of another person they could not be the agents of Rhodes for the sale of coal which did not belong to Rhodes. Further than that the contract is that they will thus be the agents of Mr. Rhodes for seven years, with this important qualification, "subject nevertheless to the determination of such agency in manner hereafter mentioned." You are, therefore, informed at the commencement that, although there is a fixed term stated, namely, seven years, means are provided in a subsequent part of the contract for terminating the agency.

Then there are two engagements, one upon the side of Rhodes, and the other upon the side of Forwood, and they are the only two express engagements which I find in the contract. With regard to Rhodes, the express engagement on his part is in the second clause:

> ". . . during the continuance of such agency Mr. Rhodes will not employ any other agent for the sale of coals in the port of Liverpool, save in respect of contracts now existing, all of which are expressly exempted from this agreement."

That is all which he actually contracts for. He ties his hand against having any other agent for the sale of coal in the port of Liverpool. The express contract on the part of Forwood, Paton & Co. is in the fourth paragraph:

> "Forwood, Paton & Co. will not, during the continuance of their agency, act as agents for the sale of any other steam coal, without the written consent of Mr. Rhodes, to be obtained for each transaction."

It is a correlative contract on their part, negative also in its aspect, that, as Rhodes will not employ any other agent, so they will not act for any other principal.

I ask your Lordships to consider, if the contract had stopped there, what would have been the result? Both parties would have been tied and bound for seven years, the one not to employ another agent, the other not to act for another principal. Then it appears to have occurred to them, naturally enough, to consider—but what if the agency produces no fruit to the agents? Or what if the agents are not able to act with the energy which the principal expects? Is this state of things to go on for seven years in that case? To deal with that, your Lordships find that cl. 7 is introduced, providing that if

> ". . . during the first or any subsequent year of the agency hereby created . . . Forwood, Paton & Co., shall not have bona fide sold 50,000 tons of coal on Mr. Rhodes's account, in conformity with the terms of this contract, it shall be lawful for Mr. Rhodes, at any time prior to May 1 in the ensuing year, to determine the said agency, at the expiration of six months from the delivery of a notice in writing to that effect. . . ."

On the other hand,

> "in the event of Mr. Rhodes not being able to supply with due despatch the quantity and quality of coal, not exceeding 75,000 tons in all in any one year which may have been sold on his account in conformity with the terms of this contract (saving the case of strikes or inevitable accident) it shall be lawful for Messrs. Forwood, Paton & Co. in like manner to determine their agency. . . ."

Therefore, there is not an absolute contract to employ no other agent during seven years, and an absolute contract to act for no other principal for seven years, but a contract of that kind, subject to determination in the manner mentioned, the mode of determination being that which I have read—a power to the principal to resile if his agent cannot sell at prices approved by him 50,000 tons of coals in the year, and a power to the agent to resile if the principal cannot supply him in any year with 75,000 tons of coal which can be sold at those prices. That is the protection which the parties have provided for themselves with reference to the duration or the continuance of this agreement.

I ask, the parties having provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply in the agreement what it is admitted is not found expressly there, namely, an engagement that during that time the principal will not disable himself from sending coals to Liverpool by selling his colliery to any other person? This question was asked by counsel for the respondents: Can you assume that the agents intended to leave open the right to sell the colliery without any assent on their part? I should ask, in answer to that, another question: Can you assume that the principal, the colliery owner, meant to tie his hands for seven years against selling the colliery without either obtaining the assent of the agents, or without paying them a gross sum, the equivalent for all the profits they might make by the continuance of the engagement during the seven years? If it was the intention that there should be an implied undertaking of that kind, how inconsistent would that have been with the clause which I have read, providing expressly in the events which are there mentioned for the determination of the agreement.

As I pointed out in the course of the argument, there are in this agreement several risks which are left altogether uncovered, as to some of which it is candidly

admitted by counsel for the respondents that no provision was made, and that they could not say that there was, even by implication, any protection. I will remind your Lordships of what those risks are. On the one hand, the appellant might sell the whole of his coals at ports other than Liverpool, and not send a single ton to Liverpool. That is admitted on the part of the respondents; they do not challenge that proposition. They say that that is an infirmity in the engagement between the parties. In the next place, the coal might have been sent to Liverpool, but the principal might have taken a view with regard to the price to be obtained for it which would have led him to place limits upon the coal such as to prevent the agents selling any of it in any one particular year, and the agents might have been left in that year without any commission whatever, although having coal in stock, because the principal might have thought it expedient to hold the coal, and wait for better prices. Again it is admitted that that was in the power of the principal, and that the agent could not have complained. Again, I asked the question: Supposing the colliery owner had, by reason of difficulties arising with the workers, or otherwise, chosen to close his colliery for a year, or for several years, and to wait for better times, or a more easy mode of working, could the agents have complained? It was said that they could not; that the colliery owner must be the judge of that; he might have taken that course without exposing himself to any proceedings for damages.

If that is so, if any one of these three courses might have been adopted, if all the coal after it was got out of the colliery might have been sold elsewhere, if the colliery might not have been worked at all, if the prices required to be fetched at Liverpool might have been such that the coal could not have been sold even after it went to Liverpool, if all that was in the power of the colliery owner and it could not be contended that there was any provision in this contract against any of those risks, why is it to be assumed with regard to the risk of the colliery owner selling the colliery to a purchaser, that there is an implied undertaking against that one risk? An agreement of this kind is obviously made upon the chances of risks of the sort I have referred to, none of which is expressed in the agreement. That which is in the mind of the parties, the principal, on the one hand, and the agents, on the other, is, supposing it to be convenient that the business should go on, and the coal find its way to the port of Liverpool, all that we require to stipulate for is that, on the one hand the principal should have the security that his agents will be sufficiently energetic to sell a certain quantity of coal in the year, and, on the other hand, that the agents should be able, if a sufficient quantity of coal is not put into their hands for sale to terminate the engagement. It is obvious, now that the result is seen, that it would have been a much wiser thing if the agents, in place of stipulating for a mode of terminating the agreement which required to work it out the lapse of perhaps a year, or eighteen months, had stipulated for a more speedy power of terminating it, and for the power of taking coal for other people as agents, supposing the coal of the Risca Colliery was not sent to them. That, however, was for them to judge of. Your Lordships cannot reform an agreement, because in the result it appears to produce consequences which possibly may not have been expected.

The simple point here appears to me to be, as it is admitted that there is no express contract which has been violated: Can your Lordships say that there is any implied contract which has been violated? I can find none. I cannot find any implied contract that the colliery owner would not sell his colliery. Therefore, I am obliged to arrive at the conclusion that the decision of the Court of Exchequer was correct, and that judgment should be given for the appellant.

LORD CHELMSFORD.—The question to be determined is whether the agreement upon which the action is brought involves an implied agreement on the part of the appellant that he will continue to carry on the Risca Colliery, and to employ the respondents as his agents at Liverpool for the sale of the coals of all kinds produced at the Risca Colliery, absolutely during seven years. It is conceded

that there is no express agreement to this effect; and the question is whether the sale of the colliery during the seven years is a breach of the agreement, the breach in the declaration being that the appellant before the expiration of the seven years disabled himself from any longer carrying out the agreement. LUSH, J., in his judgment, says:

> "There is not a phrase or a word which implies that the agency is to cease if the defendant chooses to sell the colliery while it is a going concern. Whether this was an inadvertent omission or an intentional one is beside the question. Probably such an event was not contemplated. It is sufficient, however, to say that it is not provided for, and therefore the contract remains binding, as it would have been if the defendant had continued to hold the colliery."

With great respect to the learned judge, how can an intention not in the contemplation of the parties be implied to have existed?

There is no doubt that at the time of entering into the agreement, both parties contemplated its continuance for seven years—that the one would continue to carry on business at Liverpool, and that the other would be the possessor of, and continue to work the Risca Collieries; and upon this expectation they provided for the determining of the contract, in the then existing state of things, by the owner of the colliery if the agents did not sell in any year 50,000 tons of coal, and by the agents, in case the owner did not supply 75,000 tons in any one year. This may be called the mode of actively determining the contract. But what is there in the agreement to prevent its coming positively to a premature end, either by the agents giving up business, or the owner giving up the colliery? The mere agreement for seven years, or the provisions for the determination of it on either side, will not be sufficient, and if it had been intended that the relations of the parties should absolutely continue for seven years, it ought to have been provided for. Not having been provided for, it cannot, in my opinion, be taken to have been intended. It was conceded that the appellant was not bound to send his coals to Liverpool. By sending them elsewhere he would voluntarily disable the agreement itself; what difference in point of fact can there be in disabling himself from performing it by parting with the colliery. I agree that the judgment of the Exchequer Chamber should be reversed, and judgment entered for the appellant.

LORD HATHERLEY.—I entirely concur in the views which have been expressed by the noble and learned Lords who have preceded me. It appears to me, as it did to QUAIN, J., in the court below, that when you peruse this whole agreement, you find an ordinary agreement of agency, and of agency alone. Forwood, Paton & Co. having said that they will be always ready and willing to act as Mr. Rhodes' agents for seven years, he says he will not, during the time they are so, employ any other agents at Liverpool for the sale of coals coming from the Risca collieries. He reserves to himself the full right to sell his coals anywhere else, and he also reserves the sole control over the price of the coals, the mode of effecting sales, and the terms. The sales are to be subject to the approval of Mr. Rhodes in all respects. Messrs. Forwood & Paton are merely agents so long as he retains the sole control over his property in the coal, and over the disposition of it. There is no allegation on the part of the respondents of anything in the shape of mala fides on the part of Mr. Rhodes in anything that he has done. The ordinary sales were made by him of his property at the times when he thought it beneficial to make such sales. It is also not now contended that there is anything in this agreement to prevent him from selling his coals elsewhere than in the port of Liverpool, as he may think fit, of course bona fide, and not with any special view of evading this agreement. On the other hand, Forwood, Paton & Co. engage (and that was greatly relied upon in the Exchequer Chamber), that during the continuance of this agency they will not "act as agents for the sale of any other steam coal without the written consent of Mr. Rhodes to be obtained for each transaction."

It appears to me that when you have read as far as those four clauses, you have a very clear and complete agreement. Afterwards, it is true, there is cl. 7, which is very important, upon the whole, in the consideration of the case, regard being had to the arguments which have been adduced on the part of the respondents, still in those four clauses you have a very clear and complete agreement. It would be a singular undertaking to introduce by implication into that agreement that Mr. Rhodes would never during a period of seven years dispose of the colliery itself. Why is there anything more reasonable in implying—on the contrary, is it not much more unreasonable to imply—such a provision as that he should deprive himself for seven years of the power of selling his colliery than that the engagement on the part of Forwood, Paton & Co. to act as agents was meant to continue only so long as he continued to be the owner of the colliery? The latter seems to me a much more reasonable supposition than the former. The one party says: "We are engaging to sell for you your Risca coal, of course implying that while so acting as your agents, we are selling for you in the capacity of owner of that colliery, and when you cease to be owner of it, we shall cease to be agents." The case has arisen in which the agency is necessarily by the force of events terminated. To imply such a proposition as this from the agreement, that because other persons have said to you: "We are content to act as your agents, and will stand ready and willing for seven years to be your agents," therefore you have engaged not to deal with your own property for that period, seems to me a far more forced interpretation than that of simply inserting a clause like that to which I have referred. This view of the agreement is very much strengthened by cl. 7, which shows that the parties did contemplate possible reasons for their being dissatisfied on both sides with the working of the agreement, and wishing to absolve themselves from the binding efficacy of it. For that purpose experience was required to enable them to judge of its working. Accordingly they provide, if you, on the one hand, find by experience that we are such slow agents that we cannot dispose of 50,000 tons of coal to your advantage, you may determine it; if we, on the other hand, think that we are such active agents as to be able to dispose of 75,000 tons a year, and you cannot supply us with the quantity, then we may determine it.

The parties seem to me to have entered into a simple contract of agency, which necessarily determines when the subject-matter of the agency is gone. The subject-matter of the agency has disappeared without mala fides on either side. Therefore, the contract is brought to an end by the course of events, by that happening which might have been expected to happen, and which would have the effect of putting an end to the contract. It was as entirely open to anticipation that the contract of agency might be concluded by that event as that it might be concluded by the operation of cl. 7. There are three or four other kinds of contingencies, as the noble and learned Lord on the Woolsack has observed, which are unprovided for.

It appears to me that all that has happened is this. The parties meet together, and they assume as between themselves the probability of a certain state of things existing, but they do not enter into a guarantee that that state of things shall continue to exist. As was well observed by COCKBURN, C.J. in *Stirling* v. *Maitland* (1) if you find that a certain state of things, which existed at the date of the contract, is necessary in order to give the contract any effect at all, you may no doubt, acting with due care and caution in such cases, imply an agreement that that state of things shall exist, because otherwise no effect could be given to the contract. But here very full effect could, as it appears to me, be given to the contract in the way in which it has been given by the original decision of the Court of Exchequer, and I am of opinion that that decision should stand, and that the judgment of the Court of Exchequer Chamber should be reversed.

LORD PENZANCE.—I desire to say but a very few words upon this case, agreeing entirely as I do with the way in which this question has been dealt with by the noble and learned Lords who have preceded me. The case resolves itself into a very simple one—which, independently of the special terms of the contract,

may be, and probably is, a case that is arising in many other trades and businesses, and in many other cases besides the present.

A principal who wants to have a portion of his business transacted in Liverpool engages an agent, and they enter into a mutual bargain, the one that he will employ no other agent, the other that he will act for no other principal. They enter into other stipulations as to prices, commission, and so forth, but the substance of the agreement is such as I have mentioned. Upon such an agreement as that, unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as a matter of obligation on his part that, whether the business is a profitable one or not, he shall be bound to carry it on for the benefit of the agent, and the commission he may receive. I say that in a contract of that kind there ought to be some special obligation, otherwise the natural reading of such a contract would be that as long as the principal chooses to carry on his business, and as long as he chooses, as here, to carry on that portion of the business which consists of sales of coals at the particular port he shall be bound to employ the person whom he has agreed should act as his agent for such sales, but that he shall be at liberty, when he likes to put an end to that business, to do so. But in this case the sort of obligation or condition which is asked by the respondents to be implied is of a most singular character, because they do not contend that the principal is bound to carry on the business for their profit. They do not contend that the principal is bound to continue to send the coals to Liverpool; but they say: Although it is quite true that you are not bound to carry on your business in such a way as to give me any profit whatever, because you are not bound to raise coal, and, if you do, you are not bound to send it to Liverpool, yet I maintain that there is implied somewhere in this contract an obligation that you will keep possession of this colliery. For what purpose? What possible interest has the agent in a condition that, although the principal is not bound to send coal to Liverpool and so put money into the agent's pocket, still the colliery must remain the property of the principal? It seems to me, therefore, that the contention of the respondents in the present case does not go far enough. They ought to have gone at least to the extent of saying that the nature of the bargain was such that they had an interest in the appellant's colliery as well as he, and that he could not put an end to the business in Liverpool without damaging their interest. But they do not say that; they admit that the principal might, in the variety of ways that have been indicated, have so acted that they might have obtained no benefit from the agreement. They say: We maintain that there is an implied condition that although we get no benefit out of it, nevertheless you shall keep yourself possessed of the colliery. I confess I am quite unable to find any terms in this contract from which such an obligation can be implied, and I cannot conceive that the intention of the parties was, or that the respondents would have had any interest in its being, that such an obligation should be created.

I wish to say a few words upon *M'Intyre* v. *Belcher* (2) in which the defendant bought a business, and was to pay a portion of the profits that he should make from it. After he had bought the business he ceased to carry it on, and, therefore, the seller lost a portion of what was the agreed price for which the business was sold. The court held that there was an implied obligation on the part of the defendant that he would go on working at the business in order to make profits: and I think no one can deny that that was quite in accordance with justice, and with law. That was a very different case from the present. There the bargain was for a definite payment out of the profits to be earned by the defendant as part of the price of the business which had previously been sold to him. Here the bargain is for an agency to be carried on for the mutual benefit of Forwood, Paton & Co., and Rhodes, the selling prices of the coals to be sold being at the sole discretion of Rhodes himself. Therefore, instead of its being a payment for something gone by, the bargain is that, if the business is carried on, Forwood, Paton & Co. shall get a certain benefit out of it. It seems to me, therefore, that not only

does that case not apply in the present instance, but that the principle contained in it very well illustrates the great difference there is between the present case and all cases in which the court has held, in the language of COCKBURN, C.J., in *Stirling* v. *Maitland* (1), "that the defendant is bound to continue a state of things which is necessary to the carrying out of his own contract."

I wish to add one word more upon a suggestion which has been made, that the agents here might be bound for eighteen months not to act for anybody else, notwithstanding that Rhodes had in the meantime sold the colliery. The question whether they are so bound does not arise in this case, but I should be sorry to affirm the proposition that when the appellant had sold the colliery, and had, therefore, put an end to the agency, the respondents were still bound not to act for anyone else, for I find that the terms of the contract upon that subject are these, that Forwood, Paton & Co. "will not, during the continuance of their agency, act as agents for the sale of any other steam coal." If the appellant has put an end to the agency, it might be successfully contended that the other party was at liberty to act for other coal proprietors. But that point does not arise in the present case, and, therefore, I desire not to express an opinion upon it at present. On the whole I think the judgment of the Court of Exchequer Chamber ought to be reversed, and the judgment of the Court of Exchequer affirmed.

LORD O'HAGAN.—With such hesitation as is made reasonable by the difference of opinion among the learned judges in the courts below, I fully concur in thinking that the decision of the Court of Exchequer Chamber ought to be reversed.

The question is merely as to the construction of the contract; and I can add little of value to the argument already presented to your Lordships. The terms of the instrument appear to me fairly to indicate the intention of the parties that whatever coals might be sent by the appellant at his own option from his mine to Liverpool should be sold there by the respondents, as his agents, for a proper commission, but not at all to import, according to the contention of the respondents, that the appellant should, for a period of seven years deprive himself of the power of disposing of his own property whatever might be the inducement, the interest, or the necessity. I think that the words in themselves are not naturally and fairly open to this latter construction; and the consequences of such an interpretation seem to me so unreasonable and inconvenient as to incline us to repel it even if the matter, on the reading of the words, was in a condition of doubt.

As in most cases of the kind we are little assisted by authority. Judicial decision on one contract can rarely help us to the understanding of another; and, dealing with that before us within itself, regarding the relative position of the parties as throwing light upon its meaning and upon their real purpose, and remembering the admission at the Bar that the appellant was at liberty to sell his coals in other markets besides that of Liverpool, I approve the view adopted by the Court of Exchequer, which is commended by many considerations of consistency and convenience not to be found in that to which it is opposed.

I have said that there is no case ruling or much affecting the question before us, but I shall refer your Lordships to a passage in the judgment of your Lordship's House in *Shaw* v. *Lawless* (3), which indicates the hesitation felt by the noble and learned Lords who pronounced it in assuming, without a very clear expression to that effect, the purpose of a devisor to control the right of a devisee in dealing freely with his own property. In that case Mr. Shaw, having made a devise for life and directed the purchase of real estate, declared his desire that his executors should retain Mr. Lawless as agent in the receipt of the rents, at the usual fees. The words of the will were held not to create a trust in favour of Mr. Lawless, LORD COTTENHAM, L.C., observing (5 Cl. & Fin. at p. 155):

> "What is the subject in the present case? It is the right to be employed in the receipt of the rents and the agency and management of the land of the devisee upon the usual fees. What is the necessary effect of this alleged right?

It goes to exclude Shaw from the management of his own estate, or from the receipt of the rents themselves."

In a previous part of his judgment he says (ibid. at p. 154):

"When your Lordships see to what extent, I might almost say to what absurd extent, this construction of the will necessarily leads, you cannot hesitate in coming to the conclusion that it is at least very doubtful how far this could possibly have been the intention of the testator."

So in this case I more than hesitate to believe that the intention imputed to the parties by the respondents could really have been entertained by them. Looking to these considerations, and the plain words of the instrument itself, I believe the conclusion to which your Lordships have arrived is well founded, and will carry into effect the true purpose of the contract.

Appeal allowed.

Solicitors: *Bridges, Sawtell, Heywood & Ram*; *Chester, Urquhart, Mayhew & Holden*, for *Haigh & Co.*, Liverpool.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

COLE AND OTHERS *v.* NORTH WESTERN BANK

[Court of Exchequer Chamber (Cleasby, Pollock, Amphlett and Bramwell, BB., Blackburn, Mellor and Lush, JJ.), February 4, 5, May 12, 1875]

[Reported L.R. 10 C.P. 354; 44 L.J.C.P. 233; 32 L.T. 733]

Agent—Mercantile agent—Pledge—Right to pledge—"Agent entrusted with possession of goods"—Agent instructed to warehouse goods and obtain valuation.

By s. 1 of the Factors Act, 1842: "Any agent who shall be entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bona fide made by any person with such agent so entrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent."

S. carried on the business of a warehouseman, and also that of a wool broker, the two businesses being distinct from and independent of each other. In March and April, 1872, the plaintiffs, wool importers, sent to S. bills of lading relating to four parcels of wool which were about to arrive in different ships, requesting him to take charge of the wool for their account and send them a report and valuation and to follow their instructions as regards disposal. Accordingly, S. took the wool from the ships and put it into his warehouse. He then obtained from the defendant bank a loan of £7,000 on the security of the wool. S. having absconded with the money, the bank obtained the keys of the warehouse and took possession of the wool. Later, the wool was sold. In an action by the plaintiffs against the bank to recover the proceeds of the sale,

Held: for a person to be an "agent entrusted with the possession of goods" within s. 1 of the Act of 1842, he must be entrusted with them in his character of an agent for sale, or of an agent who as such ordinarily had a power of sale or pledge; if he had an independent business as warehouseman and was in possession of goods entrusted to him in that capacity, the Act did not entitle a pledgee to assume that he had been entrusted in the one capacity rather than the other, and the fact of his carrying on the two trades did not bring a pledge made by him within the protection of the Act if it had been made without the authority of his principal to sell or pledge; accordingly, S. was not an "agent entrusted with the possession of goods" within s. 1 so as to be able to create a valid pledge of the wool to the defendants as against the plaintiffs, and the plaintiffs were entitled to succeed.

Agent—Principal—Liability for act of agent—Apparent authority of agent—Liability as if authority real.

Per BLACKBURN, J.: The general principle of law is that where the owner of goods has clothed anyone with apparent authority to act as his agent he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority to the same extent as if the apparent authority were real.

Notes. The Factors Act, 1842, was repealed by the Factors Act, 1889, the enactment now in force (1 HALSBURY'S STATUTES (3rd Edn.) 29). In the Act of 1889 the words "mercantile agent" are substituted for "agent entrusted with the possession of goods" in the Act of 1842, but it is submitted that, in view of the definition of "mercantile agent" in s. 1 of the Act of 1889, the decision in the present case is applicable to the substituted words.

Followed: *Hellings* v. *Russell* (1875), 33 L.T. 380; *Johnson* v. *Credit Lyonnais* (1877), 2 C.P.D. 224. Approved and Applied: *City Bank* v. *Barrow* (1880), 5 App. Cas. 664. Considered: *Oppenheimer* v. *Frazer and Wyatt*, [1907] 1 K.B. 519; *Folkes* v. *King*, [1922] All E.R.Rep. 658; *Lowther* v. *Harris*, [1926] All E.R.Rep. 352. Referred to: *Mildred* v. *Maspons* (1883), 8 App. Cas. 874; *Colonial Bank* v. *Whinney*, [1886–90] All E.R.Rep. 468; *Nähmaschinen Fabrik (vormals Frister and Rossman) Act.* v. *Pickford and Lee and Harris* (1888), 4 T.L.R. 617; *Williams* v. *Colonial Bank*, *Williams* v. *London Chartered Bank of Australia* (1888), 39 Ch.D. 388; *London Joint Stock Bank* v. *Simmons*, [1891–4] All E.R.Rep. 415; *Tremoille* v. *Christie* (1893), 69 L.T. 338; *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A.C. 173; *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q.B. 643; *Farquharson* v. *King*, [1901] 2 K.B. 697; *Oppenheimer* v. *Frazer and Wyatt*, [1904–7] All E.R.Rep. 143; *Lloyds Bank, Ltd.* v. *Bank of America National Trust and Savings Association*, [1937] 3 All E.R. 312; *Pearson* v. *Rose and Young, Ltd.* (*Little, third party, Marshall, fourth party*), [1950] 2 All E.R. 1027.

As to acts of a factor binding his principal, see 1 HALSBURY'S LAWS (3rd Edn.) 214, 215; and for cases see 1 DIGEST (Repl.) 357 et seq., in particular pp. 383–399.

Cases referred to:

(1) *McCombie* v. *Davis* (1805), 7 East, 5; 3 Smith, K.B. 3; 103 E.R. 3; 1 Digest (Repl.) 643, *2191.*

(2) *Wilkinson* v. *King* (1809), 2 Camp. 335, N.P.; 33 Digest (Repl.) 491, *476.*

(3) *Pickering* v. *Busk* (1812), 15 East, 38; 104 E.R. 758; 1 Digest (Repl.) 359, *335.*

(4) *Dyer* v. *Pearson* (1824), 3 B. & C. 38; 4 Dow. & Ry.K.B. 648; 107 E.R. 648; 1 Digest (Repl.) 429, *852.*

(5) *Phillips* v. *Huth* (1840), 6 M. & W. 572; 10 L.J.Ex. 65; 151 E.R. 540; 1 Digest (Repl.) 391, *535.*

(6) *Hatfield* v. *Phillips* (1842), 9 M. & W. 647, Ex. Ch.; affirmed (1845), 14 M. & W. 665; 12 Cl. & Fin. 343; 10 Jur. 189; 153 E.R. 642, H.L.; 41 Digest 387, *2316.*

(7) *Fletcher* v. *Heath* (1827), 7 B. & C. 517; 1 Man. & Ry.K.B. 335; 6 L.J.O.S.K.B. 95; 108 E.R. 815; 1 Digest (Repl.) 394, *550*.

(8) *Monk* v. *Whittenbury* (1831), 2 B. & Ad. 484; 1 Mood. & R. 81; 109 E.R. 1222; 1 Digest (Repl.) 383, *491*.

(9) *Paterson* v. *Tash* (1743), 2 Stra. 1178; 93 E.R. 1110; 1 Digest (Repl.) 397, *578*.

(10) *Taylor* v. *Kymer* (1832), 3 B. & Ad. 320; 1 L.J.K.B. 114; 110 E.R. 120; 1 Digest (Repl.) 394, *555*.

(11) *Bonzi* v. *Stewart* (1842), 4 Man. & G. 295; 5 Scott, N.R. 1; 11 L.J.C.P. 228; 3 L.T.O.S. 301; 134 E.R. 121; 1 Digest (Repl.) 394, *556*.

(12) *Wood* v. *Rowcliffe* (*Roecliffe*) (1846), 6 Hare, 183; 11 Jur. 707; affirmed (1847), 2 Ph. 382; 17 L.J.Ch. 83; 10 L.T.O.S. 281; 11 Jur. 915; 41 E.R. 990; 1 Digest (Repl.) 385, *502*.

(13) *Lamb* v. *Attenborough* (1862), 1 B. & S. 831; 31 L.J.Q.B. 41; 8 Jur.N.S. 280; 10 W.R. 211; 121 E.R. 922; 1 Digest (Repl.) 386, *510*.

(14) *Hayman* v. *Flewker* (1863), 13 C.B.N.S. 519; 1 New Rep. 479; 32 L.J.C.P. 132; 9 Jur.N.S. 895; 143 E.R. 205; 1 Digest (Repl.) 384, *496*.

(15) *Jenkyns* v. *Usborne* (1844), 13 L.J.C.P. 196; 3 L.T.O.S. 300; 8 Jur. 1139; 135 E.R. 273; 39 Digest 626, *2236*.

(16) *McEwan* v. *Smith* (1849), 2 H.L.Cas. 309; 13 Jur. 265; 9 E.R. 1109, H.L.; 39 Digest 522, *1367*.

(17) *Kingsford* v. *Merry* (1856), 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 236; 3 Jur.N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex. Ch.; 21 Digest (Repl.) 464, *1614*.

(18) *Hardman* v. *Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur.N.S. 81; 11 W.R. 239; 158 E.R. 1107; 39 Digest 534, *1453*.

(19) *Sheppard* (*Shephard*) v. *Union Bank of London* (1862), 7 H. & N. 661; 31 L.J.Ex. 154; 5 L.T. 757; 8 Jur.N.S. 265; 10 W.R. 299; 158 E.R. 635; 1 Digest (Repl.) 312, *19*.

(20) *Baines* v. *Swainson* (1863), 4 B. & S. 270; 2 New Rep. 357; 32 L.J.Q.B. 281; 8 L.T. 536; 11 W.R. 945; 122 E.R. 460; 1 Digest (Repl.) 383, *493*.

(21) *Fuentes* v. *Montis* (1868), L.R. 3 C.P. 268; 37 L.J.C.P. 137; 18 L.T. 21; 16 W.R. 900; affirmed, L.R. 4 C.P. 93; 38 L.J.C.P. 95; 19 L.T. 364; 17 W.R. 208; 1 Digest (Repl.) 391, *537*.

(22) *Vickers* v. *Hertz* (1871), L.R. 2 Sc. & Div. 113; 1 Digest (Repl.) 383, *492*.

Also referred to in argument:

Navulshaw v. *Brownrigg* (1852), 2 De G.M. & G. 441; 21 L.J.Ch. 908; 20 L.T.O.S. 25; 16 Jur. 979; 42 E.R. 943; 1 Digest (Repl.) 393, *545*.

Portalis v. *Tetley* (1867), L.R. 5 Eq. 140; 37 L.J.Ch. 139; 17 L.T. 344; 16 W.R. 503; 3 Mar.L.C. 34; 1 Digest (Repl.) 388, *521*.

Langton v. *Waring* (1865), 18 C.B.N.S. 315; 11 L.T. 633; 13 W.R. 347; 144 E.R. 165; 39 Digest 483, *1036*.

Fearn v. *Filica* (1844), 7 Man. & G. 513; 8 Scott, N.R. 241; 14 L.J.C.P. 15; 3 L.T.O.S. 180; 135 E.R. 206; 1 Digest (Repl.) 364, *375*.

Higgons v. *Burton* (1857), 26 L.J.Ex. 342; 29 L.T.O.S. 165; 5 W.R. 683; 1 Digest (Repl.) 533, *1452*.

Appeal from a decision of the Court of Common Pleas (Lord Coleridge, C.J., Brett, J., and Denman, J.), on a Special Case stated by an arbitrator.

The plaintiffs were merchants carrying on business in London under the style of W. H. Cole & Co., and the defendants were bankers at Liverpool. Edwin Slee carried on business in Liverpool as a woolbroker. He also had several warehouses in different parts of the town, and carried on the business of a warehouseman separately from and in addition to his business as woolbroker. The plaintiffs were in the habit of importing wool of two kinds, sheep's wool and goats' wool, and they used to warehouse both kinds in Slee's warehouse. Slee's business as a

A woolbroker was confined to selling sheep's wool, and he frequently sold the sheep's wool belonging to the plaintiffs and deposited in his warehouse under special instructions from them, but he never sold goats' wool for them. The practice between the plaintiffs and Slee was this. Before the arrival of the ship in port they used to send to Slee the bills of lading of their wool, and he by means of them used to obtain delivery of the cargo, warehouse it, and await instructions. B When the plaintiffs sold goats' wool to any purchaser Slee used to deliver it to him, and then the plaintiffs paid Slee the warehouse rent that had been earned. When Slee as broker sold under special instructions sheep's wool of the plaintiffs from his warehouses, he used to pay the purchase money over to the plaintiffs, subject to the brokerage commission, and then they paid him warehouse rent for the time he had had the care of the wool. He never sold except under special C instructions to do so from the plaintiffs. The following letters were sent by the plaintiffs to Slee in reference to the wool which was the subject of this action.

"London, Mar. 12.

"Edwin Slee, Esq., Liverpool.

"Dear Sir,—Enclosed please find bill of lading for bales mohair per *Albanian*, D of which please take charge as usual for our account, sending us report and valuation at your early convenience and following our instructions as regards disposal. The parcel is comprised, &c.—Yours truly,

"W. H. Cole & Co."

"London, Mar. 13.

E "Edwin Slee, Esq., Liverpool.

"Dear Sir,—Enclosed please find bill of lading for bales wool per *Bavarian*, of which kindly take charge as usual, and send us report and valuation following our instructions as regards sale or disposal.—Yours truly,

"W. H. Cole & Co."

F

"London, Mar. 25.

"Edwin Slee, Esq., Liverpool.

"Dear Sir,—Enclosed please find bill of lading for bales mohair per *Hecla*, of which be pleased to take charge, and send us your report and valuation at your early convenience.—Yours truly,

G "W. H. Cole & Co."

"London, April 2.

"Edwin Slee, Esq., Liverpool.

"Dear Sir,—Enclosed please find bill of lading for bales wool per *Grecian*, of which please take charge for our account, and send us report and valuation H as usual for our instructions as to disposal.—Yours truly,

"W. H. Cole & Co."

In accordance with these letters Slee proceeded to get the wool and mohair (goats' wool) from the ships, and put it in his warehouse. On April 5 he obtained from the defendants £7,000 as an advance upon the goods on the following letter:

I

"To the North Western Bank, Limited,

"In consideration of your advancing to me against Bills to be got hereafter for the sum of £7,000 for two months, I agree to hold the produce hereinunder specified as trustee for you, and as security for the said advance (with interest and commission) and to sell the same under your orders and pay you the proceeds thereof as and when received in or towards the repayment of the said advance; and I further agree that I will whenever you request me so to do, deliver the produce to you to enable you to sell the same, and to apply the

proceeds to the payment of the said advance. The property is fully insured by floating policies with the Royal for the sum of £—, the policy for which I hold for your behalf.—I am Sir, your obedient Servant,

EDWIN SLEE.

"Specification of the goods and quantities. Warrants for which I can lodge to-morrow."

Slee did not lodge the warrants the next day, and on being asked he made the excuse that he was busy. On April 10 he absconded without ever having lodged them. On April 13 the defendants, by threatening Slee's brother, obtained from him the keys of the warehouse, and took possession of the wool they found there. On April 5, the date of the alleged pledging to the defendants, Slee had not actual possession of 114 bales out of the lot, and previously to April 10 the plaintiffs had sold 88 bales. The defendants having seized the wool, on April 20 they received notice from the plaintiffs that they claimed the wool so seized. Notice was given to the registrar of the county court of the claim, and a formal demand made. Eventually the wool was sold under an arrangement and realised £5,249, which was a loss, and the money was paid into the bank in the joint names of the plaintiffs and defendants to await the issue of this case.

The case was referred to arbitration and the arbitrator stated a Special Case for the opinion of the Court of Common Pleas who held that the defendant bank were not entitled to retain the price of the wool as against the plaintiffs, no valid pledge to them having been made; Slee was not an "agent entrusted with the possession of goods" within s. 1 of the Factors Act, 1842, so as to be able to create a valid pledge and bind the plaintiffs; when by means of the bills of lading Slee obtained delivery of the wool into his warehouse, he held as warehouseman and the fact of his being a woolbroker also did not make him an "agent" within the Act; and although Slee had carried on two distinct trades, they could not be joined together for the purpose of bringing him within the Act. The bank appealed.

By s. 2 of the Factors Act, 1842 [referring to s. 1, see p. 486] :

"Where any such contract or agreement for pledge, lien, or security shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandize, or document of title, or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien and security for or in respect of a previous advance by virtue of some contract or agreement made with such agent, such contract and agreement, if bona fide on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance within the true intent and meaning of this Act, and shall be as valid and effectual, to all intents and purposes, and to the same extent as if the consideration for the same had been a bona fide present advance of money: Provided always, that the lien acquired under such last-mentioned contract or agreement upon the goods or documents deposited in exchange shall not exceed the value at the time of the goods and merchandize which, or the documents of title to which, or the negotiable security which shall be delivered up and exchanged."

By s. 4 :

"Any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act; and any agent entrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been entrusted with

the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been entrusted with the possession of the goods represented by such document of title as aforesaid, and all contracts pledging or giving a lien upon such document of title as aforesaid shall be deemed and taken to be respectively pledges of and liens upon the goods to which the same relates; and such agent shall be deemed to be possessed of such goods or documents; whether the same shall be in his actual custody, or shall be held by any other person subject to his control or for him or on his behalf; and where any loan or advance shall be bona fide made to any agent entrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall actually be received by the person making such loan or advance, without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this Act, though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such agent as aforesaid, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed and taken to be an advance within the meaning of this Act; and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this Act, to have been entrusted therewith by the owner thereof, unless the contrary can be shown in evidence."

Benjamin, Q.C., *R. G. Williams, Q.C.*, and *Dicey* for the defendants.
Herschell, Q.C., and *W. G. Harrison* for the plaintiffs.

Cur. adv. vult.

May 12, 1875. **BLACKBURN, J.**, read the following judgment of himself, MELLOR, and LUSH, JJ., CLEASBY, POLLOCK and AMPHLETT, BB.—This is a Special Case on which the Court of Common Pleas gave judgment for the plaintiffs for the sum of £6,661 1s. 7d. The defendants brought error on that judgment. [HIS LORDSHIP stated the facts.] The great question was whether Slee was, under the circumstances, so entrusted with the possession of the goods as to have been able on April 5 (supposing he had then delivered actual possession to the defendants), to make a pledge to the defendants good against the plaintiffs. As to this there is a distinction between the sheep's wool and the goats' wool, for Slee never sold goats' wool at all, and was clearly entrusted with the goats' wool as warehouseman and as warehouseman only. But he did sell sheep's wool as a broker.

A broker who, without being entrusted with the goods, makes a contract between two principals has no opportunity to pledge the goods at all. But we know (though it is not stated in the Case), that brokers are often capitalists who make advances on the goods, and have them transferred into their names as a security for such advances. Sometimes, especially when the principal is resident at a distance, the goods are transferred into the broker's name for the purpose of facilitating a sale by him, although there has been no advance made by him upon them. The agent thus entrusted is something more than a mere broker. A pledge by a person thus entrusted with the possession of goods as broker would, no doubt, be good; and if, as is sometimes the case, the broker had warehouses of his own in which the goods so entrusted to him were stored, they would be equally in his possession as broker as if they had been stored in the warehouse of another in his name. But we are all agreed that we must understand from the statement of the facts in the Case that Slee had not warehouses as merely ancillary to his business as broker, but that he carried on two distinct and

independent businesses, the one being that of a warehouseman, and the other that of a sheep's wool broker.

This raises the first question of fact, viz., whether the goods in question were entrusted to him merely as warehouseman, or also as broker. It is stated in the Case that the bills of lading of the plaintiff's wool (whether goats' or sheep's wool), were, in the ordinary course of business, sent down to Slee for the purpose of his receiving the wool from the ship, and warehousing it. Slee, after the wool had been so received and warehoused, sent up a report and valuation thereon, and then awaited the plaintiffs' further instructions as to disposal. Two sample letters are set out in the Case, one relating to goats' wool, the other to sheep's wool, and they bear out the statement in the Case, that both kinds of wool were treated exactly in the same way. But there is the further statement that:

"as to the sheep's wool, Slee had no general authority from the plaintiffs to sell, but always awaited instructions, and acted only under specific authority given to him from time to time in each case, and when such last mentioned sales were effected Slee received the proceeds."

We draw the inference of fact that as between the plaintiffs and Slee, Slee was entrusted with the sheep's wool and goats' wool alike, solely for the purpose of warehousing them. But as it appears that he was sometimes authorised by the plaintiffs to sell and receive payment for sheep's wool deposited in his warehouse, the question arises whether he could make to the defendants a good pledge of any wool (either goats' wool or sheep's wool, or of sheep's wool only, or of neither), deposited by the plaintiffs in his warehouse, though not intended to be sold. The Court of Common Pleas decided that the pledge (even supposing it to have been executed by delivery on April 5, would not have been good either as to the sheep's wool or the goats' wool, and we are of opinion that they were right, and this judgment should be affirmed.

The decision of this case depends, in our opinion, entirely on the true construction of the Factors Act, 1842, which was passed to amend and to extend the earlier Factors Acts of 1823 and 1825 [both repealed by Act of 1889]. We think, however, that in order to understand the Act of 1842, it is necessary to consider what was the common law before any legislation on the subject, what were the provisions of the two earlier Acts, and the judicial decisions upon them. The amount at stake in the present action is large, and renders our decision of importance to the parties, but the general importance of the question as regards the commerce of this country is even greater. It was for this reason and not from any doubt as to what the decision should be, that the court took time to consider their judgment. For the same reason we now proceed to give our reasons at some length.

The fourth edition of ABBOTT ON SHIPPING was published before the passing of either of the earlier Factors Acts. The fifth edition, the last published in the lifetime of the author, was published before the passing of the Act of 1842, but it contains a valuable abstract of the two earlier Acts, indicating what LORD TENTERDEN thought was their effect [ABBOTT, C.J., was raised to the peerage as BARON TENTERDEN of Hendon in 1827]. The passage containing his opinion has been suppressed in the sixth and subsequent editions of ABBOTT ON SHIPPING. The fifth edition, in which alone it is to be found, is out of print. It is worth while, therefore, to quote the whole passage at length from the fifth edition (p. 381, pt. 3, c. 4, s. 16):

"Lastly, we are to consider by what acts the right of the consignee may be taken away before the end of the transit. Since the publication of the former editions of this book, this subject has received the attention of the legislature, and Acts of Parliament have passed [the Acts of 1823 and 1825], by which the matter will in many cases be governed in future. The legislative enactments are in part confirmatory of the common law, and in part are important alterations of it. The following abstract of them will, it is hoped, be found

correct and useful. The person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, if he has not notice by the bill of lading or otherwise, at or before the advance or receipt, that such person is not the actual and bona fide owner of the goods; and such person shall be taken for the purposes of the Act to have been entrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear [s. 1 of the Act of 1825]. So also a person entrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders, mentioned in the Act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, or the deposit or pledge thereof, if the buyer, disponee, or pawnee, has not notice by the documents or otherwise, that such person is not the actual owner of the goods [s. 2]. But if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other than was possessed by the person making the deposit or pledge [s. 3]. And further, any person may contract for the purchase of goods with any agent entrusted with the goods, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he shall have notice that the party with whom he contracts is an agent, if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment notice that the agent is not authorised to sell or to receive the price [s. 4]. Also any person may accept any goods or any such documents as aforesaid on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent, but in such case shall acquire such right, title, or interest, and no further or other than was possessed by the factor or agent at the time of the deposit or pledge [s. 5].

"It is, however, provided that the Act shall not prevent the true owner of the goods from recovering them from his factor or agent, before a sale, deposit or pledge, or from the assignees of such factor or agent in the event of his bankruptcy; nor from the buyer, the price of the goods, subject to any right of set-off on the part of the buyer, against the factor or agent; nor from recovering the goods deposited or pledged, upon repayment of the money or restoration of the negotiable instruments advanced on the security thereof to the factor or agent; and upon payment of such further money, or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands, as the produce of a sale of the goods, after deducting the money or negotiable instrument advanced on the security thereof. And in the case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed, shall be held to have discharged pro tanto, his debt to the estate of the bankrupt [s. 6]. I am not aware that any case has hitherto been decided upon the construction of these enactments. They appear, as I have before observed, to be partly a confirmation, and partly an alteration of the law, and as a knowledge of the former state of the law is often very useful, even after an alteration has been made, it has been thought advisable to retain the contents of the last edition on this subject, with a reference to some subsequent decisions."

We agree with LORD TENTERDEN in thinking that these Acts were partly a confirmation, and partly an alteration of the law, and to understand them it is necessary to see what the law was before they were passed. At common law a person in possession of goods could not confer either by sale or by pledge any

better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge as the case might be. If, however, the owner of the goods had so acted as to clothe the seller or pledger, with apparent authority to sell or pledge, he was, at common law precluded, as against those who were induced bona fide to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited, and the possession of bills of lading or other documents of title to goods did not, at common law, confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods in transitu had the same effect in defeating the unpaid vendor's right to stop in transitu that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained had no greater effect at common law, than the transfer of the actual possession.

Lord Tenterden thus states the law (Abbott on Shipping (5th Edn.), p. 391, part 3, chap. 9, s. 19):

> "If the goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do. And as in the case of actual possession, although a factor might sell the goods and thereby bind his principal because his employment and authority are to sell, but could not pawn or pledge them, because he is not by his employment authorised so to do before the arrival of the goods, it was held that he could not divest the consignor's right to stop them by endorsing or delivering over the bill of lading as a pledge."

The proposition that a factor is not by his employment authorised to pawn and pledge goods entrusted to him was for many years much controverted in point of fact. But, it having once been decided as a matter of law, that he was not so authorised, the courts adhered to what had been decided. The law in this respect has been altered by the Factors Act, 1842, as will be shown hereafter, but the legislature did not alter it in the first Factors Act, 1823, except in the case of consignments by sea. In *McCombie* v. *Davis* (1) the decision went so far as that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts.

The general principle of law that where the true owner has clothed anyone with apparent authority to act as his agent he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority to the same extent as if the apparent authority were real, is illustrated by two decisions, which probably were present to the minds of those who framed the Act of 1825. In *Wilkinson* v. *King* (2) it appears that one Ellil was a wharfinger, and was accustomed to sell lead from his wharf. It is not distinctly stated in the report whether these sales were solely of his own lead, or also of lead sent to him by others to sell as their factor, but, as it is expressly mentioned that he had never sold any lead for the plaintiff, it appears probable that he sold for others as factor. The defendant bona fide bought from Ellil lead belonging to the plaintiff, which had been sent to him as wharfinger only. Lord Ellenborough ruled that, "Ellil had no colour of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion." Several other cases depending on similar sales by Ellil were decided in 1809 and 1810, in the same way. In none of these

A does there appear to have been any attempt to review in court the decisions at nisi prius.

In *Pickering* v. *Busk* (3), in 1812, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker, and an agent for sale, and the goods were, at the plaintiff's desire, transferred into the name of Swallow. It was held that this proved that Swallow had an implied authority to B sell, and consequently that the defendants were justified in buying of Swallow, and paying him the price. LORD ELLENBOROUGH goes somewhat further. He says (15 East, at p. 43):

> "If a person authorizes another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a C broker's engagements are necessarily, and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principal in respect of the subject-matter, and there would be no safety in mercantile transactions if he could not."

D It is to be observed, however, that the other judges base their judgment on the ground that the circumstances proved, in fact, an implied authority to Swallow to sell, and that LORD ELLENBOROUGH limits his more extensive doctrine to the case of a person "authorising another to assume the apparent right of disposing of property in the ordinary course of trade," or, in other words, entrusting it to an agent whose business is to sell. On *Wilkinson* v. *King* (2) being cited on the E argument, he says (ibid. at p. 42):

> "That was the case of a wharfinger whose proper business it was not to sell, and to whom the goods were sent for the mere purpose of custody,"

whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were entrusted to an agent whose ordinary business it was to sell in the course of his business as such agent and because he F was such an agent. LE BLANC, J., expressly says (ibid. at p. 45):

> "This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell."

Perhaps, however, *Dyer* v. *Pearson* (4), which was decided in 1824, the year before the passing of the second of the earlier Factors Acts, is that which throws G most light on the intention of the legislature. That was trover for wool. There Smith, who had sold the wool to the defendant, had been entrusted by the plaintiffs with the bill of lading for the purpose of warehousing the goods, which he did in his own name. There was no distinct evidence that Smith was in the habit of buying or selling wool for others, and this was relied on in the argument, as distinguishing the case from *Pickering* v. *Busk* (3), which was not questioned; and it was not H contended that he, in fact, had any authority from the plaintiffs to sell. ABBOTT, C.J., had at the trial left the question to the jury whether the defendant had purchased the wool under circumstances which would have induced a cautious man to believe that Smith had authority to sell. The jury found for the defendants. A new trial was granted. ABBOTT, C.J., delivering the judgment of the court, says (3 B. & C. at p. 42):

I "The general rule of the law of England is, that a man who has no authority to sell, cannot by making a sale transfer the property to another. There is one exception to that rule, viz., the cases of sales in market overt. Now this being the rule of law, I ought either to have told the jury that even if there was an unsuspicious purchase by the defendant, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs, or should have left it to the jury to say whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having not the possession only, but the property; for if the real owner of goods suffer another to have possession of his

property, and of those documents which are the indicia of property, then *perhaps* a sale by such a person would bind the true owner. That would be the most favourable way of putting the case for the defendant; and that question, *if it arises upon the evidence*, ought to have been submitted to the jury."

The legislature seem to have intended to declare the law in future on the two points on which in that judgment doubt was expressed, and which I have indicated by putting them in italics.

When we look at the language used in the two earlier Factors Acts with reference to this state of the law, it seems to us clear that the legislature intended by the Act of 1823 to alter the law in favour of consignees so far as to enact that where goods were shipped in the names of persons "entrusted for the purposes of sale," with goods, the consignees might advance money on the security of goods as if the consignors were the true owners, unless they had notice to the contrary, with a proviso (which may have some bearing on the construction of s. 4 of the Factors Act, 1842),

"that the persons, in whose names such goods are so shipped, shall be taken to have been entrusted therewith unless the contrary appear or be shown in evidence by any person disputing the fact."

By s. 2 of that Act the legislature repealed *McCombie* v. *Davis* (1), in so far as it was applicable to those taking pledges from consignees; but that Act did not alter the established law as to pledging with regard to others than consignors and consignees. The Act of 1825, s. 1, re-enacted s. 1 of the Act of 1823. We are not in the present case concerned with the rights of consignees, except in so far as the provisions respecting them throw light on the other sections of the Acts. Section 2 of the Act of 1825 made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing bona fide with the possessor beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in *Dyer* v. *Pearson* (4), by enacting that the possession of the documents of title might enable the persons so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by "persons entrusted with" these documents of title, on which a construction was put by the courts in the two cases of *Phillips* v. *Huth* (5) and *Hatfield* v. *Phillips* (6). The Factors Act, 1842, in consequence of these decisions, altered the law as to what should constitute entrusting.

Section 2 of the Act of 1825 also contained a proviso that the purchaser or pledgee had not notice by the documents or otherwise that the seller or pledgor was not "the actual and bona fide" owner of the goods sold or pledged, a proviso which, especially after the decision of *Fletcher* v. *Heath* (7) rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This, also, has been altered by the Act of 1842. But in s. 4 of the Act of 1825, the language used by the legislature is completely changed. It does not in this section give any power to pledge at all, nor does it use the language of s. 2, and authorise "any person entrusted with the possession of the goods" to sell them to any one not having notice that this person is not the true owner; but it enacts that it shall be lawful to contract with "any agent" entrusted with any goods, or to whom they may be consigned, for the purchase of such goods, and pay for the same to "such agent," and such sale and payment is to be good, notwithstanding the purchaser has notice that the party selling or receiving payment is only an agent, provided such contract or payment is made in the usual course of business, a proviso which by itself alone shows that the legislature meant by the word "agent" only such agents as in the usual course of business sell goods for their principals, and receive payments, such as factors, brokers, &c., and did not mean to include bailees, warehousemen,

carriers, and others who may in one sense, no doubt, be called agents but do not sell or receive payment for goods entrusted to them by those employing them. It, therefore, solves the second doubt in *Dyer* v. *Pearson* (4), by declaring that if the evidence should be such as to show that the person in possession of the goods was entrusted as an "agent," a sale by him should bind the true owner. There follows a further proviso that the person dealing with the agent has not notice that the agent is not authorised to sell or receive payment. This latter proviso shows that the framers of the Act remembered that a factor might as between him and his principal be restrained from selling except on particular terms, or possibly forbidden to sell at all, and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had.

It seems to us, therefore, that the legislature by this section intended to confirm (to use LORD TENTERDEN'S expression) the common law as laid down in *Pickering* v. *Busk* (3), but did not mean to extend it to all cases in which any person was entrusted with the custody of goods, though that person might in one sense be an agent for the entruster. And it seems to us that on the construction of the Act, and without reference to authority, it must be intended to apply only to cases in which the entrusting was in the course of that kind of agency so as to create the relation of principal and agent between the entruster and the entrusted—in effect that the decision in *Wilkinson* v. *King* (2) was not overruled or shaken in *Pickering* v. *Busk* (3), and was not intended to be affected by the legislature. For example, if a furnished house was let to one who carried on the business of an auctioneer, he is entrusted as tenant with the furniture, being in fact an auctioneer. But it never was the common law, and could not be intended to be enacted that, if he carried that furniture to his auction room and there sold it, he could confer any better title on the purchaser, than if he had as auctioneer acted for some other tenant who committed a similar larceny as a fraudulent bailee. Nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is entrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by a sale of the goods than he could if they had been entrusted to some other warehouseman who employed him to sell.

This was the construction put upon the Act in *Monk* v. *Whittenbury* (8) decided in 1831, and that decision has never been questioned. That decision was before the Factors Act, 1842, and the legislature might easily have altered the enactments, if they had been so minded, so as to avoid the effect of that decision, as they did alter them so as to avoid the effect of other decisions. The Act of 1842 commences with a preamble; and though, of course, the enacting part may either go further than or fall short of effecting what is recited in that preamble as being the object of the legislature, that preamble is of great importance. It first recites that under the Act of 1825

> "owing to the present state of the law advances cannot safely be made upon goods or documents to persons known to have possession as agents only."

This points to *Fletcher* v. *Heath* (7) and shows an intention to alter the law as there decided. It then recites that

> "advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to bona fide advances upon goods and merchandize as by the said recited Act is given to sales, and that owners entrusting agents with the possession of goods and merchandize, or of documents of title thereto, should, in all cases where such owners by the said recited Act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances bona fide made on the security thereof."

This recital shows a plain intention to enact that whatever since *Paterson* v. *Tash* (9) had been the law should no longer be so, and that an agent having power to sell should also be enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not power to sell; nor to extend the power to sell beyond that which by the common law and the Act of 1825 was given, nor to alter the construction put upon that enactment by the decision in *Monk* v. *Whittenbury* (8).

There is a further recital that the Act does not extend to protect exchanges of securities bona fide made. This refers to *Taylor* v. *Kymer* (10), and, perhaps, *Bonzi* v. *Stewart* (11), though that latter case (after very protracted litigation) was not decided till a few weeks before the Act of 1842 received the royal assent; and this recital shows an intention to alter the law as there decided. There is no express recital pointing to the decision in *Phillips* v. *Huth* (5) and *Hatfield* v. *Phillips* (6), which had then been decided in the Exchequer Chamber, and was still pending in the House of Lords, but from the enactment in s. 4 it is plain that these cases were in contemplation, and that it was intended to alter the law as laid down in those cases. The legislature then proceeded in s. 1 to enact that "any agent" who thereafter should be entrusted with the possession of goods or of the documents of title to goods might pledge the same. The legislature, it is to be observed, does not use the words "person entrusted," which are those used in s. 2 of the Act of 1825, but "agent entrusted," being the words used in s. 4 of that Act, on which words a judicial construction had been put in *Monk* v. *Whittenbury* (8). Section 2 alters the law as declared in *Taylor* v. *Kymer* (10). Section 4 alters the law as laid down in *Phillips* v. *Huth* (5), by enacting

> "that any agent entrusted as aforesaid, and in possession of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been entrusted with the possession of the goods or of any other documents of title thereto, shall be deemed and taken to have been entrusted with the possession of the goods . . . . and an agent in possession as aforesaid of such goods or documents shall be taken for the purposes of this Act to have been entrusted therewith by the owner thereof, unless the contrary can be shown in evidence."

It is not necessary to notice any other parts of the Act.

Counsel for the defendants argued that the object of the legislature was to afford facilities for safely making advances, and that this object was only imperfectly carried out if an advance made under such circumstances as the present was not protected. He argued that the defendants had no means of knowing whether Slee was possessed as a warehouseman or as a broker. As far as regards the mohair, this argument fails in fact, for a very little inquiry would have made the defendants aware that Slee was not a broker for mohair at all. As regards the sheep's wool, however, there is force in the argument that the defendants might without much negligence be led by Slee to believe that he was entrusted with the sheep's wool as a broker. But if the plaintiffs knew that the warehouseman whom they trusted was also a wool broker, the defendants were aware that the wool broker whom they trusted was also a warehouseman, and there seems no reason why without inquiry they should think he was entrusted in the one capacity rather than the other. Probably s. 4 of the Act of 1842 requires us to treat him as being so entrusted unless the contrary is shown in evidence. But we are all of opinion that in this case the plaintiffs have shown in evidence that Slee was not entrusted as broker, but solely as warehouseman. We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done. The general rule of law is that where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The

A legislature seems to us to have wished to make it the law that where a third person has entrusted goods or the documents of title to goods to an agent, who in the course of such agency sells or pledges goods, he should be deemed by that act to have misled anyone who bona fide deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorised to sell or procure the advance. We think that if this was the intention, it was carried B out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales in case that person sold them. If such was the wish of those who framed the Act, we think they have not used language sufficient to express an intention so to enact.

Hitherto we have been considering the Act of 1842 as if we had to construe its C language for the first time without the assistance of any decided cases. We think, however, that every case that has been decided since the passing of the statute confirms our view. In *Wood* v. *Rowcliffe* (12), WIGRAM, V.-C., held that a person entrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner, was not an agent within the meaning of the Act, and consequently could not make a good pledge. In *Lamb* v. *Atten-*D *borough* (13), it was held that a clerk who as such was possessed of delivery orders was not an agent entrusted within the meaning of the Act, and could not make a good pledge. In *Hayman* v. *Flewker* (14), WILLES, J., in delivering judgment says that what the case decided

> "may be stated thus, that the term 'agent' does not include a mere servant or caretaker, or one who has possession of the goods for carriage, safe custody, E or otherwise, as an independent contracting party, but only persons whose employment corresponds to that of some known kind of commercial agent like that class [factors] from which the Act has taken its name."

So it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the F unpaid vendor's rights, because the vendee is not entrusted as an agent: *Jenkyns* v. *Usborne* (15), and *McEwan* v. *Smith* (16).

It may be observed that in many of such cases in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission merchant, yet it never seems to have occurred to anyone that that fact made any difference. So it G has been repeatedly held that where either the goods or documents of title are obtained from the owner, not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick, a purchaser or pledgee acquires no title for the trickster is not an "agent entrusted" with the possession: *Kingsford* v. *Merry* (17), *Hardman* v. *Booth* (18). Quite consistently with these latter decisions it was held first by the Exchequer on demurrer in *Sheppard* v. *Union* H *Bank of London* (19), and afterwards by the Court of Queen's Bench on the facts in *Baines* v. *Swainson* (20) that if the true owner did in fact entrust the agent, as an agent, though he was induced to do so by fraud, a pledge by the agent would be good. In *Fuentes* v. *Montis* (21), it was decided first by the Common Pleas, and afterwards by the Exchequer Chamber, that after the true owner had demanded back his goods from the factor, who wrongfully refused to give them I up the factor ceased to be "entrusted," and a pledge subsequently made by him was not good. In delivering judgment, WILLES, J., speaks of *Baines* v. *Swainson* (20) as going to the extreme of the law, but does not express any dissent from it.

Against this great mass of authority counsel for the defendants could produce nothing but some observations of LORD WESTBURY'S in *Vickers* v. *Hertz* (22); but we think that, when those are rightly understood, they are not in conflict with the other decisions. The facts in *Vickers* v. *Hertz* (22) have a very close resemblance to those in *Baines* v. *Swainson* (20). Campbell, who was a Glasgow broker, had represented to Vickers that he had made for him a sale to a principal

of a large quantity of iron. This, it seems, was a falsehood. Vickers was induced by this falsehood to send a delivery order to Campbell. He did not entrust him with the delivery order with a view to his making a sale, for he thought it was already made, but he did entrust him in the course of his business as agent with the document of title that he might as such agent deliver the goods. The decision of the House of Lords was that a pledge by Campbell was good under the Factors' Acts. LORD WESTBURY seems to have understood WILLES, J., in *Fuentes* v. *Montis* (21) as expressing an opinion that the Act did not embrace the case of any but a factor who was entrusted for the purpose of effecting a sale not yet made. Had WILLES, J., expressed such an opinion, it would no doubt have been inconsistent with *Baines* v. *Swainson* (20), and been overruled by the House of Lords in *Vickers* v. *Hertz* (22). We think, however, that he expressed no such opinion, and, consequently, that all authorities are in unison with the decision of the Common Pleas in this case, which we, therefore, affirm.

BRAMWELL, B.—I find as a fact in this case that Slee was in possession of this wool, only as a warehouseman. He certainly was in possession of the goats' wool in that and in no other character. He got and kept possession of the sheep's wool first in the same way as he did of the goats', and, though he usually sold the sheep's wool, it was under specific instructions. He had no general authority to do so; he acted under specific instructions. I infer that, as he did it usually, he did not do it always, and that there was nothing in the dealings between the parties to prevent the plaintiffs from having the sheep's wool sent to London, or employing somebody else to sell it. Moreover, his possession of the sheep's wool was not necessary to his selling it as a broker, nor, I suppose, a thing ordinarily the case with sheep's wool brokers. Nothing of the sort is stated. His possession of both classes of wool was accounted for in the same way unconnected with his being a broker, viz., by Liverpool being the port of landing, his having warehouses there, and being employed to land the wool and warehouse it in his own warehouses. I may add, though it is not material, that it does not appear that the defendants knew he had the wool, nor documents of title for it. Indeed as to the *Grecian's* parcel they could not know it.

These being the facts as I find them, was he an agent entrusted with the possession of goods within the meaning of s. 1 of the Factors Act, 1842? The argument is that he is an agent, and that he is entrusted with the possession of the goods. But unless we adopt a verbal construction that leads to absurdities, some limitations must be put on these words, some such limitation as "agent, entrusted as such, and ordinarily having as such agent a power of sale or pledge." Otherwise the words would include the case of an agent for the sale of one thing, say a metal broker, entrusted with a thing unconnected with his agency, say wool, and also the case of an agent for some purpose which neither in fact gave him power to sell or pledge, nor, according to the usage of business, appeared to give such power. For instance, a packer entrusted with goods, though known to be a packer by the lender of money, might pledge the goods to such lender. So a carrier, who is an agent to deliver goods from A. to B., would have power to pledge to C., who knew he was a carrier only, and as such only had possession, because the conclusion of s. 1 protects the transaction, though the pledgee "may have had notice that the person is only an agent." But only an agent, in what sense? Surely only an agent such as the pledgee might well suppose had power to pledge, this clause and this part of it being intended to protect persons who deal with agents known to be such, who in reason may pledge because they usually make advances to those who have entrusted them with the goods. It may be said that these difficulties are met by the provision that the transaction must be bona fide in the man advancing the money. But the answer is not sufficient. He might bona fide believe in a special authority or right to pledge where there was none at all.

It seems to me, speaking generally, that the statute was meant to apply to those cases where one person has given an apparent authority to another, and a

A third person has dealt with that other in the belief that the authority really existed. That is not the case here. In the first place, as I have observed, the possession of the wool was not necessary to Slee's acting as broker in relation to it. But, in the next place, Slee filled two characters. If the defendants chose to trust him as the possessor of goods without inquiring in which character he possessed them, they cannot get a title on the ground that he was in possession in fact, B when he was not in possession as agent nor entrusted as such. When I look at the terms of Slee's note to the defendants, I doubt if the defendants trusted him on account of his possession of the wool or knew of it. The decisions are, in my judgment, uniform in favour of this view. The cases are so fully considered by my brother BLACKBURN that I think it needless to go into them. I am of opinion that the judgment should be affirmed.

C

Appeal dismissed.

Solicitors: *Clark, Son & Rawlins*; *Chester, Urquhart & Co.*

[*Reported by* ETHERINGTON SMITH, ESQ., *Barrister-at-Law.*]

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ROUQUETTE *v.* OVERMANN AND ANOTHER

[QUEEN'S BENCH DIVISION (Cockburn, C.J., Lush and Quain, JJ.), April 30, May 4, July 6, 1875]

[Reported L.R. 10 Q.B. 525; 44 L.J.Q.B. 221; 33 L.T. 420]

F *Conflict of Laws—Bill of exchange—Bill drawn in one country and payable in another—Rights and liabilities of drawer, acceptor, and endorser—Regulation by law of country of payment—Maturity of bill postponed by moratorium.*

Where a bill of exchange is drawn and endorsed in one country and payable in another, the rights and liabilities of the acceptor and those of the drawer and an endorser inter se are regulated by the law of the country where the bill is payable. A party transferring for value the property in a bill of exchange G warrants to the transferee that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words he engages as security for the due performance by the acceptor of the obligations which the acceptor takes on himself by the acceptance. His liability is, therefore, to be measured by that of the acceptor whose surety he is, and, as the obligations of the acceptor are to be deter- H mined by the lex loci of performance, so also must be those of the surety. Accordingly, if the maturity of a bill is postponed by subsequent legislation in the country where the bill is payable the drawer's liability is also postponed, and presentation, or notice of dishonour, at the time when the bill would fall due in regular course is unnecessary.

A bill, dated June 28, payable Oct. 5, 1870, was drawn and endorsed in I England, accepted and payable in France. By a French law of Aug. 13, 1870, prolonged by subsequent decrees, the maturity of the bill was postponed until Sept. 5, 1871. It was then presented and protested, and notice given to all parties according to French law. The first endorsee, having paid the amount of the bill to a subsequent endorsee, sued the drawers.

Held: the endorsee was entitled to recover.

Notes. Provisions regulating the rights, duties, and liabilities of the parties to a bill of exchange drawn in one country and negotiated, accepted, or payable in

another are to be found in s. 72 of the Bills of Exchange Act, 1882 (2 HALSBURY'S STATUTES (2nd Edn.) 505).

Considered: *Casanova* v. *Meier* (1885), 1 T.L.R. 213; Re *Francke and Rasch*, [1918] 1 Ch. 470.

As to the conflict of laws relating to bills of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 235–238; and for cases see 6 DIGEST (Repl.) 401 et seq.

Cases referred to:

(1) *Allen* v. *Kemble* (1848), 6 Moo.P.C.C. 314; 13 Jur. 287; 13 E.R. 704, P.C.; 6 Digest (Repl.) 403, *2873*.

(2) *Gibbs* v. *Fremont* (1853), 9 Exch. 25; 22 L.J.Ex. 302; 21 L.T.O.S. 230; 17 Jur. 820; 1 W.R. 482; 1 C.L.R. 675; 156 E.R. 11; 6 Digest (Repl.) 315, *2298*.

(3) *Wiffen* v. *Roberts* (1795), 1 Esp. 261, N.P.; 6 Digest (Repl.) 215, *1490*.

(4) *Rothschild* v. *Currie* (1841), 1 Q.B. 43; 4 Per. & Dav. 737; 10 L.J.Q.B. 77; 5 Jur. 865; 113 E.R. 1045; 6 Digest (Repl.) 407, *2888*.

(5) *Hirschfeld* v. *Smith* (1866), L.R. 1 C.P. 340; Har. & Ruth. 284; 35 L.J.C.P. 177; 14 L.T. 886; 12 Jur.N.S. 523; 14 W.R. 455; 6 Digest (Repl.) 407, *2889*.

Also referred to in argument:

Phillips v. *Eyre* (1870), L.R. 6 Q.B. 1; 10 B. & S. 1004; 40 L.J.Q.B. 28; 22 L.T. 869, Ex. Ch.; 11 Digest (Repl.) 451, *888*.

Rowe v. *Young* (1820), 2 Bli. 391; 2 Brod. & Bing. 165; 4 E.R. 372, H.L.; 6 Digest (Repl.) 60, *534*.

Patience v. *Townley* (1805), 2 Smith, K.B. 223; 6 Digest (Repl.) 230, *1618*.

Pattison v. *Mills* (1828), 1 Dow. & Cl. 342; 2 Bli.N.S. 519; 6 E.R. 553, H.L.; 11 Digest (Repl.) 426, *740*.

Case of Mixed Moneys, 2 Bli. 98, n.

Allatini et Cie v. *Abbott* (1872), 26 L.T. 746; 6 Digest (Repl.) 406, **2851*.

Case Stated for the opinion of the court in an action brought on a bill of exchange by the plaintiff against the defendants for the recovery of £369 18s. 11d., together with interest from Sept. 29, 1871 (the date of the writ), until judgment.

The facts are set out in the judgment of the court.

Benjamin, Q.C., and *Trevelyan* for the plaintiff.

Herschell, Q.C., and *Ravenhill* for the defendants.

Cur. adv. vult.

July 5, 1875. **COCKBURN, C.J.,** read the following judgment of the court.— This was an action brought by the plaintiff as endorsee and holder against the defendants as drawers and endorsers of a bill of exchange. The defendants are merchants at Manchester. They had business transactions with the house of Magalhaes Frères, of Paris, and having shipped goods on account of the latter to Pernambuco, drew on them the bill of exchange in question, which was as follows:—

"Manchester, June 28, 1870.

"For £345 15s. 2d. sterling.

"On Oct. 5, 1870, pay this first bill of exchange (second and third unpaid) to the order of ourselves the sum of £345 15s. 2d. sterling, at the exchange as per indorsement, for value received, which place to account as advised.

"OVERMANN AND SCHOU.

"To Messrs. Magalhaes Frères, 5 Rue Martel, Paris."

The defendants were in the habit of sending bills so drawn on Paris to the plaintiff, who carried on business in London, for the purpose of his disposing of them and remitting to them the proceeds; and, there being no fixed rate of exchange between Manchester and Paris, the bills were drawn in English money at an exchange of so many francs per pound to be fixed by the plaintiff's indorsement on the bill. The

bill in question being to the order of the drawers, was by them endorsed specially to the plaintiff, and transmitted to him for sale. The plaintiff, having endorsed the bill, and by his endorsement on it fixed the rate of exchange at 25 francs 38¾ centimes for the pound sterling, sold the bill to Krauetler and Mieville, of London, and duly remitted the proceeds to the defendants, minus the commission received by him on such transactions by agreement between him and them. Krauetler and Mieville endorsed the bill to Pillet, Will & Co., of Paris, and transmitted it to them. The bill was duly accepted in Paris by Magalhaes Frères, the drawers.

The bill, according to its tenor, was payable on Oct. 5, 1870. Pending its currency, the German army having invaded France, the Emperor Napoleon, on August 13, by virtue of his legislative power, issued an edict in these terms:

> "The time within which protest and all other acts required to preserve the right of action on negotiable instruments signed before the promulgation of the present law must be effected, is prolonged for a month. Payment cannot be demanded of the endorsers or other persons bound thereby within that time."

The Emperor Napoleon having ceased to reign, on Sept. 10, the government of the National Defence, the then sovereign power of France, passed and promulgated a law prolonging the delay thus afforded by the law of Aug. 13 for the further period of a month from the ensuing Sept. 14. Similar enactments were passed from month to month by the legislative power, and duly promulgated by the head of the executive government, by which the operation of the law of Aug. 13 was extended to Mar. 13, 1871. On Feb. 19 the war between France and Germany came to an end. On Mar. 10 the National Assembly passed, and the head of the executive government duly promulgated, a law, by the second article of which it was, among other things, enacted that bills, &c. which had become due between Aug. 13 and Nov. 12, 1870, should be payable at the expiration of seven months from the time at which they respectively fell due according to their tenor. By art. 3 instead of the one day allowed by art. 162 of the Code de Commerce for effecting protest on non-payment, ten days were to be allowed for that purpose.

By the effect of this law the bill in question, having fallen due on Oct. 5, would have been payable on May 5, but fresh occurrences took place which led to a still further postponement. At the end of March a revolution broke out at Paris, which led to the suspension of commercial business. On April 26, a law was passed by the National Assembly the then sovereign power of France, and was duly promulgated by the President of the Council, by which it was enacted that commercial bills, whatever might be the date of their signature, payable in the department of the Seine, which had already fallen due, or which would fall due between the previous Mar. 18 and a period of ten days after the re-establishment of the postal service between Paris and other parts of France, should not be liable to payment till after that term. The resumption of such service was to be notified by the government in the JOURNAL OFFICIEL, and the ten days were to run from the publication of such notice. The benefit of the delay in making the necessary protest, in case of non-payment, granted by art. 3 of the law of Mar. 10, was made applicable to all commercial bills falling within the law.

On July 1 the government declared the postal service between Paris and the rest of France re-established, and the present bill would consequently have been payable on the 11th, but on July 4, a further law, promulgated on the 7th, was passed, whereby the delay granted by the law of Mar. 10, for protesting bills of exchange which had fallen between Aug. 13 and Nov. 12 was extended for another four months, making thus eleven months in the whole; and payment, therefore, could only be demanded, date for date, between July 13 and Oct. 12 ensuing. By a further article the holders of bills of exchange, &c., which in the regular course would have fallen due prior to the passing of the law were to notify within twenty days to the parties liable thereon the obligations they would have to fulfil in respect thereof. The debtor was to be entitled to avail himself of the delays in respect of

protest granted by the present law. The notice to the party liable and the answer of the latter were to be noted on the bill.

On July 19, Pillet, Will & Co., the holders of the bill gave the notice required by this law to Magalhaes, Frères, the acceptors, who thereupon wrote on it: "Vu pour prorogation, Paris, 19 Juillet, 1871, Magalhaes, Frères." On Sept. 5, the day on which the extended term of grace expired in respect of this bill, Pillet, Will & Co., presented the bill for payment, which was refused. They then presented it on the same day to Mr. William Bechtel, of Paris, to whom reference in case of need had been made by the drawers on the second of exchange, but he also refused payment. The bill was duly protested according to the French law on the ensuing day, Sept. 6. Notice of dishonour, and of the protest of the bill in manner required by the law of France was sent by Pillet, Will & Co., to Krauetler and Mieville on Sept. 8, and was received by the latter on the 9th. The like notice was on the same day given by Krauetler and Mieville to the plaintiff, and by him to the defendants. The defendants refused payment of the bill.

Having paid to Krauetler and Mieville before action the sum of £368 18s. 8d., the amount due on the bill for principal and interest, the plaintiff brings this action to recover that amount, together with a further sum for interest and postage. The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonour on its non-payment at that time, by reason of which the endorsers were discharged, whence, as was contended, it follows that the plaintiff had paid the bill in his own wrong, and, therefore, could not claim to be indemnified by the defendants, who, again it was said, were entitled on their own account to notice of dishonour on non-payment at the regular time, it being contended that, whatever might be the effect of this special legislation of the French government as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and endorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course according to its tenor, and, if it was not then paid, to give notice of its dishonour—the right to insist on due diligence in these particulars according to the law of England as a condition precedent of liability being one which it was not competent to a foreign legislature to affect, and that, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law.

The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it, and that in case of non-payment notice of dishonour will thereupon be given. How then, it was asked, can the right to insist on these as the conditions of liability on a bill drawn and endorsed in this country be modified or affected by the legislation of a foreign country? The question is of considerable importance and interest in a judicial point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favour of the view presented to us on the part of the defendants. The High Court of Geneva, and the Cour de Cassation of Turin, have come to the opposite conclusion. Our view coincides with theirs.

In considering the subject, two questions present themselves. The first is what was the effect of this special legislation on the obligations of the acceptors; the second, what, if any, was its effect on the rights and liabilities of the drawers and endorsees inter se. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second. So far as the French law was concerned, that the effect of the exceptional legislation in question was to substitute as the time of payment the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the bill had been presented for payment on Oct. 5, and, payment having been refused, an action had been brought in a French court against

A the acceptors, whether by a French or a foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance—a rule which is strikingly illustrated by the familiar but pertinent B example of the effect of days of grace being allowed by the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or vice versa, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. This arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is indeed true that in the present instance the period of grace has been C accorded by ex post facto legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

D Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effect on the relative position of the drawer and the drawee, or endorsee and holder. It is said that, although the obligations of the acceptor may be determined by the lex loci of the country in which the bill is payable, the contract as between the drawer and endorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the E defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonour should thereupon have been given according to the requirements of English law. It is unnecessary to consider how for this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract so far as presentment for payment is F concerned; still less to a formality required on non-payment, in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being G presented at the time it becomes due, be paid. In other words he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance.

His liability, therefore, is to be measured by that of the acceptor, whose surety he is, and, as the obligations of the acceptor are to be determined by the lex loci of performance, so also must be those of the surety. To hold otherwise would H obviously lead to very startling anomalies. The holder might sue the drawer or endorser before, according to the law applicable to the acceptor, the bill became due; or the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the endorser in respect of any loss he might have sustained by reason of the delay, although the obligations of I the acceptor had been fully satisfied by payment of the bill. Again, as a bill may be endorsed in different countries before it arrives at maturity, and each endorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each endorser's liability, confusion must arise in determining by what law the rights and liabilities of the different endorsers and endorsees inter se shall be governed.

It may be urged no doubt that, though it may be true that the parties to a bill of exchange payable in a foreign country may be assumed to have contracted

for the payment of the bill according to the existing law of the country where it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that on the contrary the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that, such being the effect of the endorsement, the obligation of the endorser cannot, as between him and his endorsee, be affected by ex post facto legislation in the foreign country. A strong argument ab incovenienti may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by the bill at the precise moment it is to become due; he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The endorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment. It may be argued that to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments it may be answered that the endorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If by an alteration of the local law pending the currency of the bill the obligations of the acceptor are rendered more onerous those of the endorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the endorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill falling due on a day appointed to be kept as a holiday should be payable a day after, as was done by the Bank Holidays Act, 1871, the period at which the liability of the endorser on non-payment by the acceptor would arise, would be pro tanto delayed. To the second argument it may be answered that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments, or diminishing their utility.

If then, the right of the holder as against the acceptor and the antecedent parties can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonour in order to preserve his right of recourse to them. If the time of payment, which is of the essence of the contract, and the consequent necessity for presentment at the original time, can thus be postponed, it would seem to follow that a fortiori a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged.

But independently of this consideration we are of opinion on general principles that notice of dishonour cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that if the bill had been presented for payment at the time mentioned in it the acceptors might possibly have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might possibly the acceptor of a bill under ordinary circumstances if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable, that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the endorser before the time when his right to demand payment of the acceptor has

A accrued, and the liability of the endorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew when the period of grace had expired and the liability B of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the endorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the endorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonoured, or that notice of dishonour could be effectually given so as to charge the endorser.

C Another ground for holding that presentment and notice of dishonour at the earlier period were not necessary to preserve the right of recourse against the defendants as drawers and endorsers is to be found in the reasons assigned for requiring presentment at the appointed time, and notice of dishonour immediately on payment being refused. The reason given is that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his D assets from the acceptor or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced.

E It was contended on behalf of the defendants in the present case that the question before us was concluded by the authority of the decisions of the Judicial Committee of the Privy Council in *Allen* v. *Kemble* (1) and of the Court of Exchequer in *Gibbs* v. *Fremont* (2). In delivering the judgment of the Committee of the Privy Council in the former case LORD KINGSDOWN lays it down as law that as between the holder and drawer or endorser of a bill of exchange drawn in one country, but made payable F in another, if the bill is not paid the contract is to be governed in respect of damages and costs by the law of the country in which the bill is drawn, and not by that of the country in which it is payable. LORD KINGSDOWN said (6 Moo. P.C.C. at pp. 321, 322):

> "The drawer by his contract undertakes that the drawee shall accept, and shall afterwards pay the bill according to its tenor, at the place of domicil G of the drawee if it be drawn and accepted generally, at the place appointed for payment if it be drawn and accepted payable at a different place from the place of the domicil of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with interest, damages, and costs, as the H law of the country where he contracted may allow."

Whatever may be the respect to which an opinion of the Judicial Committee of the Privy Council may be entitled, the authority which would otherwise attach to the statement of the law contained in the foregoing judgment is materially diminished by the fact that it was unnecessary to the decision of the case then be- I fore the court. When *Allen* v. *Kemble* (1) is more fully looked at it will be seen that the question there turned, not on any disputed liability on a bill of exchange, but on a disputed right of set-off in a case of debtor and creditor. The facts were simply these. A., residing in Demerara, drew a bill on B. residing in Scotland, payable to C.'s order in London, and C. endorsed it to D. residing in Demerara, who endorsed it to E. resident in London. B. accepted the bill, making it payable at a banker's in London. When the bill arrived at maturity B. was the holder of an overdue acceptance of E., the last endorsee and holder, who in the meantime had become bankrupt, and he claimed to set off the amount of this acceptance, as he was

entitled to do, against his liability on his own acceptance. To avoid this right of set off the assignees of the bankrupt, instead of suing the acceptor, brought their action against the drawer and the endorser in Demerara. But they were foiled in an unexpected manner. By the Roman Dutch law, the law of Demerara, a surety called upon to pay on default of his principal is entitled to the benefit of any cross-claim which the principal may have against the creditor. Taking advantage of this, the defendants, not at all contesting, as indeed they could not for a moment contest, their liability on the bill, claimed, being sued in Demerara, the benefit of the local law, and insisted on their right to set off the amount of the bankrupt's unpaid acceptance in the hands of their principal, the acceptor of the bill on which they were sued, against their liability on the bill, a right which they would not have had by the law of England. The colonial court disallowed the claim, but its decision was afterwards reversed by the Judicial Committee of the Privy Council, in our opinion, most properly, so far as the result is concerned. But the decision had obviously nothing to do with the law relating to bills of exchange. It was simply, as we have said, a question regarding the applicability of the law of Demerara as to set off to a case of principal and surety on a debt of the principal arising in a country where a different law prevailed. Nothing turned on the law as to bills of exchange. The question would have been precisely the same if the action against the parties in Demerara had been brought on a guarantee given by them in respect of goods supplied to a party in this country.

Gibbs v. *Fremont* (2), in which the Court of Exchequer adopted and acted upon the law laid down by LORD KINGSDOWN in *Allen* v. *Kemble* (1) is more to the present purpose, as the decision there turned on the law applicable to bills of exchange. A bill having been drawn in California on a party resident at Washington without interest being reserved on the face of it, in an action against the drawer by a holder in this country, acceptance having been refused, it was held that the holder was entitled to interest according to the rate current at California. Without expressing any opinion as to the soundness of this view, it is sufficient to observe that the question in the present case turns, not upon what may be the rights and liabilities of endorser and endorsee in regard to damages on non-payment of the bill, but on the time of presentment for payment and notice of dishonour.

As has already been observed, it is well settled that the time when a bill becomes due depends on the lex loci solutionis; and it is equally certain that presentment for payment before a bill is due in point of law is inoperative to affect an antecedent party. It was so ruled by LORD KENYON in *Wiffen* v. *Roberts* (3), 1 Esp. at p. 262, and the law has never been questioned. It is equally clear that until presentment for payment has been effectually made notice of dishonour cannot be effectually given. *Rothschild* v. *Currie* (4) in this court establishes the position that where a bill payable in a foreign country is drawn and endorsed in this country the sufficiency of the notice of the dishonour must depend on the law of the place of payment; and consequently that notice of dishonour—good by the law of France, in which country the bill in that case was payable, though beyond the time within which such notice must have been given according to English law—was sufficient to fix the endorser. The same point arose in *Hirschfeld* v. *Smith* (5), and was decided by the Court of Common Pleas on the authority of *Rothschild* v. *Currie* (4), though also on the further ground that, assuming that the contract between endorser and endorsee on a bill endorsed in England is to be governed by the law of England, and, therefore, notice of dishonour, as required by the law of England is necessary, yet that reasonable notice is all that is required; and though, as regards inland bills, what is reasonable time has become fixed by practice and legal decision, as regards bills payable in a foreign country what is a reasonable time must depend on circumstances, and that the law of the country where the bill is payable affords a safe criterion, and notice given according to it may be taken to be reasonable notice.

It cannot be disputed that notice of dishonour as given in this case would have been good and sufficient according to the law of France. It follows upon the authorities referred to that it must be held to have been sufficient as between the

holder and the antecedent parties to the bill in an action brought in this country. Moreover, if it be once established that on the dishonour of a bill of exchange payable in a foreign country the notice to be given to the drawer or endorser should be with reference to time and to the required formalities in conformity with the law of the place of payment a further ground presents itself for deciding against the defendants in the present case. By the law of France before notice of dishonour can be given a protest, accompanied by certain prescribed formalities made through the intervention of a notary public, is indispensably necessary: see article 162 of the CODE DE COMMERCE; and by art. 165 of the code it is of this protest that the holder must give notice to the drawer or endorser whom he proposes to make liable. But by the special law by which the bill now in question was affected the protesting of all bills coming within its operation was expressly prohibited till the expiration of the additional time for payment allowed by way of indulgence to the acceptors. It is admitted that this bill was protested at the earliest time which the existing law admitted of, and that due diligence was used in giving notice to the defendants from the time of making the protest. On these grounds we are of opinion that the presentment for payment was made and the notice of dishonour given at the right time, and that the foundation on which the defence rests consequently fails. Our judgment, therefore, must be for the plaintiff.

Judgment for plaintiff.

Solicitors: *Druce, Sons & Jackson*; *J. Elliott Fox.*

NITRO-PHOSPHATE AND ODAM'S CHEMICAL MANURE CO. *v.* LONDON AND ST. KATHARINE DOCKS CO.

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), July 16, 20, 23, 26, 29, August 7, 1878]

[Reported 9 Ch.D. 503; 39 L.T. 433; 27 W.R. 267]

Water—Wall—River wall—Height—Maintenance—Height result of long experience—Liability for flooding due to reduced height.

If a riparian owner interferes with an existing river wall and lowers its height he will be liable in an action for negligence for any damage which is suffered by the owners of neighbouring property by flooding due to the reduced height of the wall. Such a wall should be maintained at the height at which it has been stood as a result of the long experience of, perhaps, centuries, and not merely at a height which has proved adequate to contain the water in comparatively recent times, e.g., 40 years.

Notes. Applied: *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q.B.D. 418. Considered: *Burt* v. *Victoria Graving Dock Co. and London and St. Katharine's Dock Co.* (1882), 47 L.T. 378. Applied: *Baldwin* v. *Halifax Corpn.* (1916), 85 L.J.K.B. 1769. Considered: *Thomas and Evans, Ltd.* v. *Mid-Rhondda Co-operative Society, Ltd.*, [1940] 4 All E.R. 357. Referred to: *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349.

As to liability for damage due to flood water, see 39 HALSBURY'S LAWS (3rd Edn.) 519, 572–574; and for cases see 44 DIGEST 58–65.

Cases referred to in argument:

Rylands v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334.*

Nichols v. *Marsland* (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 165, *880.*

Withers v. *North Kent Rail. Co.* (1858), 27 L.J.Ex. 417; sub nom. *Withers* v. *Great Northern Rail. Co.*, 31 L.T.O.S. 169; 8 Digest (Repl.) 96, *638.*

Paradine v. *Jane* (1647), Aleyn, 26; Sty. 47; 82 E.R. 897; 31 Digest (Repl.) 278, *4124.*

River Wear Comrs. v. *Adamson* (1876), 1 Q.B.D. 546; 46 L.J.Q.B. 83; 35 L.T. 118; 24 W.R. 872; affirmed (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 26 W.R. 217; 3 Asp.M.L.C. 521, H.L.; 36 Digest (Repl.) 166, *890.*

Workman v. *Great Northern Rail. Co.* (1863), 32 L.J.Q.B. 279; 36 Digest (Repl.) 325, *696.*

Smith v. *Fletcher* (1874), L.R. 9 Exch. 64; 43 L.J.Ex. 70; 31 L.T. 190, Ex. Ch.; affirmed sub nom. *Fletcher* v. *Smith* (1877), 2 App. Cas. 781; sub nom. *Smith* v. *Musgrave*, 47 L.J.Q.B. 4; sub nom. *Musgrave* v. *Smith*, 37 L.T. 367; 42 J.P. 260; 26 W.R. 83, H.L.; 33 Digest (Repl.) 867, *1155.*

Hudson v. *Tabor* (1877), 2 Q.B.D. 290; 46 L.J.Q.B. 463; 36 L.T. 492; 42 J.P. 20; 25 W.R. 740, C.A.; 44 Digest 82, *640.*

A.-G. v. *Tewkesbury and Malvern Rail. Co.* (1863), 1 De G.J. & Sm. 423; 32 L.J.Ch. 482; 8 L.T. 682; 9 Jur.N.S. 951; 46 E.R. 168, L.JJ.; 38 Digest (Repl.) 310, *129.*

York and North Midland Rail. Co. v. *R.* (1853), 1 E. & B. 858; 1 C.L.R. 119; 22 L.J.Q.B. 225; 21 L.T.O.S. 116; 17 Jur. 690; 1 W.R. 358; 17 J.P.Jo. 309; 118 E.R. 657, Ex. Ch.; 38 Digest (Repl.) 293, *46.*

Davis v. *Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 8 Digest (Repl.) 14, *65.*

Biscoe v. *Great Eastern Rail. Co.* (1873), L.R. 16 Eq. 636; 21 W.R. 902; 38 Digest (Repl.) 304, *91.*

Coe v. *Wise* (1866), L.R. 1 Q.B. 711; 7 B. & S. 831; 37 L.J.Q.B. 262; 14 L.T. 891; 30 J.P. 484; 14 W.R. 865, Ex. Ch.; 38 Digest (Repl.) 50, *252.*

Appeal from a decision of Fry, J., in an action brought to recover damages for injury alleged to have been caused to the plaintiffs' works by an overflow of water from the defendants' dock owing to the defendants' negligence in not having maintained the retaining wall of the dock at a sufficient height.

The plaintiffs' artificial manure factory was situate at Plaistow in Essex, and nearly adjoined the defendants' Victoria Dock which was approached from the Thames by a narrow artificial channel and tidal basin, through which the water was admitted into the dock. The entrance gates of the channel opened inwards, and were so constructed as to admit and retain the water of the river, and as the tide rose the water flowed from the river through the channel into the tidal basin. The natural level of the land on which the plaintiffs' premises were situate, and on which the Victoria Dock was constructed, was some seven or eight feet below Trinity high-water mark, and the water of the river was kept from overflowing the whole of the district, by means of a river wall, which the commissioners, to whose jurisdiction the district was subject, required to be maintained at a height of 4 ft. 2 in. above Trinity high-water mark. Early in the morning of Nov. 15, 1875, there was an extraordinarily high tide in the Thames. In the Victoria Dock the water rose to 4 ft. 5 in. above Trinity high-water mark, and there was a general overflow of the river in the district. A large quantity of water flowed into the plaintiffs' premises and caused considerable damage to their works and stock-in-trade. In the previous year, on Mar. 20, 1874, there had been a very high tide in the river, when the water rose to 4 ft. above Trinity high-water mark in the Victoria Dock, and a small quantity of water overflowed the bank of the defendants' entrance channel and basin, and found its way into the plaintiffs' premises. The plaintiffs then gave the defendants notice that they should hold them liable for the damage

thus caused, but the defendants repudiated their liability, and no steps were taken to enforce it.

The plaintiffs alleged that on the present occasion the water overflowed the bank of the defendants' entrance channel and tidal basin at the same place where the overflow had occurred in 1874, and they brought this action, alleging that the defendants were liable for negligence in not keeping their bank at a proper height, so as to prevent the overflow of the water at high tides, and claiming damages to the amount of £7,000 and an injunction to restrain the defendants from permitting any further overflow of water into the plaintiffs' premises. The defence was that the water which had caused the damage had not come from the defendants' premises; that, if it had, they were not liable; that they had not been guilty of any negligence, and that the high tide of Nov. 15, 1875, was an act of God against which they were not bound in any case to protect the plaintiffs.

The Victoria Dock was constructed by a company called the Victoria (London) Dock Co. which was incorporated by a private Act passed in 1850. By a second private Act, passed in 1853 [the Victoria Dock Act, 1853] the first Act was repealed, but it was provided that the company should continue incorporated,

> "with power to make and maintain docks and works, with all proper works and conveniences connected therewith, and to purchase, take, hold, and dispose of lands and other property for the purposes, and within the restrictions of this Act and of the Acts incorporated herewith."

Section 22 of the second Act provided as follows:

> "And whereas a plan and sections authorised to be made by the said recited Act [that of 1850] and therein described as the intended dock, and of the works connected therewith, showing the situation and levels thereof respectively, and the limits within which the same are to be constructed, and also a book of reference containing the names of the owners, lessees, and occupiers of the lands upon or through which the same are intended to be made, were, previously to the passing of the said Act, and in the month of November, 1849, deposited with the respective clerks of the peace for the counties of Essex and Kent. Be it enacted that, subject to the provisions in this and the said incorporated Acts [the Companies Clauses and Lands Clauses Acts and the Harbours, etc., Act, 1847] contained, and to the powers of deviation, alteration, and enlargement herein, and in the said incorporated Acts contained, it shall be lawful for the said company to continue, make, complete and maintain the said dock and the works which were authorised by the said Act hereby repealed in the situation and upon the lands delineated upon the said plans, and contained in the said book of reference, and according to the levels defined on the said sections."

The plan and sections showed, in the opinion of the court, the retaining bank of the entrance channel and tidal basin of the intended dock at a uniform level of four feet above Trinity high-water mark.

By the London and St. Katharine's Docks Act, 1864, the London Dock Co. and the St. Katharine Dock Co. were amalgamated into one company by the name of the London and St. Katharine's Docks Co., and the transfer to the amalgamated company of the undertaking and docks of the Victoria (London) Dock Co. was authorised. Section 61 of the Act repealed the Act of 1853, but s. 62 provided that the several sections and provisions of that Act set forth in the fourth schedule to the amalgamating Act should remain in full force. Section 22 of the Act of 1853 was not set forth in such fourth schedule, but s. 92 of the amalgamating Act provided that the amalgamated company should maintain, manage, regulate, work, and use the London Docks, and the St. Katharine's Docks, subject to all statutory duties, obligations, and liabilities to which the London Dock Co., the St. Katharine's Dock Co., and the Victoria Dock Co., and their lessees, immediately before the passing of that Act were, or but for the Act would be, subject in respect of the

London and St. Katharine's Docks and Victoria Dock. Section 67 provided that, notwithstanding the repeal of the Act of 1853, all plans and books of reference deposited for the purposes of that Act with any clerk of the peace should remain in his custody as if they were deposited for the purposes of the amalgamated Act.

The action came on for trial before FRY, J., on July 19, 1877, and his Lordship held that the defendants had not kept their retaining bank or wall at the height required by their Act of Parliament, and were guilty of negligence, and were, therefore, liable for the whole of the damage suffered by the plaintiffs. The defendants appealed.

Southgate, Q.C., *Benjamin*, Q.C., *Murphy*, Q.C., and *Crossley* for the defendants.

Sir Henry James, Q.C., *Meadows White*, Q.C., *North*, Q.C., and *Rigby* for the plaintiffs.

Cur. adv. vult.

Aug. 7, 1878. **JAMES, L.J.**, read the following judgment of the court. We intimated at the close of the arguments that the judgment of the learned judge from whom this appeal is brought would be affirmed with a variation not substantially affecting the merits of the appeal, and not, therefore, affecting the right of the plaintiffs to the costs of the appeal, which will be given to them. [The variation was the omission of a declaration made by the learned judge that the whole of the damage was due to the wrongful acts of the defendants and that they were liable to make good the whole of it.] The works of the plaintiffs were inundated by a high tide which came over a low part of the retaining banks of a channel leading to the docks of the defendants, and the learned judge arrived at the conclusion that the inundation of the plaintiffs' works was due to the neglect and default of the defendants in not having maintained a proper and sufficient barrier against the influx of the tidal flood.

A great deal of the argument before the court below and in this court turned upon the question whether there was any statutory obligation to make and maintain the banks at any prescribed height. The Acts of Parliament under which the docks were constructed referred to certain deposited plans and sections showing the position and levels of the works authorised to be made. The first Act referred to them as the plans according to which it was intended to construct the docks and other works, but did not contain any express enactment that they should be made accordingly, but, the company having occasion to go again to Parliament, this omission (if it were practically an omission) was remedied by an express enactment in the second Act (the Victoria Dock Act, 1853, s. 22) that it should be lawful for the company to continue, make, complete, and maintain the dock and works in the situation and upon the lands, etc., and according to the levels defined in the sections so deposited. The contention before us was that no such levels could be found so deposited, and two witnesses called by the plaintiffs had in fact deposed that the plans were so inaccurate or defective that they could not find any such levels. The learned judge, however, found no difficulty in discovering such levels, and, upon a careful examination of the plans, we agree with him that such levels are described sufficiently and clearly for any person really desirous to find on the plans what the Act of Parliament said was to be found there. That is to say, that there was on the plan a section running through the centre of the proposed works which shows a line said to be a line corresponding with the upper surface of the banks, and shows that this line was to be 4 ft. above Trinity high water-mark, and the cross sections show the banks of the dock at a level nearly corresponding with this line. There was, therefore, a statutory direction that the banks were to be 4 ft. above the Trinity high-water mark. It was not contended by counsel for the defendants that, if that was so, there was not a statutory obligation to make and maintain retaining banks or walls of that height.

The words of the Victoria Dock Act, 1853, s. 22, are that it should be lawful for the company to make their works according to those levels, and, of course,

it was optional for them not to make their works at all. But, if they made them and not to those levels, they would be in this dilemma -either from the neglect of that provision or condition the whole works were illegal, or the provision as to levels ought to be construed as imposing a distinct and separate obligation to that effect, the breach of which would not invalidate all their acts and proceedings, but would have to be remedied or punished like any other breach of a statutory obligation. Of course the company would prefer their liability under the latter construction to their liability to capital punishment, which would be the consequence of the former; and we prefer that construction.

It was, however, with great energy and confidence, insisted before us that the liability was destroyed by the repeal of the Act which contained that section. That Act was repealed under the following circumstances. There were three dock companies, the Victoria, the London, and the St. Katharine, who applied to Parliament to authorise the two latter to be amalgamated and to absorb the first; and, to give effect to that arrangement, a new Act was passed repealing the existing Acts of the three companies, and providing for the creation of the powers and liabilities of the new company, the present defendants. There was this peculiarity in the composition of the new Act, that, although it repealed all the old Acts, it purported to continue in a schedule certain clauses, and among those clauses was not s. 22 of the Act of 1853; and it was very strongly urged upon us that this very peculiar style of legislation operated as a very special and peculiar repeal of everything in s. 22 so as to preclude the effect of s. 92 of the amalgamating Act (which provides that the new company shall maintain, work, and use the three docks respectively subject to all statutory duties, obligations, and liabilities to which the three companies respectively immediately before the commencement of the amalgamating Act were, or, but for it, would become subject in respect of the three docks respectively).

That contention is wholly inadmissible. When companies come to Parliament for an amalgamation for their own convenience, it would require very clear words indeed to induce the court to conclude that they had contrived to slip in anything to destroy any existing liability in themselves or any existing right in anyone else. Section 92 is, in fact, what one always expects to find, and does find, in all these Acts sanctioning private arrangements between existing companies. There is really no doubt whatever as to the construction of the provision repealing s. 22 of the old Act, and s. 92 of the new Act, taken together. Section 22 is repealed as to powers, because the company itself is to go, and the powers of the amalgamated or new company are otherwise defined; but it is continued as to liability, except that such liability is transferred to such new company.

We agree, therefore, with the court below that the company were clearly under a statutory liability to maintain their banks up to the 4 ft. level. But, although we have thought it right to go fully into the whole of this case as to statutory liability, having regard to the fact that it was made the foundation of the judgment appealed from, and that it constituted by far the greater part of the case argued before us, yet, in the view we take of the case, it is really immaterial, for, if there was no such statutory liability, there is another and more extensive liability on the defendants. There is nothing in the Act, either expressly or by implication, to affect the ordinary liability of the company as riverain proprietors who intermeddle with an existing river wall. They were authorised to take land and make works on the banks of the river, and what they did was to excavate a great bell-mouthed bay in the channel of the river, and to make a channel or cut from that bay into their dock, which is some distance back from the river, in the execution of those works destroying the existing river wall. They became landowners, frontagers on the river, interfering with the wall rightfully insisted on by the Commissioners of Sewers, and as such they were as much liable to have and maintain a proper river wall as any other of the landowner frontagers there.

If they had merely made the bell-mouthed bay, no one could have doubted that it was their duty to have and maintain a river wall around the curve, just as it was

to have and maintain one across the chord of that curve. But they do not maintain such a wall around the curve if there is any opening in it. An inclosure or defence not continuous is no inclosure or defence at all. They were bound to have a river wall, and that wall a continuous one; and, therefore, the whole wall or bank, from the extreme point at one end of the bay, along one side of the defendants' works round the docks, and back to the extreme point at the other end of the bay, was and is the river wall which it is their duty to have and maintain. If the gates which are across what is called the lock had been closed to the inflowing tide, that would have completed the wall at that place; but they were constructed so as to open to such tide. In fact, the defendants' works, being all open to the tide, and the water in them at high tide being part of the same sheet or body of water as that of the mid-channel, the bell-mouthed bay, the lock, the cut, the docks constitute, in fact, a bay and creek of the river as much as any natural bay, creek, or other widening or opening to be found along the course of it. The whole of this wall or bank was, therefore, a river wall or bank subject to the like liabilities and jurisdiction as any other part of the river wall.

The defendants themselves called the officer of the proper commissioners to prove that the standard appointed for the river wall had been in November, 1875, and for thirty years previously, to his certain knowledge, 4 ft. 2 in. above Trinity high-water mark, and it was the plain duty of the defendants, as riverain proprietors, to have and maintain a wall of that height. But even if the defendants had succeeded in establishing that they were not under any statutory or special liability, but only under the common law liability to take proper and sufficient precautions, it would not, in my opinion, make any substantial distinction in their favour. In judging the question of fact whether they had taken proper and sufficient precautions, all the surrounding circumstances must be taken into consideration, and, in my judgment, it would be far from sufficient for them to show that they had taken the precautions sufficient according to a table of tides for forty years. If there had been nothing else, that possibly might have excused them; but they ought to have set against that the judgment of the commissioners, based on the experience and tradition of centuries, which had fixed 4 ft. 2 in. as the height.

We now know that, although up to 1874 for forty-one years there had been no tide higher than 3 ft. 9 in. at the Shadwell Dock (which is said to be 3 in. higher than the Victoria), there were in 1874, 1875, and 1877 tides of 4 ft. 3 in., 4 ft. 6½ in. (the one in question), and 4 ft. The great probability is that the commissioners had previously experienced similar tides, and had fixed 4 ft. 2 in. accordingly, and if in a matter connected with the inundation of a whole district a landowner prefers his own deduction from the experience of a few years (not even exhausting living memory) to the deliberate judgment of the constituted authorities, whose official experience and traditions must, as I have said, date from centuries back, he does it at his peril, and he cannot, in my judgment, be said to have taken and used every precaution and care reasonably to be expected from him under the circumstances. To what I have said is to be added that the company's own engineer, before they began their works, had fixed 4 ft. as the limit. And, if there had been any shadow of excuse for them before, it was, in my judgment, wholly and most culpably inexcusable in the defendants not to have accepted the warning of the tide of 1874, which it is not suggested was due to any earthquake or other convulsion of nature, or to anything else than a peculiar combination of those causes which make some tides higher than others, and which might, therefore, be expected again to occur. It would be difficult, therefore, to fix even the common law liability at less than 4 ft.

The learned judge was, therefore, clearly right in holding that the defendants had been guilty of neglect and breach of duty, and making the consequential decree against them. But there was one matter which may possibly, and very probably, turn out to be a mere matter of form, on which we intimated that we did not agree with him. He made a declaration that the whole damage sustained by the plaintiffs was due to the defendants' wrong. [His Lordship dealt with the

evidence, said that that declaration could not be sustained, and concluded:] The judgment and decree of the judge will, therefore, be affirmed, with a variation omitting the declaration to which I have referred. The defendants must pay the costs of the appeal.

Solicitors: *W. M. Hacon*; *Kingsford, Dorman & Kingsford.*

[*Reported by* H. PEAT, ESQ., *Barrister-at-Law.*]

RHODES AND ANOTHER *v.* AIREDALE DRAINAGE COMMISSIONERS

[COURT OF APPEAL (Sir George Jessel, M.R., Kelly, C.B., Mellish, L.J. and Pollock, B.), May 9, 1876]

[Reported 1 C.P.D. 402; 45 L.J.Q.B. 861; 35 L.T. 46; 24 W.R. 1053; 3 Char. Pr. Cas. 433]

Arbitration—Arbitrator—Powers—Stating award in form of special case—Statutory arbitration—Reference under Lands Clauses Act.

By the Common Law Procedure Act, 1854, s. 5: "... the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the Superior Courts of law or equity at Westminster" might "state his award ... in the form of a Special Case for the opinion of the court ..." By s. 25 of the Lands Clauses Consolidation Act, 1845, the appointment of an arbitrator by each party respectively "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made," and by s. 36: "The submission to any such arbitration may be made a rule of any of the Superior Courts on the application of either of the parties."

Held: an arbitration under these sections of the Act of 1845 was a "reference by consent of parties" within s. 5 of the Common Law Procedure Act, 1854, and the arbitrator had power to state his award in the form of a Special Case.

Compulsory Purchase—Compensation—Limitation to damage actionable but for enabling Act—Removal of shoals in river.

By a local Act which incorporated the provisions of the Lands Clauses Consolidation Act, 1845, the defendants were authorised to execute drainage works, and it was provided that full compensation should be made by the defendants to the owners and occupiers of land sustaining any damage by reason, or in any way consequential upon, the exercise of any of the powers of the Act. The plaintiffs, who were occupiers of certain land included in the provisions of the Airedale Drainage Act, claimed compensation for damage sustained by floods occasioned by the defendants' works. The matter was referred to an umpire, who found by his award that the defendants had removed shoals from a river formed therein by gravel, soil, and other materials, and as a result the damage complained of was occasioned.

Held: the claim of the plaintiffs for compensation must be limited to damage which, but for the power conferred by the Act, would have been actionable; it was lawful for a riparian owner to remove shoals from a navigable river provided he did not injuriously affect the navigation; and, therefore, the plaintiffs were not entitled to the compensation they claimed.

Notes. Applied: *Re Bidder and North Staffordshire Rail. Co.* (1878), 4 Q.B.D. 412. Considered: *Bexley Local Board* v. *West Kent Main Sewerage Board* (1882), 9 Q.B.D. 518. Applied: *Re Carpenter and Bristol Corpn.* (1907), 71 J.P. 417. Considered: *Marriage* v. *East Norfolk Rivers Catchment Board*, [1949] 2 All E.R. 50. Referred to: *Warburton* v. *Haslingden Local Board* (1879), 48 L.J.Q.B. 451; *Knowles* v. *Bolton Corpn.* (1900), 69 L.J.Q.B. 481.

As to setting aside an award, see now s. 23 (3) of the Arbitration Act, 1950 (29 Halsbury's Statutes (2nd Edn.) 89), and 2 Halsbury's Laws (3rd Edn.) 57–61. For cases see 2 Digest (Repl.) 676 et seq. As to compensation for compulsory acquisition, see 10 Halsbury's Laws (3rd Edn.) 156–158; and for cases see 11 Digest (Repl.) 148 et seq.

Cases referred to:

(1) *Re Dare Valley Rail. Co.* (1869), 4 Ch. App. 554; 20 L.T. 717; 17 W.R. 717, L.JJ.; 11 Digest (Repl.) 208, *752*.

(2) *New River Co.* v. *Johnson* (1860), 2 E. & E. 435; 29 L.J.M.C. 93; 1 L.T. 295; 24 J.P. 244; 6 Jur.N.S. 374; 8 W.R. 179; 121 E.R. 164; 44 Digest 34, *253*.

(3) *Hall* v. *Bristol Corpn.* (1867), L.R. 2 C.P. 322; 36 L.J.C.P. 110; 15 L.T. 572; 31 J.P. 376; 15 W.R. 404; 11 Digest (Repl.) 305, *2103*.

(4) *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724, H.L.; 11 Digest (Repl.) 143, *228*.

Also referred to in argument:

Re Newbold and Metropolitan Rail. Co. (1863), 14 C.B.N.S. 405; 2 New Rep. 168; 143 E.R. 503; 11 Digest (Repl.) 202, *696*.

Ex parte Harper (1874), L.R. 18 Eq. 539; 22 W.R. 942; 11 Digest (Repl.) 206, *734*.

Caledonian Rail. Co. v. *Ogilvy* (1855), 25 L.T.O.S. 106; 2 Macq. 229, H.L.; 11 Digest (Repl.) 149, *276*.

Appeal from a decision of the Common Pleas Division (Lord Coleridge, C.J., Archibald, J., and Amphlett, B.), on a rule nisi for an order of nonsuit or that the verdict should be entered for the defendants in an action upon the award of an umpire appointed under the Airedale Drainage Act, 1861, which incorporated the provisions of the Lands Clauses Consolidation Act, 1845.

The umpire awarded to the plaintiffs the sum of £110, to recover which the action was brought. The first plea denied the validity of the award under the Airedale Drainage Act. The second plea set out the award of the umpire as follows:

"If I have no power to state my award in the form of a Special Case for the opinion of the superior court, of which the submission to arbitration of the matters so referred as aforesaid may be made a rule, then I award and judge that the plaintiffs, as occupiers of Morley Hall Farm, have sustained damage, by reason of and consequential upon the exercise by the [defendant] commissioners of the powers of the Drainage Act, to the amount of £110, and are entitled to be paid compensation for the same to that amount, but, if I have power to state my award in the form of a Special Case for the opinion of such superior court, then I hereby state my award of and concerning the matters so referred as aforesaid in the form of a Special Case for the opinion of such superior court, as follows:

"Morley Hall Farm is a farm of 150 acres, adjoining the river Aire, and situate about one mile and a half below the lowest of the works executed by the commissioners under the powers of the Drainage Act as hereinafter stated. The plaintiffs were occupiers of the farm as tenants in and during the years 1866, 1867, 1868, and 1869, and as such occupiers sustained damage from certain floodings of the farm, which occurred in these years in consequence of floods in the river. The claim for compensation referred to arbitration was

in respect of the damage so sustained by the plaintiffs. All the floodings occurred after works authorised by the Drainage Act had been executed by the commissioners under the powers of that Act. All the works were above the farm, and were executed at different points of the river within a district beginning at a point about one mile and a half above the farm, and extending up the river for a distance (reckoned along the whole course of the river) of nearly fourteen miles. For the purposes of this case the works may be divided into four classes, first, the division and alteration of tributaries of the river whereby the tributaries were made to flow into the river differently from what they previously did and otherwise would have done; secondly, the formation of several cuts or channels for the river at different points whereby the course of the river was shortened nearly a mile and three quarters; thirdly, the removal from the river of shoals formed therein by gravel, soil, and other materials, which from time to time had been brought down by tributaries of the river and deposited in the river near the confluences therewith of the tributaries; and, fourthly, the removal of a weir, belonging to a mill about a mile and a half above the farm, being the lowest work in the river executed by the commissioners under the powers of the Drainage Act. None of the works executed by the commissioners as aforesaid was executed by them in or upon land or other property of the plaintiffs or their landlord.

"All the works had been executed and were in operation before and at the time of the occurrence of the floodings of Morley Hall Farm, in respect of which the claim for compensation arose, except the first of the works, with the exception of one of the cuts. Before the passing of the Drainage Act and the execution by the commissioners of any of the works, Morley Hall Farm was more or less liable to be flooded by flood waters coming down the river. The effect of making all the cuts was to bring down the flood waters of the river to Morley Hall Farm about twenty-six minutes earlier than they otherwise would have reached that farm, and the effect of making all the cuts, except the cut which was not in operation till after the first of the floodings, was to bring down the flood waters of the river to Morley Hall Farm about eleven minutes earlier than they otherwise would have reached that farm. From the evidence before me, I find that the plaintiffs, as occupiers of the farm, sustained damage on the occasion of the floodings by reason of and consequential upon the execution by the commissioners of all the works which were in operation at the times of the floodings, to the amount of £110, and that the damage so sustained by them would have been substantially the same if the weir had not been removed. There was no sufficient evidence before me to enable me to determine, either one way or the other, whether the works, exclusive of the removal of the shoals and weir as aforesaid, caused the farm on the occasions of the floodings, to be flooded to greater extents or for longer periods of time, or to be more damaged than it otherwise would have been."

Thirdly, it was pleaded that the sum awarded by the umpire included damages in respect of matters beyond his jurisdiction, and, fourthly, that the plaintiffs had not sustained any such damages by reason of or consequential upon the circumstances of any of the powers of the Act, as entitled them to any compensation under its provisions or otherwise.

At the trial before Lord Coleridge, C.J., in 1874 the plaintiffs simply put in the award of the umpire, and closed their case, and it was agreed that the umpire, who was called, should be taken as re-presenting in the witness-box the statements made in the Special Case appended to the award. No further evidence of damage was given by the plaintiffs. A verdict was entered for the plaintiffs for the amount of the award, leave being reserved to the defendants to move to enter a nonsuit or verdict for the defendants on the following grounds: That the plaintiffs gave no evidence of any damage for which they were entitled to compensation; that the award proved in evidence was not final, or such an award as was stated in the

declaration; that the award given in evidence showed on its face that the umpire gave compensation for matters on which he had no jurisdiction; and that the third plea was proved. The Common Pleas Division (LORD COLERIDGE, C.J., ARCHIBALD, J., and AMPHLETT, B.) were divided on the question whether the word "damage" was confined to damage which would have been actionable but for the Act, but were unanimously of opinion that it sufficiently appeared from the statements of the umpire in the award that the damage was properly the subject of compensation. Accordingly, they gave judgment in favour of the plaintiff. The defendants appealed.

Herschell, Q.C., and *K. E. Digby* for the defendants.
Manisty, Q.C., *Cave, Q.C.* (*Bidder, Q.C.*, with them), for the plaintiffs.

SIR GEORGE JESSEL, M.R.—This is an appeal from the Common Pleas Division, and the question for our decision is in substance whether under the powers of the Lands Clauses Consolidation Act, 1845, an arbitrator has power to state a Special Case for the opinion of a superior court. The Common Pleas Division held that he had not. It is said that no such power is conferred under the Common Law Procedure Act, 1854. The present question doubtless turns, first, on the construction of that Act, and, secondly, what has been done with reference to the construction put on the Act. No doubt, under the words of the Common Law Procedure Act, 1854, s. 5, by which, if at all, the power is given, there is some difficulty, as it refers apparently only to arbitrations by direction of a court or judge, or by consent. On the other hand, it certainly would be remarkable that a large class of arbitrations should have been omitted; and, if we can consistently do so, we ought, I think, to bring these submissions within the purview of the enactment.

It is much to be regretted that the Common Pleas Division, in deciding the present case were unaware of *Re Dare Valley Rail. Co.* (1), where the Chancery Court of Appeal confirmed the decision of JAMES, V.-C., that an arbitration under the Lands Clauses Consolidation Act, 1845, was within the provisions of the Common Law Procedure Act, 1854, s. 5, as to arbitrations by consent. Against that decision we have nothing but the decision of the Court of Common Pleas; therefore, as an authority, we ought to decide against the latter court, and follow the judgment of a co-ordinate court given in *Re Dare Valley Rail. Co.* (1). I do not intend to say that we are always bound to follow the decision of a co-ordinate court, but there must be strong reasons for disregarding it, and no such reasons, so far as I can see, exist here.

The next point is one of great importance, viz., whether, having regard to the terms of the local Act, the damage for which a plaintiff is entitled to recover is for actionable damage only, or includes all loss whether actionable or not. The words of this particular section are undistinguishable from the words of other sections, the construction of which has been established by a long chain of decisions. When I come to look at ss. 44 and 45, I find that they are what are termed landowners' clauses, that is to say, clauses put in by opposing landowners for their protection; and if the landowners could have induced the legislature to give larger powers of compensation they would naturally (knowing as they did, the decisions on the subject) have taken care to make the intention of clauses in their own favour clear.

I will refer to two of the decisions which are referred to by AMPHLETT, B., in the court below, *New River Co.* v. *Johnson* (2) and *Hall* v. *Bristol Corpn.* (3). In *New River Co.* v. *Johnson* (2), which arose under the Waterworks Clauses Act, 1847, the words were

> "that in the exercise of the [powers conferred by the Act] the undertakers shall do as little damage as can be . . . and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers."

In *Hall* v. *Bristol Corpn.* (3), which was decided under the Public Health Act, 1848, the words were:

> "that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act."

In both these cases it was definitely decided that the right to compensation was limited to actionable damage, and, that being so, the question has been fairly decided, and I should have no doubt at all on the subject were it not that two of the learned judges in the court below appear to have arrived at an opposite conclusion. It is said: "Why are these words inserted at all? I think there are two answers, one that the time is enlarged, the other that too much effect must not be given to mere repetitions.

If the damage must be actionable, is there any such damage? No dispute arises as to the law. Riparian proprietors are entitled to remove casual obstructions as distinguished from the natural bed of the river. The only dispute is as to the construction of the award, and as regards that, I differ from the construction put on the award by all the judges, and am of opinion that that for which the arbitrator intended to award compensation, was damage caused by the removal of shoals. Is that actionable damage? It was not disputed that riparian proprietors not only may, but are under a liability to remove such shoals. If I am right as to the construction of the award, there is no actionable damage. The judgment of the Common Pleas must, therefore, be reversed.

KELLY, C.B.—I am of the same opinion. The section is on an award under the Lands Clauses Consolidation Act, 1845. The case proceeded to trial, and a verdict was eventually entered for the plaintiffs for £110, the amount of the award, but leave was reserved to the defendants to move to enter a nonsuit or verdict for them. The question whether the judgment was right depends on whether the award is valid. That throws us back to the question whether the arbitrator had jurisdiction to make the award. The question turns upon s. 5 of the Common Law Procedure Act, 1854. I may observe that, apart from the decisions, the arbitration seems to me to be, by the effect of s. 25 of the Lands Clauses Consolidation Act, 1845, an arbitration by consent, the claimants and the commissioners having each appointed an arbitrator, instead of the commissioners having exposed themselves to an appointment by the claimant singly, and the appointment of an arbitrator being, by the terms of s. 25, a submission to arbitration on the part of the party by whom the appointment is made. I should say, therefore, apart from the decisions, that the arbitration was within s. 5 of the Common Law Procedure Act, 1854, and this view is confirmed by *Re Dare Valley Rail. Co.* (1). This at once disposes of the first decision of the court below, which we are compelled to overrule. We think it right, in order to avoid future litigation, to give our decision upon the Special Case. The question raised by the Case renders it necessary for us to look at the language of the award, and to see whether the plaintiff is entitled to judgment for the sum of £110. That depends entirely on the nature of the damage which the plaintiff has sustained. By a long series of decisions it has been clearly established that the claim must be limited to damage which, but for the power conferred by the Act of Parliament, would be actionable.

Is the damage done here actionable? It appears from the Special Case that the damage may have arisen from four different causes [see p. 516 ante]. If the finding of the arbitrator had been that the damage resulted from all three causes, then, inasmuch as two of them would be actionable, were it not for the Act, the claimant would be entitled to recover. But if, on the other hand, it turns out that the cause of injury is confined to one species of damage only, namely, the removal from the river of the shoals, the question will arise whether damage so occasioned is actionable. All that the arbitrator says is that damage was caused "by the removal from the river of shoals formed therein by gravel, soil, and other materials, which from time to time had been brought down by tributaries of the

river and deposited in the river near the confluences therewith of the tributaries." We all agree that if the bed of the river had been disturbed, it would have been actionable; but does the finding of the umpire amount to such a statement? I am clearly of opinion that no conclusion of this kind can be drawn. If the arbitrator had meant us to infer that the bed of the river had been disturbed, or that the shoals had become part of the river itself, why did he not expressly say so? Instead of that he has made use of language which, to my mind, is quite unambiguous.

Lastly, was the damage caused solely by the removal of the shoals, or partly by the removal of such shoals and partly by other causes? The language of the award is, to my mind, clear as to how the damage was occasioned. The umpire has found that there was no sufficient evidence before him to enable him to determine one way or the other whether the works, exclusive of the removal of the shoals, caused the farm on the occasion of the floodings to be flooded to a greater extent or for a longer period of time, or to be more damaged than it otherwise would have been. What is the meaning of that? Why, that there is no sufficient evidence to enable him to determine whether the damage was occasioned otherwise than by the removal of the shoals; in other words, it amounts to an allegation that the removal of the shoals alone caused the injury, and that there was no evidence to satisfy him that any other cause or causes contributed. It must, therefore, be taken that the damage was solely caused by the removal of the shoals; and the law is well established that a riparian owner may remove shoals from a navigable river, so long as he takes care not injuriously to affect the navigation, without being liable to an action. I, therefore, come to the conclusion that the plaintiffs are not entitled to the compensation which has been awarded to them by the umpire.

MELLISH, L.J.—I am of the same opinion. With reference to the question whether an arbitrator, under the Lands Clauses Consolidation Act, 1845, has power to state a Special Case, I should, if there had been no decision on the matter, have thought it open to some doubt, but, considering the authorities, there can be no doubt on the subject. The point was first raised before JAMES, V.-C. His decision was that the arbitrator had such a power, and it was affirmed on appeal by the lords justices. We, therefore, should not be justified in overruling it now. Had the decision in *Re Dare Valley Rail. Co.* (1) been brought to the notice of the Common Pleas Division, I feel no doubt their decision on the demurrer would have been different. The arbitrator, therefore, having power to state a Special Case, I agree that the defendants are entitled to have a verdict entered for them on the plea of no such award.

Counsel on both sides thought it proper that we should go on to consider the merits under the powers conferred on us by the Judicature Acts. The first question that arises is, whether, according to the construction of s. 45 of the Airedale Drainage Act, the plaintiff is entitled to compensation for acts done whether actionable or not. My opinion is that he is only entitled for acts done by causes which are actionable. The argument for the plaintiffs was based upon the difference of s. 45 from s. 43. I, therefore, took the opportunity of reading s. 44. I find that that is a clause relating to Riddlesdown landowners, and in the main agreeing with s. 45, but limited to actionable damage, the words being, "whether the lands injuriously affected be within or without" a certain area, the words "injuriously affected" being the very words which in s. 68 of the Lands Clauses Act have been considered decisive of the question whether damage without legal injury can be considered the subject of compensation. I think it clear, therefore, that the plaintiff can only recover for damage which but for the Act would have been actionable.

Then comes the question raised by the award, whether the removal of shoals is actionable? With all deference to the court below I have no doubt it is not. In course of time shoals may no doubt become part of the bed of a river, in which case it would be actionable to remove them; but so long as they continue in the

shape of shoals they may clearly be removed. Such removal, therefore, not being actionable, has there been any damage in respect of any other matters? The umpire says, as to that, that there is no sufficient evidence to find one way or the other. That being so the judgment of the Common Pleas Division must be reversed.

POLLOCK, B.—As regards the first point, had the matter been res nova, I should have liked to have had it further argued; but the decision in *Re Dare Valley Rail. Co.* (1) is binding, and the convenience of that decision is shown by *Duke of Buccleuch* v. *Metropolitan Board of Works* (4). As to the other point I agree with the rest of the court.

Appeal allowed.

Solicitors: *Field, Roscoe & Co.*, for *Jeffery, Taylor & Little*, Bradford; *Phelps & Sidgwick*, for *Brown*, Skipton.

[*Reported by* R. H. AMPHLETT, ESQ., *Barrister-at-Law.*]

FOWKES *v.* PASCOE

[COURT OF APPEAL (James and Mellish, L.JJ.), March 3, 10, 12, 24, 1875]

[Reported 10 Ch. App. 343; 44 L.J.Ch. 367; 32 L.T. 545; 23 W.R. 538]

Gift—Gift inter vivos—Purchase of stock in name of purchaser and another—Presumption of resulting trust in favour of purchaser—Rebuttal—All circumstances to be regarded—Evidence of donee and wife.

Will—Ademption—Person in loco parentis—"In loco parentis" defined.

S.B., a widow, at various times between 1843 and 1850, purchased sums of stock in the name of the defendant P., who was the son by a second marriage of the widow of a deceased son of S.B., and she transferred other sums of stock into the names of herself and P. At the same time as some of these purchases she made other purchases in the names of herself and a woman who was her companion. S.B. died in 1850, having appointed P. and one T. executors and trustees of her will, by which she gave to P. her real property and an ultimate share of residue. A bill was filed by parties interested under the will against P. and T., praying a declaration that (i) the stock belonged to the testatrix's estate, and (ii) that if the transactions relating to the stock were to be regarded as gifts they adeemed the gifts made to P. in the will. P., in his evidence, stated that S.B. always took as much interest in him as she could have done if he had been her own child, and that her intention in making the investments of stock in the joint names of herself and him was that the stock should at her death become absolutely his property.

Held: (i) the presumption that in the circumstances in which the purchases of stock were made there was no gift to P. but a resulting trust in favour of S.B. was rebuttable by sufficient evidence; in considering whether or not the presumption had been rebutted the court must regard all the circumstances, and in the present case the fact that on occasion stock was bought in the names of S.B. and more than one other person was a cogent matter to be taken into account; if it should appear that the first transaction constituted a gift to P., the subsequent purchases, being of the same nature, would appear to be of the same character; P.'s evidence and that of his wife was admissible to prove his case although they were interested parties; and in the result the evidence in favour of gift and against trust was conclusive:

(ii) the gifts in the will were not adeemed by the previous gifts since S.B. was never in loco parentis to P.

Consideration of what constitutes a person in loco parentis.

Notes. Considered: *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328; *Re Orme, Evans* v. *Maxwell* (1883), 50 L.T. 51; *Re Scott, Langton* v. *Scott*, [1900–3] All E.R.Rep. 221. Referred to: *Re Eykyn's Trusts* (1877), 6 Ch.D. 115; *Re Howes, Howes* v. *Platt* (1905), 21 T.L.R. 501; *Re Shields, Corbould-Ellis* v. *Dales*, [1912] 1 Ch. 591; *Hatley* v. *Liverpool Victoria Legal Friendly Society* (1918), 88 L.J.K.B. 237; *Re Binns, Public Trustee* v. *Ingle*, [1929] All E.R.Rep. 542; *Re Schebsman, Ex parte Official Receiver, Trustee* v. *Cargo Superintendents (London), Ltd. and Schebsbaum*, [1943] 2 All E.R. 768; *Young* v. *Sealey*, [1949] 1 All E.R. 92; *Shephard* v. *Cartwright*, [1954] 3 All E.R. 649.

As to gift or resulting trust, see 18 Halsbury's Laws (3rd Edn.) 384–388; and for cases see 43 Digest 650–656. As to ademption, see 39 Halsbury's Laws (3rd Edn.) 934–937; and for cases see 44 Digest 403–416.

Cases referred to:

(1) *Pym* v. *Lockyer* (1841), 5 My. & Cr. 29; 10 L.J.Ch. 153; 5 Jur. 620; 41 E.R. 283, L.C.; 20 Digest (Repl.) 477, *1840*.

(2) *Montefiore* v. *Guedalla* (1859), 1 De G.F. & J. 93; 29 L.J.Ch. 65; 1 L.T. 251; 6 Jur.N.S. 329; 8 W.R. 53; 45 E.R. 294, L.C. & L.JJ.; 20 Digest (Repl.) 479, *1854*.

(3) *Meinertzhagan* v. *Walters* (1872), 7 Ch. App. 670; 41 L.J.Ch. 801; 27 L.T. 326; 20 W.R. 918, C.A.; 20 Digest (Repl.) 479, *1857*.

Also referred to in argument:

Currant v. *Jago* (1844), 1 Coll. 261; 3 L.T.O.S. 240; 8 Jur. 610; 63 E.R. 410; 25 Digest (Repl.) 562, *107*.

Re Curteis' Trusts (1872), L.R. 14 Eq. 217; 41 L.J.Ch. 631; 26 L.T. 863; 43 Digest 636, *744*.

Dyer v. *Dyer* (1788), 2 Cox, Eq. Cas. 92; 30 E.R. 42; 25 Digest (Repl.) 559, *84*.

Dummer v. *Pitcher* (1833), 2 My. & K. 262; Coop. temp. Brough. 257; 47 E.R. 91, L.C.; 20 Digest (Repl.) 437, *1540*.

George v. *Bank of England* (1819), 7 Price, 646; 146 E.R. 1089; 25 Digest (Repl.) 568, *143*.

Hill v. *Wilson* (1873), 8 Ch. App. 888; 42 L.J.Ch. 817; 29 L.T. 238; 21 W.R. 757, L.JJ.; 25 Digest (Repl.) 571, *154*.

Nicholson v. *Mulligan* (1869), 17 W.R. 659; 43 Digest 659, **922 i.*

Powys v. *Mansfield* (1837), 3 My. & Cr. 359; 7 L.J.Ch. 9; 1 Jur. 861; 40 E.R. 964, L.C.; 20 Digest (Repl.) 520, *2316*.

Rider v. *Kidder* (1805), 10 Ves. 360; 32 E.R. 884, L.C.; 43 Digest 651, *854*.

Sayre v. *Hughes* (1868), L.R. 5 Eq. 376; 37 L.J.Ch. 401; 18 L.T. 347; 16 W.R. 662; 25 Digest (Repl.) 561, *98*.

Strong v. *Bird* (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745; 22 W.R. 788; 25 Digest (Repl.) 589, *285*.

Soar v. *Foster* (1858), 4 K. & J. 152; 31 L.T.O.S. 381; 4 Jur.N.S. 406; 6 W.R. 265; 70 E.R. 64; 27 Digest (Repl.) 150, *1095*.

Tucker v. *Burrow* (1865), 2 Hem. & M. 515; 6 New Rep. 139; 34 L.J.Ch. 478; 12 L.T. 485; 11 Jur.N.S. 525; 13 W.R. 771; 71 E.R. 563; 25 Digest (Repl.) 562, *103*.

Dawson v. *Dawson* (1867), L.R. 4 Eq. 504; 20 Digest (Repl.) 498, *2077*.

Leighton v. *Leighton* (1874), L.R. 18 Eq. 458; 43 L.J.Ch. 594; 22 W.R. 727; 20 Digest (Repl.) 478, *1851*.

Appeal by the defendant from a decree of Sir George Jessel, M.R., made in an action in which the plaintiffs, trustees of a will, sought a declaration that certain stock belonged to the estate of the testatrix and had not been the subject of gifts to the defendant during the testatrix's life.

Mrs. Sarah Baker, widow, on several occasions during a period extending from 1843 to 1850, purchased sums of stock in the name of the defendant John Irving Pascoe, who was the son by a second marriage of the widow of a deceased son of Sarah Baker, and transferred other sums of stock into the names of herself and John Irving Pascoe. Mrs. Baker died in December, 1850, having appointed John Irving Pascoe, and a gentleman named Thompson, executors and trustees of her will. Elizabeth Ann Pascoe, the defendant's mother, died in 1872, leaving two children surviving her, Mary Ann, the wife of Frederick Heritage, and the defendant. A bill was filed in 1873 by the trustees of Mrs. Heritage's marriage settlement, praying for a declaration that the sums of stock so purchased or transferred belonged to the estate of the testatrix, and for consequential relief. The defendant by his answer alleged that the testatrix up to the time of her death took as much interest in his welfare as she could have done had he been her own son, and that her intention in making the investments of stock in their joint names was, that the stock should, at her death, become absolutely his property, and he claimed to be absolutely entitled to the stock for his own benefit. In the court below it was held that the defendant's evidence, uncorroborated by any excepting that of his wife, was insufficient to prove the intention of the testatrix that the investments in the joint names were in the nature of a gift. The defendant appealed.

Chitty, Q.C., *Waller, Q.C.*, and *W. H. Thompson* for the defendant.
Southgate, Q.C., and *Davey* for the trustees.

JAMES, L.J.—The case of the plaintiff is simply this. Sums of stock have been discovered to have been standing in the joint names of Mrs. Sarah Baker, a lady since deceased, and the defendant. They were partly purchased with the lady's money and partly transferred from her name to the joint names. This, it is alleged, proves a resulting trust for the lady. It is further alleged that the onus of rebutting the presumption of such resulting trust lies on the defendant and he has failed to rebut it. The Master of the Rolls agreed with that submission, hence the appeal.

The relations between the lady and the defendant were of a character very natural, but singular in this respect, that nothing like them appears to have occurred in any of the reported cases. Mrs. Baker was a widow of considerable property, childless, but she had had an only son, who had also left a childless widow. The younger widow lived with her father-in-law and mother-in-law, and later with the latter. The mother-in-law's house was her home, where she lived until she found a second husband, whom she married from that house. Her marriage does not appear to have diminished the feeling of maternal and filial affection between her and Mrs. Baker; everything in the case shows that Mrs. Baker looked upon the daughter-in-law and her children as if they had been her own descendants, the issue of her own body. There was, among other issue of the second marriage, a son, the defendant, and two daughters, one deceased, the other the plaintiff. All three are mentioned in her will. The son, when a youth, and for some years prior to and up to his marriage, lived with the old lady. In 1844, he married and had children. He resided after his marriage near Birmingham, the old lady in London. Whenever he came to London he took up his abode at her house. His children were brought from Birmingham to London to the old lady's house to be baptised from there at her church by her clergyman, and the likenesses of the little ones were the favourite ornaments of her room. She made her will in 1843 By that she gave her real property to the defendant and the residue of her property, which was large, subject to certain annuities, she gave to her daughter-in-law for life for her separate use, charged with annuities for the two daughters of £100 each, whenever they should attain their majority. She gave the property, after the daughter-in-law's death, between the children of the daughter-in-law, and in default of such children to the next-of-kin.

This was the relationship between the parties when the facts happened from which the present suit has arisen. In 1843, some months before the will, Mrs. Baker appeared to have a sum of £500, probably savings, to invest. She invested it in stock, one half in the name of herself and the defendant, and the other half in the names of herself and a lady who was her companion. In 1845 she made an exactly similar investment. In 1846, 1847, and 1848, she made further investments in the purchase of sums of like stock of £500 each in the names of herself and the defendant. About 1848 she transferred a sum of £4,000 into the names of herself and the defendant, and shortly before her death a purchase was made of £1,000 in the same names, the money for that purchase being, as the defendant says, given to him under the following circumstances:

> "The said Sarah Baker, during her last illness, and not long before her death, called me to her and instructed me to purchase in the joint names of herself and myself the further sum of £1,000 stock. Accordingly, on Nov. 28, 1850, I invested the sum of £980 in the purchase, in the joint names of the said Sarah Baker and myself, of the sum of £1,000 bank £3 5s. per cent. annuities, and a few days before her death, the said Sarah Baker handed to me her keys in order that I might take from the cash which she then had in her house, the said sum of £980 for the purchase of the said last-mentioned sum of stock."

Of these sums the defendant has been declared by the Master of the Rolls to be a trustee for the estate of Mrs. Baker.

I will assume for the present purpose that all the history I have given of the origin and nature of the relations between them did not affect the legal presumption of resulting trust. I will assume, further, that the implication of such a resulting trust does not arise as much in the case of a transfer as in that of a purchase of stock, although that certainly is not the case with regard to a voluntary conveyance of land, and I will proceed to consider how the evidence stands on those assumptions. To my mind, differing in this respect altogether from the Master of the Rolls, the evidence in favour of gift and against trust is absolutely conclusive. There is, to begin with, in respect of the two first purchases, an inference from the facts themselves which is, to my mind, irresistible. Whatever may be the presumption as to one purchase or one transfer standing by itself, the fact of the contemporaneous purchase of distinct sums in different names, the name of the quasi son or grandson in the one case and of a companion in the other, and the subsequent repetition of those purchases is not to be got over. The lady had £500 to invest. She had already large sums of stock standing in her own name, besides other considerable property. Is it possible to reconcile with mental sanity the theory that she put £250 into the names of herself and her companion, and £250 into the names of herself and the defendant as trustees upon trust for herself? What trust? What object is there conceivable in doing this? If this case was tried before a jury no judge could withdraw the fact of the contemporaneous purchases and their repetition from the consideration of the jury, and no jury would or could in my opinion, be found who would venture to say the thing was done by way of trust and not gift.

Starting with this, that the original purchase was gift and not trust, it appears to follow that the subsequent additions must be of the same nature, and the piecemeal nature of the additions is pregnant with the same inference. But the case is far from resting here. The defendant swears positively to their having been gifts, and although I concur in what the Master of the Rolls has said:

> "His [Mr. Pascoe's] mere statement uncorroborated is not sufficient, otherwise every trustee might convert himself into a beneficial owner by simply swearing that the dead person—the dead beneficial owner—told him so. That would be contrary to the first principles on which justice is administered."

This court has more than once said that it is too dangerous to rely on the mere evidence of a party interested as to conversations with a deceased person, yet it is

legally admissible evidence, and it is not to be disregarded where adduced by a man in support of that which is his indisputably at law, and of which he is sought to be deprived. Where the Court of Chancery is asked on an equitable assumption or presumption to take away from a man that which, by the common law of the land, he is entitled to, he surely has a right to say: "Listen to my story as to how I came to have it, and judge that story with respect to all the surrounding facts and circumstances." The evidence is to be weighed, of course, with reference to that danger, but still to be, in fact, weighed like every other piece of evidence, together with every other fact and inference in the cause. The wife of the defendant swears as follows:

> "In conversation with me the said Sarah Baker frequently told me that she was making provision for my husband, myself, and our family, by investing money from time to time in sums of stock in such manner that on her death the said sums of stock would become absolutely the property of my husband, John Irving Pascoe, and she informed me that she had in a similar manner, but for the benefit of the said Mary Clapham, invested in stock to the amount of £500. The said Sarah Baker told me that her object in making provision for us in manner aforesaid, instead of giving us legacies by her will, was to avoid the payment of legacy duty. From conversation with my sister, the said Mary Clapham, I know that she was aware that the said Sarah Baker had made such provision for her as aforesaid, and that she was also aware that the said Sarah Baker was in a similar manner making provision for my husband and family. My mother-in-law, the said Elizabeth Ann Pascoe, has more than once conversed with me on the subject of the said investments, and I know from such conversations that she was well aware of the fact that the object of the said Sarah Baker in making the said investments was to leave at her death my husband in possession of the said sums of stock for his own use and benefit absolutely, and to evade any payment in respect of legacy duty on the value of the said stock. The said Elizabeth Ann Pascoe, also, several times told me that she knew that the said Sarah Baker had, in manner aforesaid, provided liberally for my husband and his family."

It is said that this is to be disregarded, that it is only evidence of a wife, and that she may have brought herself to believe that something she had been told by her husband had been actually communicated to her by the deceased person whom she mentions. It is also said that she has gone greatly beyond her husband, who has not ventured to swear to any expressions so plain and unambiguous as the wife deposes to. I cannot concur in that criticism on the evidence. The wife was not cross-examined; the story is in the highest degree probable, and the fact that she deposes to actual expressions which the husband does not, so far from weakening, strengthens her testimony. If you put yourself in the position of the parties it is obvious that such a conversation would be very natural between the two ladies, one telling the other what she had done, and very unnatural as between the lady and the man, who knew as well as she did what had been done. When a person has made a gift to another, and been duly thanked for it, it is not usually made a topic of conversation between them, but it might well be the subject of gossip in a friendly family discourse.

I have no doubt, therefore, that if the onus probandi be on the defendant, he has proved his case. It may, perhaps, be thought that some distinction should be made as to the last purchase; but I am of opinion that no such distinction can be made. All that the plaintiff's case shows as to this is the fact of the stock being in the joint names, and of the investment being made a few days before the death. As for the details, they depend entirely on the defendant's statement, who has not been cross-examined, and unless he stole the money from his dying benefactress, or embezzled it, by applying it to some purpose other than that for which it was entrusted to him, it must have been given to him, as he states, to be invested.

Certainly the fact that it was made in the last illness would rather lead to the inference of gift than the inference of trust.

It was, however, contended that if under the circumstances of the case the theory of gifts would prevail, the same circumstances and evidence would show that they were so made as to be an ademption or partial satisfaction of the share of the residue to which the defendant was entitled under the will. If one were permitted to guess—if one were permitted to act on an instinctive feeling of what probably was the testatrix's intention, it is probably the result which the court would arrive at. But is it possible, consistently with established rules, to arrive at that result? In the first place, no parol evidence of such an intention is admissible, for such parol evidence would be to alter the written will. That effect, if produced at all, must be produced by operation of law. The rule of law is that legacies given by a father or a person in loco parentis are or may be adeemed by gifts between the will and the death of portions or provisions. The principle is that the will shows the distribution which the father thinks just and expedient to provide for his children, and if, after having made such a scheme for distribution, he advances one of his children on marriage or going out to establish himself in the world, or the like, it is to be presumed, a presumptio juris et de jure, that the advancement is an anticipation of the testamentary provision, just as under the statute of distributions an advancement is to be brought into hotchpot.

But this presumption applies only to fathers or to persons who have put themselves in loco parentis. What in any particular case is putting oneself in loco parentis is probably one of the most difficult legal problems to solve. It used to be laid down in the treatises that nothing short of assuming the whole functions and duties of the father would do, and, in particular, that such a character could not be predicated where the child was actually living with his own father and maintained by him, and that it could not be predicated even between grandfather and grandson if the father were alive. But in *Pym* v. *Lockyer* (1), before Lord Cottenham, that rule certainly was not acted upon to the full extent. In that case, where a grandfather had made a provision on marriage for three grandchildren, and had by his will given legacies to them, it was held that one was in partial satisfaction of the other. The facts on which Lord Cottenham came to the conclusion that the grandfather was in loco parentis were these:

> "It had been referred to the master to inquire how the father had acted towards the grandchildren. The master found from the statement of their father that the three children had been maintained by him, the father, except that as to Frederick, the grandfather being desirous that he should go into the church, had agreed to pay his college expenses, and had paid the tailor's bill, and part, but not all, of his personal expenses, and that from the time of his ordination to that of his marriage he paid him £200 per annum, and after his marriage £100 per annum. That as to Edmund, being desirous that he should be of the profession of the law, he paid the stamp on his articles and the premium to the solicitor to whom he was articled and some small sums as pocket money, and after he had served his time paid the costs of his admission as an attorney, and his fee to a conveyancer, and made him an allowance for his lodging and maintenance in London, but which was very inadequate for those purposes. That as to the granddaughter Eleanor, the testator did not defray any of the expenses of her maintenance or education up to the time of her marriage. That he was in the habit of constant intercourse with all his grandchildren, making them presents of money and other gratuities, and directing and controlling them with an authority equal to that of their father. That he was referred to on the treaties for the respective marriages of the grandchildren as a person whose consent was indispensably necessary, and as the principal party to the pecuniary arrangements; but that all such children lived at the same time in intimate and affectionate intercourse with their parents, and that their father was never, until their marriage, wholly exempt from the

costs of their maintenance and support, and that upon the marriage of Eleanor he agreed to make her an allowance of £50 per annum."

That case has certainly gone beyond the former rule, but even that case must be considerably extended to bring the present case within it. Nothing of that kind took place in this case. There are, no doubt, very strong expressions about adoption proved by the defendant himself and the servants. But it does not appear that the old lady ever did provide, or have occasion to provide, for the maintenance, education, marriage portion, or setting out in the world of the children of her daughter-in-law, except so far as the son's living with her, how maintained does not appear, and whether he was doing anything for himself there is no evidence to prove, but that he received a very considerable and handsome present on his marriage. What she did was this. There being no nearer or dearer objects of her testamentary bounty, she selected the daughter-in-law and her children to be her heirs, and all her expressions and her conduct are to be explained by and referred to her adoption of the family in that sense. On full consideration I am satisfied that that is far from bringing the case within the rule as to ademption or satisfaction of legacies, and that if we extend the rule to it we cannot stop short of applying it to every case of gifts made after a will to one of a family selected as the residuary legatees of a testator. It may be further observed that *Montefiore* v. *Guedalla* (2) was the first case in which the doctrine of ademption or satisfaction was applied to residuary legatees; and in *Meinertzhagan* v. *Walters* (3) we came to the conclusion that it could only be applied between children against a child in favour of a child, not in favour of a stranger. It would, therefore, be necessary in this case to show that the testatrix had placed herself in loco parentis not only to the defendant, but also to his sister, of which there is no trace.

The result is that the order of the Master of the Rolls, so far as regards the capital, must be discharged. The defendant is clearly liable to account for the dividend due in the lifetime of the testatrix, and afterwards received by him.

MELLISH, L.J.—I am entirely of the same opinion. I should not have thought it necessary to add anything to what has been said by the lord justice, except that I wish to say something on the principles on which the Master of the Rolls decided this case, out of the great respect I have for his judgment.

There can be no doubt that the question in this case is a question of fact. It cannot be decided simply on the ground of the legal presumption, because, whatever effect is given to the evidence of Mr. Pascoe and his wife, beyond all question the evidence of Mr. Pascoe and his wife is evidence to rebut the presumption, and, therefore, the court must consider whether the presumption is rebutted or not. The Master of the Rolls appears to have thought that because, when there was no evidence to rebut the presumption that there was a trust and not a gift, the presumption must prevail, therefore, when there was evidence to rebut the presumption he ought not to consider the probability or improbability of the circumstances of the case, whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of Pascoe and his wife, taken alone, was not satisfactory. In my opinion, where there is once evidence to rebut the presumption, the court is put in the same position as a jury would be, and we cannot give such influence to the presumption in point of law as to oblige the court, if it does come to a satisfactory conclusion in point of fact, viz., that the investment was made for the purpose of making a gift, to say that the evidence of the beneficiary himself is not sufficient to rebut the presumption, and so decide against him.

The presumption, beyond all question, must be of very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and you would require very strong evidence indeed on the part of the solicitor to prove it was intended as a gift. Certainly his own evidence would not be suffi-

cient. On the other hand, if a man makes an investment of stock in the name of himself and some person, although that person may not be his child or his wife, yet is in such a position to him that it is extremely probable that he is an object of his bounty, and it is extremely probable that it was intended as a gift in itself, although even in that case the rule of law, if there was no evidence at all, would compel the court to say the presumption must prevail notwithstanding the court does not believe that in real truth the fact is in accordance with that presumption, yet, if there is evidence to rebut it, then, in my opinion, the court must go into the actual facts.

If we go into the facts and look at the circumstances in which the investment was made, it appears to me utterly impossible, as the lord justice has said, to come to any other conclusion than that the first investment was made for the purpose of gift, and not for the purpose of trust. It was either for the purpose of trust or else for the purpose of gift, and, therefore, any evidence which shows it was not for the purpose of trust is evidence to show it was for the purpose of gift. Here we have a lady of considerable fortune, having no nearer connections than Mr. Pascoe, who was then a young man living in her house, and for whom she was providing. We find her, manifestly out of her savings, buying a sum of £250 stock in the joint names of herself and him, and at the same time buying another sum of £250 stock in the joint names of herself and a lady who was living with her as a companion. Applying one's common sense to that, what inference is it possible to draw, except that it was intended for the purpose of gift? If it was intended for the purpose of trust what possible reason was there why the two sums were not invested in one name? Besides, at the very same time the lady had a large sum of stock in her own name. Could anything be more absurd than that a lady with £4,000 or £5,000 invested in her own name at that time in the same stock, and having a sum of £500 to invest out of her savings, should invest £250 in the name of herself and a young man who was living in her house, and another £250 in the name of herself and a companion? I cannot come to any other conclusion than that it must have been intended by way of a gift after her death.

When we have once arrived at this, that the first investment and the second investment were the same transaction and that the account was open for the purpose of gift, that appears to me to rebut the presumption altogether, because, when the account is once open for the purpose of gift, there is very strong reason to suppose that everything added to that account was intended for the purpose of gift. Also, assuming the testatrix to know that she had made a gift and had invested a sum of money in stock in the joint names of herself and Mr. Pascoe, for the purpose of making a present to him, it would certainly be an extraordinary thing that she should add other sums to that account, not for the purpose of making a present to him, but for the purpose of his being a trustee. I cannot help coming to the conclusion, as a matter of fact, that these investments were intended for the purpose of making a gift.

There were one or two facts relied on against it. It was said that the defendant kept the matter secret for a great number of years and never revealed it. I do not greatly rely on that. Everyone that has experience knows that some persons are very reticent about their affairs, while others are always talking about them. You cannot form any inference from that. If he really and bona fide believed it, and had no doubt it was intended for a gift, and for his use, I do not see there was anything extraordinary in his not mentioning it to the persons who now say it was never mentioned. The only fact that in the least degree went against him was his not accounting for the dividend which was due at the death of the testatrix. I think it was not at all improbable he might have honestly believed that that was his, although I entirely agree that in point of law it was not so. I come to the same conclusion as the lord justice.

Solicitors: *D. W. Heritage*; *Thompson & Groom.*

DUBLIN, WICKLOW AND WEXFORD RAIL. CO. *v.* SLATTERY

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, Lord Coleridge, C.J., Lord Blackburn and Lord Gordon), February 5, 7, 8, 11, 14, May 28, 31, June 3, July 31, 1878]

[Reported 3 App. Cas. 1155; 39 L.T. 365; 43 J.P. 68; 27 W.R. 191]

Practice—Trial—Submission of no case—Negligence—Prima facie case made out by plaintiff—Proof or admission by plaintiff of facts disentitling plaintiff to judgment—Contributory negligence.

The judge should withdraw a case from the jury where the plaintiff has failed to make out a prima facie case, but he has no power to do so where the plaintiff has proved a prima facie case but at the same time has proved or admitted facts which would render him not entitled to judgment.

Accordingly, in an action under the Fatal Accidents Act, 1846, where the plaintiff had made out a case of negligence against the defendants, but had also given evidence of facts showing that her deceased husband had been guilty of contributory negligence,

Held (by Lord Cairns, L.C., Lord Penzance, Lord O'Hagan, Lord Selborne, and Lord Gordon, Lord Hatherley, Lord Coleridge, C.J., and Lord Blackburn dissenting): the plaintiff having established a prima facie case of negligence on the part of the defendants, the right course was for the case to be left to the jury for them to return a verdict on the whole of the evidence.

Notes. This case must be read in the light of the common law which was in force in 1878 and was that contributory negligence by the plaintiff was a complete defence to an action for negligence by him. The law was altered by the Law Reform (Contributory Negligence) Act, 1945, which provided that where contributory negligence by a plaintiff was proved the damages recoverable by him are to be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage: see 17 Halsbury's Statutes (2nd Edn.) 12.

Distinguished: *Davey* v. *London and South Western Rail. Co.* (1883), 12 Q.B.D. 70. Considered: *Wright* v. *Midland Rail. Co.* (1885), 1 T.L.R. 406, n.; *Bettany* v. *Waine* (1885), 1 T.L.R. 588. Applied: *Williams* v. *Whittall* (1885), 2 T.L.R. 165; *Wakelin* v. *London and South Western Rail. Co.* (1886), 12 App. Cas. 41; *Finegan* v. *London and North Western Rail. Co.* (1889), 53 J.P. 663. Considered: *Cutsford* v. *Johnson* (1913), 108 L.T. 138; *Canadian Pacific Rail. Co.* v. *Frechette*, [1915] A.C. 871; *Banbury* v. *Bank of Montreal*, [1918–19] All E.R.Rep. 1. Referred to: *Clarke* v. *Midland Rail. Co.* (1880), 43 L.T. 381; *Bentley* v. *Lancashire and Yorkshire Rail. Co.* (1886), 3 T.L.R. 196; *Cohen* v. *Metropolitan Rail. Co.* (1890), 6 T.L.R. 146; *Smith* v. *South Eastern Rail. Co.*, [1896] 1 Q.B. 178; *Totanto Rail. Co.* v. *King*, [1908] A.C. 260; *Grand Trunk Rail. Co.* v. *McAlpine*, [1913] A.C. 838; *Norman* v. *Great Western Rail. Co.*, [1915] 1 K.B. 584; *Everett* v. *Griffiths*, [1921] 1 A.C. 631; *Sharpe* v. *Southern Rail. Co.*, [1925] 2 K.B. 311; *Baker* v. *E. Longhurst & Sons, Ltd.*, [1932] All E.R.Rep. 102; *Stimpson* v. *Standard Telephones and Cables, Ltd.*, [1939] 2 All E.R. 441; *Knight* v. *Sheffield Corpn.*, [1942] 2 All E.R. 411.

As to trial of actions for negligence, see 28 Halsbury's Laws (3rd Edn.) 106–109; and for cases see 36 Digest (Repl.) 127 et seq.

Cases referred to:

(1) *Siner* v. *Great Western Rail. Co.* (1869), L.R. 4 Exch. 117; 38 L.J.Ex. 67; 20 L.T. 114; 17 W.R. 417, Ex. Ch.; 8 Digest (Repl.) 87, *590.*

(2) *Ryder* v. *Wombwell* (1868), L.R. 4 Exch. 32; 38 L.J.Ex. 8; 19 L.T. 491; 17 W.R. 167, Ex. Ch.; 22 Digest (Repl.) 25, *61.*

(3) *Jewell* v. *Parr* (1853), 13 C.B. 909; 1 C.L.R. 454; 22 L.J.C.P. 253; 17 Jur. 975; 138 E.R. 1460; 22 Digest (Repl.) 26, *69.*

(4) *Toomey* v. *London, Brighton and South Coast Rail. Co.* (1857), 3 C.B.N.S. 146; 6 W.R. 44; 140 E.R. 694; sub nom. *Tooney* v. *London, Brighton and South Coast Rail. Co.*, 27 L.J.C.P. 39; 30 L.T.O.S. 135; 22 Digest (Repl.) 26, *74.*

(5) *North Eastern Rail. Co.* (*Directors, etc.*) v. *Wanless* (1874), L.R. 7 H.L. 12; 43 L.J.Q.B. 185; 30 L.T. 275; 38 J.P. 420; 22 W.R. 561, H.L.; 38 Digest (Repl.) 357, *380.*

(6) *Bridges* v. *North London Rail. Co.* (*Directors, etc.*) (1874), L.R. 7 H.L. 213; 43 L.J.Q.B. 151; 30 L.T. 844; 38 J.P. 644; 23 W.R. 62, H.L.; 36 Digest (Repl.) 131, *676.*

(7) *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193; 47 L.J.Q.B. 303; 37 L.T. 679; 42 J.P. 420; 26 W.R. 175, H.L.; 36 Digest (Repl.) 35, *168.*

(8) *Skelton* v. *London and North Western Rail. Co.* (1867), L.R. 2 C.P. 631; 36 L.J.C.P. 249; 16 L.T. 563; 15 W.R. 925; 36 Digest (Repl.) 28, *121.*

(9) *Wyatt* v. *Great Western Rail. Co.* (1865), 6 B. & S. 709; 6 New Rep. 259; 34 L.J.Q.B. 204; 12 L.T. 568; 29 J.P. 630; 11 Jur.N.S. 825; 13 W.R. 837; 122 E.R. 1356; 36 Digest (Repl.) 36, *172.*

(10) *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; 1 L.J.K.B. 92; 110 E.R. 43; 35 Digest (Repl.) 41, *344.*

(11) *Smith* v. *Braine* (1851), 16 Q.B. 244; 20 L.J.Q.B. 201; 16 L.T.O.S. 483; 15 Jur. 287; 117 E.R. 872; 6 Digest (Repl.) 166, *1159.*

(12) *Harvey* v. *Towers* (1851), 6 Exch. 656; 20 L.J.Ex. 318; 17 L.T.O.S. 169; 15 Jur. 544; 155 E.R. 706; 6 Digest (Repl.) 166, *1158.*

(13) *Ellis* v. *Great Western Rail. Co.* (1874), L.R. 9 C.P. 551; 43 L.J.C.P. 304; 30 L.T. 874, Ex. Ch.; 36 Digest (Repl.) 129, *658.*

Also referred to in argument:

Cotton v. *Wood* (1860), 8 C.B.N.S. 568; 29 L.J.C.P. 333; 7 Jur.N.S. 168; 141 E.R. 1288; 36 Digest (Repl.) 130, *662.*

Stubley v. *London and North Western Rail. Co.* (1865), L.R. 1 Exch. 13; 4 H. & C. 83; 35 L.J.Ex. 3; 13 L.T. 376; 29 J.P. 808; 14 W.R. 133; sub nom. *Stubley* v. *Lancashire and Yorkshire Rail. Co.*, 11 Jur.N.S. 956; 38 Digest (Repl.) 357, *381.*

Lewis v. *London, Chatham and Dover Rail. Co.* (1873), L.R. 9 Q.B. 66; 43 L.J.Q.B. 8; 29 L.T. 397; 38 J.P. 103; 22 W.R. 153; 8 Digest (Repl.) 88, *592.*

Falkiner v. *Great Southern and Western Rail. Co. of Ireland* (1871), I.R. 5 C.L. 213; 36 Digest (Repl.) 176, **1508.*

Adams v. *Lancashire and Yorkshire Rail. Co.* (1869), L.R. 4 C.P. 739; 38 L.J.C.P. 277; 20 L.T. 850; 17 W.R. 884; 36 Digest (Repl.) 191, *1010.*

Butterfield v. *Forrester* (1809), 11 East, 60; 1 Man. & G. 571, n.; 103 E.R. 926; 36 Digest (Repl.) 177, *939.*

Davies v. *Mann* (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 6 Jur. 954; 152 E.R. 588; 36 Digest (Repl.) 177, *945.*

Stapley v. *London, Brighton and South Coast Rail. Co.* (1865), L.R. 1 Exch. 21; 4 H. & C. 93; 35 L.J.Ex. 7; 13 L.T. 406; 29 J.P. 824; 11 Jur.N.S. 954; 14 W.R. 132; 38 Digest (Repl.) 356, *378.*

Purdon v. *Earl Longford* (1877), I.R. 11 C.L. 267; 22 Digest (Repl.) 27, **83.*

James v. *Great Western Rail. Co.* (1867), L.R. 2 C.P. 634, n.; 36 L.J.C.P. 255, n.; 36 Digest (Repl.) 6, *6.*

Radley v. *London and North Western Rail. Co.* (1876), 1 App. Cas. 754; 46 L.J.Q.B. 573; 35 L.T. 637; 41 J.P. 484; 25 W.R. 147, H.L.; 36 Digest (Repl.) 170, *915.*

A *Gee* v. *Metropolitan Rail. Co.* (1873), L.R. 8 Q.B. 161; 42 L.J.Q.B. 105; 28 L.T. 282; 21 W.R. 584, Ex. Ch.; 8 Digest (Repl.) 83, *550*.

Appeal from a decision of the Exchequer Chamber in Ireland, affirming a judgment of the Irish Court of Common Pleas.

The action was brought, under the Fatal Accidents Act, 1846, by the respondent, the widow of John Slattery, deceased, on behalf of herself and her children, to B recover damages from the company in respect of the death of her late husband, who had been killed at a level crossing by the negligence, as was alleged, of the company's servants. The case was first tried at the Wicklow summer assizes in 1873, before Fitzgerald, B., and a special jury, when the plaintiff obtained a verdict. A new trial was granted on the ground of improper reception of evidence, and the case was tried again before Palles, C.B., and a special jury, at the spring assizes C 1874, when the plaintiff obtained a verdict for £1,205. A rule was obtained, pursuant to leave reserved, to set aside this verdict and to enter a verdict for the defendant company on the ground that there was no evidence of negligence to leave to the jury, and that the deceased had been guilty of contributory negligence. The Court of Common Pleas in Ireland (Monahan, C.J., Keogh, and Morris, JJ.) discharged the rule. The company appealed to the Exchequer Chamber in Ireland D which was equally divided in opinion, Palles, C.B., Fitzgerald and Dowse, BB., being in favour of affirming the judgment of the Common Pleas, and Whiteside, C.J., Deasy, B., and Barry, J., in favour of reversing it. The decision of the Common Pleas, accordingly stood affirmed, and the defendant company appealed to the House of Lords.

Sir Henry James, *Q.C.*, *P. White*, *Q.C.*, and *W. Anderson* (the two latter of the E Irish Bar) for the appellants.

Gibson, *Q.C.*, *Hemphill*, *Q.C.*, *T. P. Hamilton* and *A. M. Sullivan* (all of the Irish Bar) for the respondent.

Their Lordships took time for consideration.

July 31, 1878. The following opinions were read.

F

LORD CAIRNS, L.C.—In this case the respondent, the widow of a man who was killed by a locomotive engine at a level crossing on the railway in May, 1873, brought an action in the Court of Common Pleas in Ireland to recover damages on the ground of the negligence of the railway company. The two issues raised were (i) whether there was any negligence on the part of the appellants (the railway G company) leading to the collision; and (ii) whether the deceased might by the exercise of ordinary care have avoided the accident. Both these issues were found in favour of the respondent (the widow), and in the result she obtained a verdict and damages for £1,205, to be distributed between herself and her children. A rule was obtained to set aside the verdict, and enter a verdict for the company, pursuant to leave reserved at the trial, or that the verdict should be set aside as being against H the evidence or weight of evidence and a new trial granted, but it was discharged and the verdict stood. Thereupon the company appealed to the Court of Exchequer Chamber in Ireland. The appeal could not, according to practice, raise any question whether the verdict was against the evidence; it only raised the question whether the verdict should be entered for the company. On this point the Court of Exchequer Chamber were equally divided, and the verdict for the respondent was I left to stand. It is this question only—namely, whether the verdict should be entered for the company, which comes before your Lordships by way of appeal.

The deceased, John Slattery, with a cousin and two friends, Darcy and Farelly, went, about 11.40 p.m., on May 9, 1873, to the Lansdowne Road station on the railway from Kingston to Dublin. Darcy was going to Dublin from that station, and Slattery went to see him off. There was a level crossing leading from Horseshoe Gate to the ticket office on the other side of the line. When Slattery and his friends arrived at the gate the train from Kingstown to Dublin came up on the opposite side and stopped at the station. Slattery crossed the line to the ticket

office just in front of the train as it was coming to a stop. He was next seen at the back of the train coming forward to re-cross the line to where his friends continued to stand, signalling them at the same time to come across. He passed behind the train, across the up rails on to the six-foot way and on to the down rails, and just as he reached the down rails an express train from Dublin passed through the station, struck him, and killed him. The only negligence alleged against the company was that the train did not whistle before passing through the station, which would have acted as a caution to the deceased. It appeared it was the duty of the engine-driver of express trains to whistle on passing every station; and at the trial two or three witnesses for the respondent said they did not hear the whistle, but the engine-driver and other witnesses, to the number of ten, stated positively that whistling did take place. If the question whether the verdict was against the evidence were open, I should be of opinion that a verdict more directly against the evidence I have seldom seen, and I think the jury were probably actuated by feelings of compassion for the respondent.

The second issue was: Could the deceased by the exercise of reasonable care and skill on his part have avoided the collision? In other words, was he guilty of contributory negligence? If the deceased, in coming on the six-foot way had looked up the line he would have seen the express train, and his conduct must be viewed between two alternatives. Either he looked up and saw the train advancing and took on himself the responsibility of getting across before it came close, or he did not look up the line at all. It is on this part of the case I look with a degree of doubt, which is increased by finding that the view taken by some of their Lordships, for whose opinion I have the greatest respect, differs from that which I have ultimately formed.

The only question now is whether, upon the evidence, the judge ought to have taken the case out of the hands of the jury in the first instance. I am not aware of any authority for this being done, and none of the cases cited in the course of the argument could, in my opinion, be looked upon as an authority for such a course. I certainly cannot look upon the result of the litigation as satisfactory. The company will, I fear, have to pay a sum for which I cannot think they ought to have been made liable, and the respondent and her children will recover money to which their legal right has not been established. But I cannot seek to prevent this by proposing to your Lordships on the only part of the case which was brought for your determination to do what would seriously encroach upon the legitimate province of a jury. I must, therefore, advise your Lordships to dismiss the appeal. Your Lordships are accustomed, in dismissing an appeal, to dismiss it with costs, and you would not consider a difference of opinion among yourselves a sufficient reason for departing from the general rule. In the present case, however, the Court of Exchequer Chamber in Ireland, consisting of six judges, was equally divided, and the company could hardly have done otherwise than submit the case to be reviewed before the Queen in her Court of Parliament. Your Lordships may possibly, under these circumstances, think that the appeal should be dismissed, without costs.

LORD HATHERLEY.—The question in this case is one of considerable importance as to the duty of a judge on the trial of an action of this kind. I concur with the opinion of BARRY, J., in the court below:

> "When once a plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury."

But I concur also in the opinion expressed by PALLES, C.B., that:

> "When there is proved, or admitted, on the part of the plaintiff, an act which per se amounts to negligence, and when it appears that such act caused, or directly contributed to, the injury, the defendant is entitled to have the case withdrawn from the jury."

A Here I assume negligence to have been proved as against the company, by the finding of the jury with regard to the alleged omission of the company's servants to whistle on passing through the station, though I may be surprised at their finding such a verdict on the evidence. But there is another and distinct issue raised, namely, that the respondent's husband contributed by his own negligence to the injury which he suffered. If such contributory negligence be admitted by the B respondent, or be proved by the respondent's witnesses while establishing negligence against the company, I do not think there is anything left for the jury to decide, there being no contest of fact.

MORRIS, J., puts it thus. If there had been glaring neglect on the part of the sufferer so as to repair the neglect of the company, he would be disposed to say that the judge ought to withdraw the case from the jury; but he was of opinion that C such glaring neglect had not been shown on the part of the deceased. Assuming the non-whistling to be proved, and assuming that to be actionable negligence, it is part of the respondent's case that the deceased was well acquainted with the course of the management of the line, and was led to expect a warning by means of a whistle before the down train could arrive at the station. By the same reasoning he knew that a down train was expected; but I pass that by and ask whether it is D not negligence for a man to pass over a railway at all without looking to see whether or not a train is approaching. It is clear that the lights of the down train were visible to any one looking before he crossed the line, but the deceased was beckoning to his friends, and they saw the lights which he did not. If he saw the lights his negligence was greater in attempting to cross; if he did not see the lights he cannot have looked for them.

E It appears to me that the proper course, upon the facts established by the respondent's witnesses, would have been to nonsuit the respondent, because, assuming that she had proved negligence on the part of the defendants in not whistling, she had likewise proved negligence on the part of the deceased in crossing a line of railway without looking to see if it was clear. I cannot consider it a proper question for a judge to ask the jury whether a man crossing F a line of railway on which a train is expected, without looking to see whether a train be in sight, be an act of negligence. As MONTAGUE SMITH, J., observed in *Siner* v. *Great Western Rail. Co.* (1) (L.R. 4 Exch. at p. 123):

> "Judges cannot denude themselves of the knowledge of the incidents of railway travelling which is common to us all."

G In *Ryder* v. *Wombwell* (2) WILLES, J., cited with approbation the opinion of MAULE, J., in *Jewell* v. *Parr* (3), and of WILLIAMS, J., in *Tooney* v. *London, Brighton and South Coast Rail. Co.* (4), to the effect that it is not enough to say that there must be some evidence, but that there must be, in order to justify a judge in leaving the case to a jury, evidence from which a jury may reasonably conclude the issue to be proved.

H I do not hold it to be the office of the judge to weigh or balance conflicting evidence, that is for the jury; but he may and ought to tell the jury, where there is no evidence at all on one side, that they will not be justified in law in finding contrary to the only evidence given or in inferring that which no reasonable man would infer from the evidence. I do not think it would be reasonable to infer that a man exercised due caution in walking on a railway at night without looking I about him. It appears to me what MORRIS, J., in the court below, described as "glaring negligence" on the part of the deceased is established here. I do not think that the omitting to whistle can be held to be a direct invitation to cross the line, and this distinguishes the case from *North Eastern Rail. Co.* (*Directors, etc.*) v. *Wanless* (5). Again the case might be different if a statutory duty were imposed on the company of whistling at a station. But I rest my opinion on this. A person transacting the ordinary business of life is bound to take the ordinary precautions that the nature of the act he is about to enter upon would induce any reasonable man to take. If he is about to cross a road, where from the nature of the

traffic there must always be a risk to encounter, he must take the ordinary care for that particular case. It does not appear to me to be too exacting to say that a person preparing to cross a railroad at night should look each way before he crosses. I think, therefore, a verdict should have been entered for the company, and that the judgment here complained of should be reversed.

LORD PENZANCE.—The question is not whether the negligence of the company and its connection with the accident was reasonably established by the evidence, but only whether the evidence of negligence on the part of the company which the respondent gave was evidence which was properly submitted to the jury. To whatever degree the deceased man may have been to blame in the course which he took, and in whatever degree that course may have contributed to the accident which befell him, I think it is clear that the absence of that whistling, which is usual on all railways as the signal of an approaching train, may have been reasonably considered by the jury to have influenced the course taken by him, and thus caused the accident, although they might also have been of opinion that, had he used anything like ordinary care, the danger caused by the want of whistling, which in the result proved fatal, might have been avoided. If so, it was proper to take the opinion of the jury on the subject, asking them, first, whether there was in fact any whistling, and, if not, then whether the absence of such whistling constituted a want of due and reasonable care on the part of the company, regard being had to the regulations of the company, and the existence of the level crossing; and lastly, whether the accident was due to the want of reasonable care on the part of the company's servants in that respect. All these matters are properly within the cognisance of a jury. There are, no doubt, cases in which it is the recognised and unquestioned duty of the judge to withdraw the case from the jury, upon the simple ground that there is no evidence in support of the issue fit for them to take into their consideration. This could not be done in the present case, for it is impossible to say that on the question whether the whistle was sounded or not there was not evidence which a jury were bound to consider. It is equally impossible to say that the absence of this particular species of notice of an approaching train might not have influenced the deceased man in attempting to cross the line, and so caused the accident.

I pass, therefore, to the second question, which is this: Whether, assuming evidence proper for the consideration of the jury on the issue of the company's negligence to have been given by the respondent and left to the jury, the judge at the trial ought to have decided for himself the second issue on the record, which is whether the deceased man was guilty of contributory negligence or not, and, having decided it in the affirmative, to have withdrawn it from the jury and directed them to find the verdict upon that issue for the company. The question so stated hardly admits of argument. Such a proposition would involve the assertion of a similar right on the part of a judge in any proceeding, civil or criminal, where the evidence was cogent and conclusive; and to admit this would be to confound the functions of the judge and the jury in a most unfortunate degree. It was suggested that it might be put in this way, that when the evidence upon the affirmative of an issue is very cogent, the onus of proof is thereby shifted, and evidence rendered necessary to rebut it on the other side; and, if no such evidence is produced, the judge may then declare that there is no evidence to go to the jury of the negative of the issue, and on that ground take upon himself to decide that the affirmative is established. I cannot subscribe to such a proposition. I entirely fail to see how the shifting of the onus of proof in the course of the trial can alter the issue itself, which is an affirmative one, and not a negative one, or vary the tribunal by which it is to be decided. To understand the full effect of such a principle it is only necessary to observe its results in a criminal case. In the majority of cases the prisoner gives no evidence at all. [This was, of course before the Criminal Evidence Act, 1898: see on this generally 10 HALSBURY'S LAWS (3rd Edn.) 480–482]. Suppose then that the prosecutor makes

A a prima facie case, so strong a case that without some evidence in answer or explanation no one can doubt the prisoner's guilt; does this, by shifting the onus of proof, also shift from the jury to the judge the duty of deciding upon the effect of the prosecutor's evidence, and is the judge entitled to direct the jury that they must find a verdict for the Crown?

In these difficulties the counsel for the company contended that the two issues B of the defendants' negligence, on the one hand, and the negligence of the deceased man, on the other, should be considered together, and that, looking to the strong evidence which the case presented of negligence on the part of the deceased man, by which the accident was really caused, there was no evidence to go to the jury of negligence on the part of the company. He cited a number of cases in which the courts, in discussing whether there was evidence fit to go to the jury of the C defendants' negligence or not, entered into a consideration of the plaintiff's conduct, and discussed the question how far the accident was, in reality, brought about by that conduct. What I will ask your Lordships to observe in respect of these cases is that in all of them the question which the court was deciding was not whether the plaintiff was negligent, but whether there was evidence to go to the jury of negligence by the defendants such as caused the injury. Although, therefore, D the learned judges, in many of the cases quoted, have commented upon the plaintiff's conduct as wanting in due and reasonable care, they have not done so in the course of deciding any issue raised as to the plaintiff's negligence, still less have they done so in reference to an issue of contributory negligence on the plaintiff's part, an issue which does not arise until the defendants' negligence, and its relation to the accident have been first established, and, in the absence of that conclusion, is E immaterial to the case. The cases cited, therefore, by no means support the conclusion at which your Lordships are asked to arrive.

This brings me to the discussion of the company's argument that the negligence of the defendants and the contributory negligence of the plaintiff should be considered together in actions of this kind. But this is, in the present case, and on the present pleadings, absolutely untenable. For the respondent has taken no burden F upon herself of disproving the negligence of the deceased man, and the negligence of the company, on the one hand, and of the deceased man, on the other, are pleaded, not as parts of one proposition, but separately, and are the subjects of separate and independent issues. The proof of the first issue, which is that of the company's negligence, is upon the respondent; the proof of the second, which is that of contributory negligence, lies upon the company. Upon either of these issues G it is competent to the judge to say negatively that there is not sufficient evidence to go to the jury; but it is no more competent for him to declare affirmatively that one of them is proved than the other. In fact, there is no case, that I am aware of, in which the facts and the proper conclusions of fact, to be drawn from them being in dispute, the judge has been held entitled to tell the jury that they were bound to find the issue proved. I am, therefore, of opinion that the learned judge H did right at the trial, and that the present appeal should be dismissed.

LORD O'HAGAN.—The principle on which I think this case ought to be decided appears to me to be well expressed in the maxim "ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores." The questions raised at the trial were questions of fact only.—(i) whether the company had been guilty of I negligence, and (ii) whether contributory negligence could properly be ascribed to the man who lost his life. As questions of fact they were proper to be submitted to the jury, and the learned judge who tried the cause was bound, in my opinion, so to submit them. No doubt, in some cases the court is warranted in assuming to itself the function of withdrawing the matter in controversy from the consideration of the jury, in the absence of proof of essential facts, or of their connection with the question in issue. But here on both the questions there was abundant evidence, and I have no doubt that the judge was not at liberty to direct a verdict, whatever may have been, in his own opinion, the preponderance of proof on the one

side or the other. That is the only point for the consideration of your Lordships. You have nothing to do with the weight of the evidence, or the propriety of the inferences drawn by the jury.

As to the first question, whether the company were guilty of negligence, I cannot see how it could possibly have been taken from the jury. PALLES, C.B., rightly confined their attention to the want of whistling as the one instance of negligence with which they had to do; and with reference to that there was a large body of conflicting testimony, on which the jurymen, and they alone, were competent to pronounce. I do not enter on the question how far the whistling was a precaution which the company were bound to provide for the safety of the public. It seems to me that their own conduct is, on that point, conclusive against them. In the particular case they admitted the propriety of whistling, and accepted the duty of doing so. And if the warning which the deceased man was justified in expecting was not given, does not the case come within the principle of the decision in the *North Eastern Rail. Co.* (*Directors, etc.*) v. *Wanless* (5), that when a company, by its servants, negligently leaves open a gate which should be closed, it must be taken to have invited persons to cross, so as to be unable to escape responsibility for accident by reason of their contributory negligence?

I have no doubt that on the first question of fact the judge could not properly have given a direction; and it seems to me that on the second—whether there was contributory negligence—he had no power to give it. The circumstances establishing such negligence, and the inferences to be drawn from them, were, equally and exclusively, for the consideration of the jury. It was for the jury to find the facts, and to draw the inferences of fact, and the judge would, in my mind, have transcended his jurisdiction in finding the former or drawing the latter. I cannot understand how the mere strength of proof, where there is an issue of fact to be decided, can transfer the right of decision to the judge. I do not acknowledge the force of the reasoning which would convert an issue in fact into an issue in law, merely because there seems to be a complete preponderance of evidence upon the one side, or because there is no evidence on the other. In such circumstances the judge may speak strongly, and point out plainly what is the duty of the jurymen; and if they ignorantly or perversely disregard his counsel, and find without evidence or against evidence, the injured party has his remedy, and the law is prompt to rectify the wrong. But I am not aware of any principle, and cannot discover any authority, which can warrant the transfer of jurisdiction, and of the duty of judgment on matters of fact formally submitted to a jury, merely because the case appears to the judge to be conclusively established, on the one side or the other. The privileges of a jury may be abused. The system of trial which involves their maintenance is open to criticism, and subject to change. But while it exists it should, in my opinion, exist in its integrity. The several functions of the court and the jury should be carefully kept apart. In matters of law the jury should obey the court; in matters of fact the court should respect the jury; and both will best execute their great functions by holding in memory the adage with which I began these observations. I am of opinion that the appeal should be dismissed, but, for the reasons given by the Lord Chancellor, without costs.

LORD SELBORNE.—If I had to decide this case on the weight of evidence, I should certainly give credit to the witnesses who say that the usual notice by whistling of the approach of the down express train was properly given, although the companions of the deceased may not have heard it. But it seems to me impossible to deny that the evidence of persons who, standing in a position where the whistling must have been audible, say they heard none, was proper to be left to a jury on the issue whether there was whistling or not, however strong the affirmative evidence might be by which it was met; and the jury in this case have found that issue in the negative. If the deceased had been a mere trespasser on the line, it would have been entirely his own fault that he was in the way of danger; and, as the company would have been under no special obligation to give warning of the

approach of their trains to persons whose presence on their line they had no just cause to anticipate, the omission of whistling under those circumstances would not have been negligence on their part. But the jury have found, upon evidence which, in my opinion, certainly justifies that part of their finding, that the deceased was, at the time of the accident, "lawfully using the line." Where there is a crossing so used, it appears to me to be the duty of the company to use proper and sufficient means to give warning of the approach of a train appointed to pass by without stopping; and if a person lawfully using the crossing is killed for want of such warning, his death is prima facie, in my opinion, due to actionable negligence on the part of the company.

It is said that in this case there was a notice board with a warning of danger, and that the express train carried lights, and that the judge ought to have ruled that the company was not bound to give any other or further notice, by whistling or otherwise. To this I cannot agree. Notice to the ear, if it is reasonably practicable, seems to be necessary. The evidence proves that on this line, and at this particular place, such notice was not only reasonably practicable, but was usual. In this state of things I am of opinion that the judge could not properly have withdrawn from the jury the question whether the usual whistling was in this case omitted or not, and, if so, whether such omission was negligence on the part of the company, causing the accident.

With respect to the issue of contributory negligence, it was contended that the judge ought to have held that the respondent had failed to make a case proper to go to a jury, on the ground that there was proof of contributory negligence sufficient to neutralise the effect of the evidence given of negligence by the company. But I do not understand how, under such circumstances, the question of contributory negligence could cease to be one of fact for the jury. If indeed, there had been no evidence at all given, except what necessarily went to show that the negligence of the deceased himself was the cause of his death, a judge might have been quite right in saying that there was no evidence to go to the jury in support of the plaintiff's case. Such a case would have existed here if it had been admitted that all proper warning was given, by whistling or otherwise, of the approach of the express train, but that the deceased neglected that warning, and persisted in crossing the line. But that is not how the case actually stands.

North Eastern Rail. Co. (Directors, etc.) v. *Wanless* (5) and *Bridges* v. *North London Rail. Co. (Directors, etc.)* (6) in this House (with which *Metropolitan Rail. Co.* v. *Jackson* (7) is consistent) decided, as I understand them, that a man is not necessarily to be regarded as having caused or contributed to his own death by getting out of a carriage, or by crossing a line of railway in a manner prima facie dangerous and imprudent from which his death actually followed, if there is evidence of acts and omissions on the part of the company by which he might have been put off his guard and led to suppose that he might safely act as he did. I am not satisfied that there was any ground in *Wanless's* case (5) for saying that he was "invited" to cross the line, except in a sense in which a jury might be warranted by the evidence in holding that there was a similar "invitation" in this case also. I am, for these reasons, of opinion that the judgment of the court below was right on the only point which is open upon this appeal. I assent, however, not unwillingly, to the proposal that the appeal should be dismissed without costs.

LORD COLERIDGE, C.J.—Two cardinal questions arise upon the facts of this case. First, was there any evidence to go to the jury of the defendant's negligence? Secondly, was the contributory negligence of the deceased so proved or admitted, that it became the duty of the judge to direct a verdict for the defendants? It is possible, I think, that in one view of the case this second question does not arise, at least as a separate question.

It is admitted that, in order to justify a case being submitted to the jury, there must be evidence of negligence on the part of the defendants, and also that the negligence in fact caused the injury complained of. It was pointed out in course

of the argument that to the maintenance of such an action as this it is as necessary to make out the latter proposition as the former, and, therefore, in order to submit a case to the jury, there must be evidence of both. It is also clear that, if the undisputed evidence, or the admissions in the case, negative the latter proposition, the judge must withdraw the case from the jury, because the plaintiff has not satisfied the onus which lies on him. It seems to me to be also clear, though I am not perhaps justified in saying that it is admitted, that this is the duty of the judge none the less when the undisputed evidence, or the admissions which negative the fact that the defendants' negligence caused the injury to the plaintiff, point clearly to the fact that the injury was caused by the negligence of the plaintiff himself. The plaintiff fails if he fails to show that the defendants caused the wrong, and he does so fail if he shows that he caused it himself. It is, therefore, I think, the duty of the judge to withdraw the case from the jury if by the plaintiff's own evidence at the end of his case, or by the unanswered and undisputed evidence on both sides at the end of the whole case, it is proved, either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did.

I observe that the general proposition, as it seems to follow from undisputed principles, so it is not without considerable authority to support it. *Skelton* v. *London and North Western Rail. Co.* (8) seems to me a direct authority for the proposition that the question of the plaintiff's negligence is to be considered by the judge in deciding whether there is evidence of the liability of the defendants to go to the jury. I think also that *Wyatt* v. *Great Western Rail. Co.* (9) is also an authority that the court is bound to consider the question of contributory negligence in deciding whether there is evidence to go to the jury of liability on the part of the defendants. WILLES, J., distinctly says so in *Skelton* v. *London and North Western Rail. Co.* (8). It is, however, no doubt necessary to explain in what sense I speak of evidence and proof, and here is the real difficulty in these cases, not so much in finding a form of words to express the legal rule as in practically applying to particular cases the form of words when found. I mean by "evidence" and "proof" the unanswered statements of witnesses whose credibility neither side assails and on the assumed truth of whose testimony both sides conduct the case; and if such evidence ought to show to fair and reasonable men that the defendants have not either done or omitted anything which persons of reasonable care and skill would have done or omitted, it seems to be the duty of the judge to stop the case, and either to nonsuit or direct a verdict for the defendants as the case may be. I have used language which, or the equivalent of which, is to be found, I believe, in cases of undoubted authority—cases which have been described as giving rules for the guidance of judges in the performance of their difficult duty. To me the entire uselessness of such rules as practical guides lies in the inherent vagueness of the word "reasonable," the absolute impossibility of finding a definite standard, to be expressed in language, for the fairness and reason of mankind, even of judges.

If it were necessary to decide this case simply on the absence of evidence of any negligence causing injury on the part of the company, without regard to the conduct of the deceased, I should be prepared to hold that there is no such evidence. The only evidence suggested is the evidence that there was no whistling to give notice of the approach of the express train. I assume that there was no whistling, though, in my opinion, the fact was clearly otherwise, and even on that assumption I think that the precautions taken by the company, other than whistling, were sufficient, and further, that the evidence for the respondent clearly proved that the absence of whistling was not the cause of the accident. Nor is it to be left out of sight that the accident happened at a spot on which, as it seems to me, the true effect of all the evidence is that the deceased was at his own risk. I do not indeed think that he was a trespasser in the sense that the company could have maintained an action against him for crossing the line at that spot. The conduct of the company had been such that he must be taken to have been there, if not with their licence, at least with their acquiescence. But the proper crossing—which if he

had used, no accident would have happened—was elsewhere. He, therefore, took the crossing cum periculo, and I cannot see that the company in his case violated or neglected any duty which they owed to a man crossing the line at that place as the deceased man did. This is not, in my view, an unimportant consideration in arriving at the conclusion that there was no evidence to go to the jury of any negligence on the part of the company which caused the injury.

But it is not necessary to decide the case on this ground only. The true effect of the unanswered and unquestioned evidence as to the conduct of the deceased is given by Keogh, J., in the court below, with a force and accuracy to which I can add nothing; and it seems to me to show beyond controversy that he was not only negligent but reckless—to show that he was where he was without any business, any legitimate object, or any precautions—and to disprove that the company caused his death by proving clearly that he caused it and brought it on himself. This is not, I think, fairly to be described as inference from the evidence, and so for the jury; it is the very evidence itself, unanswered and unquestioned. I think, therefore, that this case should have been withdrawn from the jury, and I must advise your Lordships that the judgment of the Exchequer Chamber should be reversed.

LORD BLACKBURN.—I quite agree that the duty and power of a judge who presides at a trial by jury is not to find the facts; it is confined to giving the proper direction in point of law. Where there is no dispute between the parties as to the truth of any particular fact, or the accuracy of any particular witness, there is no need to ask the opinion of the jury on that. For "the jury is not to inquire as to that which is agreed on by the parties" Roll. Abr. tit. Trial. If there is some further inference of fact which may be drawn from the undisputed facts, it is still for the jury to say whether they will draw that inference. It is for the judge to say whether they can draw it. An absence of dispute may, in my opinion, be shown not only by an express and formal admission, but also by such a conduct of the cause as is equivalent to such an admission. But, with this exception, it is the province of the jury to find the facts. The jurors are not bound to believe the evidence of any witness, and they are not bound to believe the whole of the evidence of any witness.

Therefore, as a general rule, no judge can give an absolute direction to the jury to find a fact either way. He can only give it conditionally: "If you believe the evidence given by these witnesses, the law is such that you must find such and such a verdict." Here it is of great importance to see on whom the onus of proof lies; for if the state of the case is such that on the admissions on the record and the undisputed facts given in evidence on the trial the onus lies on either side, the judge ought to give the direction, first, that if there are no additional facts to alter this, the jury ought to find against that party on whom the onus now lies. According to what the state of the evidence is, he should either direct the jurors that, if they believe the witnesses, there is reasonable evidence on which they may properly find facts and draw inferences such that they may find for the party against whom the onus lies; or that, even though they believe the whole of what is sworn to, there is no evidence on which they can properly find the question for that party on whom the onus of proof lies, and, therefore, to direct them to find the verdict against that party. His direction either way is subject to review.

I quite agree that it is not enough that the balance of testimony should be overwhelming on one side, and that, therefore, a verdict the other way ought to be set aside as unsatisfactory. To justify a direction to find a verdict, the onus must be one way, and no reasonable evidence to rebut it. I think the decision of your Lordships' House in *Metropolitan Rail. Co.* v. *Jackson* (7) conclusively establishes this doctrine in cases in which the onus was, on the issue as joined in the record, on the party against whom the verdict was directed. I am of opinion that it is equally so when a fact found or undisputed, at trial, has shifted that onus; and I

shall mention authorities which I think support my position. In *Polhill* v. *Walter* (10) Lord Tenterden, C.J., says (3 B. & Ad. at p. 121):

> "If the defendant when he wrote the acceptance, and thereby in substance represented that he had authority from the drawee to make it, knew that he had no such authority, and upon the evidence there can be no doubt that he did, the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence."

The rule was made absolute to enter the verdict for the plaintiff. I cite this case because the decision involves in it two positions: First, that the evidence was, by the course taken at the trial, admitted to be true so far that the defendant's knowledge of his want of authority was not in dispute; and, secondly, that, this being not in dispute, there was no occasion to leave to the jury anything on that, but that the judge ought to direct the jury to find the verdict for the plaintiff on that undisputed fact, without asking any question of them, though that verdict which the jury were directed to find was one of fraud in the defendant, regarding which the onus certainly at the beginning of the trial lay on the plaintiff. Both positions seem to me clearly right.

The cases in which the principle that the onus may shift from time to time has been most frequently applied are those of bills of exchange. At the beginning of a trial the onus is on the plaintiff to prove that he is holder, and that the defendant signed the bill. If he proves that, the onus is on the defendant, for the bill imports consideration. If the defendant proves that the bill was stolen, or that there was fraud, the onus is shifted, and the plaintiff has to prove that he gave value for it. This depends, as was pointed out in *Smith* v. *Braine* (11), not on the allegation on the record that there was fraud, but on the proof of it at the trial. In *Harvey* v. *Towers* (12), the action was by an endorsee from the drawer against the acceptor of a bill. The verdict for the plaintiff was set aside on the express ground that proof of fraud shifted the onus of proof. There the fact was in dispute, and was left as a separate question to the jury, and was so found; but I apprehend the result would have been the same if the plaintiff's counsel had admitted that the evidence showed that the drawer was guilty of fraud to which the plaintiff was no party, and in consequence of that admission no question had been asked of the jury. When, as in the present case, there is doubt as to what the proper direction in law is, the judge ought, as far as practicable, to put the case in a proper train for having the verdict entered without any new trial, according to what the law may ultimately be ascertained to be. What direction he should give must depend, first, upon what the nature of the controversy on the trial is. It does not, in my opinion, make any difference in the duty, either of the judge or the jury, in deciding that controversy, whether it is raised by one form of pleading or by another. The pleadings are very material in ascertaining what the controversy is; they are immaterial in determining how the controversy is to be disposed of.

The next matter on which the propriety of the direction depends must be: What was the state of the facts and evidence at the time the direction was given? I think that there is in this case no room for doubt as to what the controversy at the trial was. It was a case of collision, and, in such cases, the principles of law have, as far as I know, always uniformly been agreed upon, though there has often been a great difference of opinion as to the application of those principles to the particular case. Those who go personally, or bring property, where they know that they, or it, may come into collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such collision. But there arises a further question. It may well be that both parties are guilty of a neglect of duty, and that if either had used reasonable care and skill the collision would have been avoided. In such case, the maritime law, which is followed in the Admiralty Court, apportions the joint damage; but by the common law, which is what we have now to administer, the damage lies where it falls, and the plaintiff,

who is himself to blame, cannot recover, though the defendant may be also to blame [see note, ante p. 529]. The controversy at the trial then, in this case, was whether this accident was the result of neglect of duty on the part of the company, and not of neglect of duty on the part of the deceased.

It was laid down in *Ryder* v. *Wombwell* (2) that there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which a jury could properly find the question for the party on whom the onus of proof lies: if there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit, if the onus is on the plaintiff, or a verdict for the plaintiff, if the onus is on the defendant. This was approved of and adopted in this House in *Metropolitan Rail. Co.* v. *Jackson* (7). I have already given my reasons for thinking that the expression "the party on whom the onus of proof lies" must mean, not the party on whom it lay at the beginning of the trial, but the party on whom, on the undisputed facts, it lay at the time the direction was given. If in the present case no evidence at all had been given to show that there was neglect of duty in the deceased occasioning the accident, no doubt it must have been taken that there was no such neglect of duty. So far the onus was at the beginning of the trial on the defendants. It, therefore, becomes necessary to inquire what difference that makes. I think it does make the difference which is pointed out by Cockburn, C.J., in *Ellis* v. *Great Western Rail. Co.* (13). If the facts on which the duty of the plaintiff would arise are disputed, it is quite possible that a jury may disbelieve the evidence which tends to prove those facts. But in the present case it is obvious that there was no such controversy; and if the found or admitted facts are such as to shift the burden of proof, I cannot think it matters that it originally lay on the other side.

That brings me to the questions on which I think the decision of this case really depends. First, can there be a case in which an admitted fact so clearly shows a prima facie want of reasonable care on the part of the plaintiff causing the accident that the judge ought to rule that unless there was proof of something to excuse or justify it, the jury ought to find for the defendant? Secondly, is the present case such a case? As to the first of these questions, Brett, J., in delivering his opinion to this House in *Bridges* v. *North London Rail. Co.* (6), certainly shows that he thought that in a proper case the judge could withdraw the case from the jury. Eight out of nine judges in the court below expressly say that in their opinion it might be done; and Fitzgerald, B., though he does not say that he agrees with them, does not, at least expressly, dissent. I quite agree that abstract propositions stated by learned judges, where they do not form the ground of the decision, though of weight as legal opinions, are not of the same weight as where the propositions are laid down as the ground of a decision. They are not so carefully considered, nor are the necessary qualifications always expressed. Counsel for the respondent said that he could not find any case in which the decision had been that the judge might direct a verdict on the ground of the plaintiff's want of reasonable care. I think that *Skelton* v. *London and North Western Rail. Co.* (8) is such a case. I doubt whether the decision in *Wyatt* v. *Great Western Rail. Co.* (9), which was on a demurrer, supports the doctrine for which it was cited by Willes, J., in *Skelton's* case (8), and perhaps *Ellis* v. *Great Western Rail. Co.* (13) is not such an authority, for it may be that the majority of the court there acted upon the absence of evidence of neglect of duty on the part of the defendants producing the accident, though Mellor, J., seems to put it on the other ground. With that exception, if it be one, none of the cases cited, nor any cases which I have found, except that of *Skelton* v. *London and North Western Rail. Co.* (8), are cases in which the doctrine has been acted on. But there is no case that I can find opposed to the doctrine, and it seems to me clearly right on principle.

I assume in what I am about to say that the finding of the jury that there was not any whistling on the part of the express train, though I think very much against the weight of evidence, is binding. I had, and still have, some doubts whether, as it appears on the evidence that the train had its lamps lighted, and was,

in fact, seen at quite a sufficient distance, the judge was not bound to say that the company had fulfilled the duties cast upon them by law and done enough without whistling, and that if they had done enough they were not liable because they might have done more. But I think that, if the experience of those who have the practical management of trains is such as to make a particular precaution ordinary and general, it may well be said that a person taking reasonable care would use that precaution. I think, therefore, that I cannot say that the judge ought to have directed the jury that they could not find a want of reasonable care on the part of the defendants. But it seems to me that the proper direction of the judge on the rest of the case ought to have been that, from the course taken by the counsel, the jury might take the account given by the respondent's witnesses as correct, and that it was for the jury to draw from it such inferences of fact as might legitimately be drawn; that if the jury thought, as perhaps they might, that the deceased did look and see the approaching train, and thought that he might cross in safety before it, then they must find for the company; for on that supposition, as the whistle would have done no more than tell him that a train was coming, the neglect to whistle was in no way the cause of the accident. But if they thought, as seems the only other alternative, and the more reasonable one, that the deceased crossed the line without looking to see whether a train was coming, I think the judge should have told them, as a matter of law, that was such negligence as cast on the plaintiff the burden of proving that there was something to excuse the failure in the deceased to take that precaution, or that he took some other sufficient precautions. I do not say that there may not be circumstances which would excuse him from looking, and if there is evidence of such circumstances that may satisfy the onus cast upon the plaintiff by the admitted fact that if he had looked he would have seen.

North Eastern Rail. Co. v. *Wanless* (5) was a case in which there were such circumstances. The gates being open by the default of the company was an invitation to cross then, and that was the ratio decidendi of your Lordships' House; but what I do say is that in the present case there was no evidence of anything to excuse the deceased from taking this precaution, and no evidence that he took any other precaution at all. Even if the evidence had been that he stopped and apparently listened, and heard nothing, I should say that was by no means a reasonable precaution. But the evidence is all the other way. There does not seem to me to be even a scintilla of evidence that he took this very insufficient precaution. If it is said that we encroach on the province of the jury by saying that not to look along the line before crossing it is a circumstance that, unanswered, shows want of reasonable care, I can only answer by referring to the judgment in *Ryder* v. *Wombwell* (2), which, I think, is sound law, and mutatis mutandis applicable to the present case. It seems to me that if we were to say that judges cannot know that it is rash to cross a railway on which it is known that trains are running, on foot, without taking some precaution to ascertain that no train is coming, and, therefore, that a judge cannot rule that, in the absence of evidence of something to excuse it, the person so crossing cannot recover for a collision, we should in effect say that the question for the jury was whether it was not shabby in the railway company not to give something to the widow and orphans of the deceased. I fear that is too often the question really considered by the jury; but I think it clear it ought not to be so. I repeat that I do not think that the urgency and strength of the evidence in support of a disputed fact justifies the judge in directing the jury to find it. But I think that when there is an admission, either express or by the conduct of the cause, of a fact, the judge is not only entitled, but bound to direct the jury to act upon that admission.

LORD GORDON.—I concur in the opinions which have been delivered by the majority of your Lordships. I think a case of disputed facts ought not to be withdrawn from a jury merely because the evidence seems to the judge to point all in one direction. Whether the evidence be strong, or conflicting, or weak, it is equally

the province of a jury to decide upon it, and I think a presiding judge would be arrogating to himself functions not belonging to him if he were, on the trial of a question of fact, to withdraw the evidence from the jury, and to decide on it himself. Where there is no evidence to go to the jury, it is proper for the judge to direct a nonsuit. That was the course which this House considered ought to have been followed in *Metropolitan Rail. Co.* v. *Jackson* (7). But, in my view, this case is very different from that. I think there was evidence in this case on both the points raised, and that the judge did right in leaving the case to the jury.

Appeal dismissed.

Solicitors: *Holmes, Anton & Greig*, for *G. Keogh*, Dublin, *Kynaston & Gasquet*, for *T. T. Mecredy*, Dublin.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* FLETCHER. Ex Parte BIRNIE

[Court of Appeal (Mellish, L.J., Brett and Amphlett, JJ.A.), November 24, 1876]

[Reported 2 Q.B.D. 43; 46 L.J.M.C. 4; 35 L.T. 538; 41 J.P. 310; 25 W.R. 149; 13 Cox, C.C. 358]

Court of Appeal—"Criminal cause or matter"—Discharge by Queen's Bench Division of rule nisi for certiorari to quash conviction.

A rule nisi for certiorari was obtained in the Queen's Bench Division to bring up and quash, on the ground of want of jurisdiction, a conviction by a justice. On appeal from a decision of the court discharging the rule,

Held: the decision was in "a criminal cause or matter" within the meaning of s. 47 of the Supreme Court of Judicature Act, 1873, and, therefore, no appeal lay to the Court of Appeal.

Notes. The Supreme Court of Judicature Act, 1873, s. 47, has been replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (a). By s. 1 (1) (a) and (2) of the Administration of Justice Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 208), an appeal now lies to the House of Lords from any decision of the Queen's Bench Divisional Court with the leave of that court or of the House of Lords, and provided that the Divisional Court certify that a point of law of general public importance is involved and it appears to that court or to the House of Lords, as the case may be, that the case is one which ought to be considered by the House of Lords.

Applied: *Blake* v. *Beech* (1877), 2 Ex.D. 335. Considered: *R.* v. *Garrett, Ex parte Sharf*, [1917] 2 K.B. 99. Referred to: *Ex parte Schofield*, [1891] 2 Q.B. 428; *R.* v. *Marlborough Street Police Magistrate, Ex parte Samuel* (1919), 63 Sol. Jo. 300; *Re Clifford and O'Sullivan*, [1921] 2 A.C. 570; *R.* v. *Army Council, Ex parte Sandford*, [1940] 2 All E.R. 102; *Amand* v. *Secretary of State for Home Affairs*, [1942] 2 All E.R. 381.

As to appeals from decisions of the High Court on orders of certiorari, see 11 Halsbury's Laws (3rd Edn.) 82, 83; and for cases see 16 Digest (Repl.) 530–532. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, see 5 Halsbury's Statutes (2nd Edn.) 357.

Cases referred to:

(1) *R.* v. *Steel* (1876), 2 Q.B.D. 37; 46 L.J.M.C. 1; 35 L.T. 534; 41 J.P. 245; 25 W.R. 34, C.A.; 14 Digest (Repl.) 608, *6030*.

(2) *The Franconia* (1876), 2 P.D. 8; 35 L.T. 721; 25 W.R. 197; 3 Asp.M.L.C. 295, C.A.; 41 Digest 759, *6118*.

Appeal by the appellant Birnie from a decision of the Queen's Bench Division (LORD COLERIDGE, C.J., and QUAIN, J.), discharging a rule nisi for certiorari to bring up a conviction.

The appellant had been summoned before the respondent, one of the justices of the peace for the county of Cumberland, for an offence against the game laws. On the hearing of the summons he had asserted, as an objection to the jurisdiction of the justice, the existence of a bona fide claim of right to the land in question in himself. That objection was overruled, and the appellant was convicted. Subsequently, a rule nisi was obtained in the Queen's Bench Division, calling on the respondent to show cause why a writ of certiorari should not issue to bring up the conviction to be quashed, on the ground of want of jurisdiction in the justice who tried the case.

Foard for the respondent, took a preliminary objection that the court had no jurisdiction to try the appeal, as it was an appeal from a decision in "a criminal cause or matter," within the meaning of s. 47 of the Supreme Court of Judicature Act, 1873, and s. 19 of the Supreme Court of Judicature Act, 1875.

Bompas for the appellant.

MELLISH, L.J.—The question is whether we have jurisdiction to hear an appeal from a decision of the Queen's Bench Division refusing a writ of certiorari to be issued against the respondent, a justice of the peace for Cumberland. Was that decision of the Queen's Bench Division a decision "in a criminal cause or matter," within the meaning which we gave to these words, in *R.* v. *Steel* (1). We there held that those words were not confined to cases referred to the Court of Criminal Appeal, but went to criminal cases in the Queen's Bench Division itself. Now a further and somewhat different question arises, whether there is an appeal from a proceeding in the Queen's Bench Division, which is not a criminal proceeding in that court, but arises out of a proceeding before the justices which was a criminal proceeding. Under those circumstances, was that proceeding in the Queen's Bench Division a proceeding in a criminal matter? In my opinion, it is clear that, subject to the few exceptions specified, criminal procedure was intended to remain unaltered by the Supreme Court of Judicature Acts, 1873 and 1875.

The words of s. 19 of the Act of 1875 are very wide, and relate to everything substantially a "criminal cause or matter." These words must be construed according to their natural meaning. Is this "a criminal cause or matter?" Before the magistrate it is, in the Queen's Bench Division it is not. If any appeal lies, it must lie on both sides. Suppose, here, the certiorari had been granted and the conviction had been brought up and quashed by the Queen's Bench Division. If there is an appeal here, there must be one also under those circumstances, and so a simple question of a small fine or a few days' imprisonment might ultimately get into the House of Lords. I think that cannot have been intended to be allowed. I think that this is such a criminal cause or matter as is intended in s. 47 of the Act of 1873. Section 19 of the Act of 1875 throws light on s. 47 in the Act of 1873, and it assumes that the procedure has not been altered in criminal matters. It was not the intention of the Judicature Act to enlarge the jurisdiction of the Court of Appeal in this respect.

BRETT, J.A.—I am of the same opinion. The question turns on s. 47 of the Supreme Court of Judicature Act, 1873. Section 19 of the Supreme Court of Judicature Act, 1875, can only be used as it was in *R.* v. *Steel* (1), that is, as interpreting s. 47, i.e., criminal practice is to remain as before, unless altered by Rules of Court. The Rules of Court do not alter it, and, further, R.S.C., 1875, Ord. 62 [revoked] was put in for the sake of caution, to show that none of the rules should apply to proceedings on the Crown side of the Queen's Bench Division. Section 19 of the Act of 1875, therefore, shows that criminal practice, inasmuch

as it is not altered by the rules, remains the same. In *R.* v. *Steel* (1), it was argued that s. 47 was confined to cases before the Court of Criminal Appeal, but the court held that the scope of the words was much larger. It is said here that those words do not apply where the question before the Queen's Bench Division was not a "criminal cause or matter." What is this case? There has been a conviction, and there is an application for a writ of certiorari to bring it up to be quashed. Is that not a "criminal cause or matter?" It is to decide whether a man is to be kept in prison or fined or not. The proper construction is that there is no appeal where there was not one before and, therefore, this case follows *R.* v. *Steel* (1).

AMPHLETT, J.A.—I am of the same opinion. To oust the jurisdiction of the justices there must be a bona fide assertion of right. Before the Queen's Bench Division what was the question? Not whether there had been poaching or not, but whether there was a bona fide assertion of right; that is, whether the plea to the jurisdiction was a good one or not. The same sort of question arose in *The Franconia* (2). Therefore, this case comes under s. 47 of the Supreme Court of Judicature Act, 1873, under the exact meaning of its words. And, if we are to look at the public convenience, would it not be most inconvenient that this case should go through all the courts, not to try a civil right, but whether there was a bona fide objection or not?

Appeal dismissed.

Solicitors: *Bischoff, Bompas & Bischoff*, for *Waugh*, Cockermouth; *Helder, Roberts & Gillett*, for *Webster*, Whitehaven.

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

DUGDALE AND OTHERS *v.* LOVERING

[COMMON PLEAS DIVISION (Grove and Brett, JJ.), January 29, 1875]

[Reported L.R. 10 C.P. 196; 44 L.J.C.P. 197; 32 L.T. 155; 23 W.R. 391]

Indemnity—Implied indemnity—Direction by one person to another to do act injuring third person—Request to hand over disputed property.

The principle in *Betts* v. *Gibbins* (1) (1834), 2 Ad. & El. 57, as explained in *Toplis* v. *Grane* (2) (1839), 7 Scott, 620—that "where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, if such an act is not apparently illegal in itself but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof"—is not limited to cases of principal and agent.

The plaintiffs, colliery owners, had in their possession coal trucks, sent to them by P., a customer, in the way of business. P. filed a petition for liquidation. The K. company claimed the trucks both before and after the date of the petition, as bought by them of P, and the defendant claimed them as the trustee of P. in liquidation. In compliance with the orders of the defendant the plaintiffs, who had notice of both claims, sent the trucks to the defendant, who had notice of the claim of the K. company. The K. company sued the plaintiffs in an action which the plaintiffs, acting reasonably, settled by payment of the full demands of the K. company.

Held: the defendant had impliedly contracted to indemnify the plaintiffs so as to entitle them to recover from him the amount paid by them to the K. company in settlement of the action.

Notes. Approved: *Sheffield Corpn.* v. *Barclay and Others*, [1904–7] All E.R.Rep. 747. Considered: *Kruger* v. *Moel Tryvan Ship Co.* (1907), 13 Com. Cas. 1; *William Cory & Sons, Ltd.* v. *Lambton and Hetton Collieries, Ltd.*, [1916–17] All E.R.Rep. 878. Applied: *Strathlorne Steamship Co.* v. *Andrew Weir & Co.* (1934), 40 Com. Cas. 168. Referred to: *Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1886), 34 Ch.D. 261; *Re Seager, Ex parte Seaward* (1891), 7 T.L.R. 616; *Bank of England* v. *Cutler*, [1908] 2 K.B. 208; *Groves* v. *Webb and Kenward* (1916), 85 L.J.K.B. 1533; *Secretary of State for India in Council* v. *Bank of India, Ltd.*, [1938] 2 All E.R. 797; *Welch* v. *Bank of England*, [1955] 1 All E.R. 811.

As to implied right of indemnity in respect of acts done at request or order of another, see 18 Halsbury's Laws (3rd Edn.) 529 et seq.; and for cases see 26 Digest (Repl.) 232.

Cases referred to:

(1) *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; 4 Nev. & M.K.B. 64; 4 L.J.K.B. 1; 111 E.R. 22; 26 Digest (Repl.) 233, *1797*.

(2) *Toplis* v. *Grane* (1839), 5 Bing.N.C. 636; 2 Arn. 110; 7 Scott, 620; 9 L.J.C.P. 180; 132 E.R. 1245; 26 Digest (Repl.) 232, *1786*.

(3) *Adamson* v. *Jarvis* (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 12 Digest (Repl.) 601, *4656*.

(4) *Humphrys* v. *Pratt* (1831), 5 Bli.N.S. 154; 2 Dow. & Cl. 288; 5 E.R. 269, H.L.; 21 Digest (Repl.) 640, *1288*.

Also referred to in argument:

Merryweather v. *Nixan* (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest (Repl.) 786, *3141*.

Farebrother v. *Ansley* (1808), 1 Camp. 343, N.P.; 21 Digest (Repl.) 645, *1322*.

Rule Nisi for a verdict for the defendant or a non-suit in an action tried by Archibald, J., sitting with a special jury, brought by the plaintiffs, the sons and trustees under the will of the deceased owner of the Baddesley Collieries in Derbyshire, one Dugdale, against the defendant, the trustee in bankruptcy of William Phillips of the Coal Exchange, London, for an indemnity against the loss sustained by the plaintiffs in settling an action brought against them by the Kiveton Park Colliery Co. for the value of certain trucks which the plaintiffs had failed to deliver to the company.

William Phillips had been a large customer of the Baddesley Collieries and on Aug. 24, 1871, in the ordinary course of business he sent two railway trucks to the collieries to be filled. On Sept. 4, the trucks were claimed from the collieries' manager by the Kiveton Park Colliery who claimed to have bought them from Phillips and threatened proceedings if they were not returned. The trucks were subsequently claimed by the defendant, the trustee in bankruptcy of Phillips, who had filed a petition for bankruptcy on Sept. 6. The following are the material extracts taken from letters passing between the parties:

"Plaintiffs' solicitors to defendant's solicitors.

Oct. 30.

. . . Our clients are advised that, before giving further information—in other words, before taking further trouble and responsibility—they should have a proper guarantee for their costs incurred, and to be incurred, for the trustees on the subject, and upon hearing from you with such guarantee we will at once send you an explicit answer . . ."

"Reply to the above.

Oct. 31

The trustees are entitled to seek and obtain from your client the information for which, on their part, we have applied, and they cannot give any guarantee to pay his expenses. . . ."

"Defendant to plaintiffs' solicitors.

Nov. 7.

We beg to hand you our cheque, value £25, and shall feel obliged by your instructing Mr. Pogmore [the plaintiffs' manager] to forward the eleven trucks of coals to Kensington immediately."

In accordance with this order the trucks were returned to the defendant. The Kiveton Park Colliery Co. then commenced proceedings against the plaintiffs, who settled the action by paying a substantial sum by way of damages together with costs. The plaintiffs claimed that the defendant expressly or alternatively impliedly agreed to indemnify them against such damages and costs. The defendant, who conceded that the plaintiffs had acted reasonably in settling the action denied the existence of an indemnity. On the verdict of the jury, however, judgment was entered for the plaintiffs.

A rule was afterwards obtained to set aside the same and enter a verdict for the defendant or a nonsuit pursuant to leave reserved, on the ground that the correspondence and documents produced at the trial did not establish any contract of indemnity by the defendant.

Cave for the plaintiffs.

Brown, Q.C., and *Mellor* for the defendant.

BRETT, J.—I am of opinion that this rule ought to be discharged. The rule is to enter a nonsuit, and the court could not enter a nonsuit if there was any question which might properly have been left to the jury.

It appears that certain waggons which afterwards turned out to be the property of certain third parties, were in possession of the plaintiffs, and claimed from them both by the defendant and such third parties. The plaintiffs have yielded to the claim of the defendant, and delivered the waggons to the defendant at his request. The question is whether the defendant in so requesting the plaintiffs to deliver the waggons to him, agreed to indemnify the plaintiffs in the event (which afterwards happened) of the claim of the third parties proving to be better than the claim of the defendant, and the plaintiffs suffering pecuniary loss in consequence.

The first case in which the point seems to have arisen was *Adamson* v. *Jarvis* (3). There the plaintiff was an auctioneer. He sold "cattle, goods, and chattels" under the order of the defendant, who had no right to dispose of them, and the true owner afterwards recovered against the plaintiff. A count in case set out that the defendant being possessed of the goods, represented to the plaintiff that he was entitled to dispose of them; that the plaintiff in consequence, at the defendant's request, sold them by auction; that the defendant deceived the plaintiff as to his right to have them sold, and that the true owner had recovered from the plaintiff. It was held that the plaintiff having done what he did at the request of the defendant, the jury were entitled to say that the defendant indemnified the plaintiff.

In *Humphrys* v. *Pratt* (4) it was held that an action upon the case lay at the suit of a sheriff, who, upon the representation of a plaintiff in a suit, had seized goods under a fi. fa. as belonging to the defendant in that suit, and against whom damages had been recovered by a third person, whose property the goods really were. The House of Lords held that there was an implied indemnity. It is true that we have not the reasons for that decision, and that it is not stated, either in that case or in *Adamson* v. *Jarvis* (3), that the plaintiff knew of the claim of the third party. But it was said by BEST, C.J., in *Adamson* v. *Jarvis* (3) (4 Bing. at p. 72):

"Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be, indeed, surprised if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrongdoers, and could not recover compensation from him who had induced them to do the wrong."

I do not think this puts the right to recover on the ground of the plaintiff being an agent, or on the ground of his having or not having notice of the claim of the third party, but rather on the ground of the plaintiff having done what he did at the request of the defendant. Next follows *Betts* v. *Gibbins* (1). There it was held that a promise to indemnify might be implied from the fact of the defendant having induced the plaintiff not to part with the goods of a third party, and no question of agency was raised. The effect of *Betts* v. *Gibbins* (1) was afterwards explained in *Toplis* v. *Grane* (2), by TINDAL, C.J. That learned judge, who was one of the most careful expositors of the law that ever sat upon the Bench, after summarizing the facts, says (7 Scott, at p. 643):

> "We think this evidence brings the case before us within the principle laid down by the Court of King's Bench in *Betts* v. *Gibbins* (1), that where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet, if such an act is not apparently illegal in itself, but is done honestly and bona fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof."

Such being the principle, the objection taken to applying it in the present case is that the series of cases upon which it is founded are distinguishable on the ground that the fact of agency was present in all of them; no doubt it was in three out of four, but it did not furnish the ratio decidendi. It seems to me that unless the correspondence be conclusive to show that the plaintiff did not rely upon the indemnity of the defendant, the facts of the case are such as would warrant a jury in finding that he did. When we come to look at the correspondence, I am of opinion that that also, so far from showing conclusively that the indemnity of the defendant was not relied on, would warrant a jury in implying a promise to indemnify. The correspondence shows that the plaintiffs were in a state of hesitation. They gave the defendant notice that they should look to him for an indemnity. The defendant evaded an answer as far as he could, and, without saying in so many words either that he would indemnify or that he would not, gave the plaintiffs an order to send the waggons to him. Upon this correspondence a jury might well have held that the plaintiff was justified in believing the indemnity given. But it is not necessary to resort to the correspondence, inasmuch as the facts are such that an indemnity might be implied in law. On both points the plaintiffs have failed, and the ruling of the learned judge was perfectly correct.

GROVE, J.—I am of the same opinion. Counsel for the plaintiffs, in support of the principle for which he contends, has cited four cases, and I think that those cases make out the principle with tolerable clearness, especially the passage cited by my brother BRETT from the judgment of TINDAL, C.J., in *Toplis* v. *Grane* (2), which is very explicit. Counsel for the defendant has urged that three out of these four cases were decided upon the law of principal and agent, and that the expressions in the judgments, which appear at first sight to have a general bearing, must in truth be limited to cases of principal and agent. No doubt, every judgment must in some sense be limited in its application, but the limitation in its turn must be a qualified one. In none of the cases cited is there any limitation in the judgments themselves, and the reasoning of the judgments is perfectly general. I should much hesitate in deciding, and I by no means now decide, that it is a true proposition of law to say that the mere handing over of the goods of a third party to the first comer would be sufficient evidence of an indemnity by the party at whose request it was done, against all claims by the true owner. Every case must be decided upon its own circumstances, and I think that the circumstances here are such as to amount to reasonable evidence upon which a jury might imply a promise to indemnify.

Looking, in the second place, to the correspondence, upon which the case for the plaintiffs rests, if it cannot be supported upon principle, I do not see how the plaintiffs should know the true owners any more than the defendant. In fact, the defendant was more likely to have correct information than the plaintiffs. The correspondence discloses reluctance to give up without an indemnity on the one side, and a reluctance to give an indemnity upon the other; but it certainly contains a request, and rather more than a request, an order by the defendant to send the waggons to him. Might not a jury infer from this that the defendant asserted a title to the waggons, and did not dissent from the giving of the indemnity? If a jury had so found, it would have been a very rational verdict.

Rule discharged.

Solicitors: *Power, Andrew & Wood*; *Linklater & Co.*

R. *v.* LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF QUEEN'S BENCH (Blackburn, Quain and Archibald, JJ.), January 21, 1874]

[Reported L.R. 9 Q.B. 134; 43 L.J.M.C. 81; 29 L.T. 910; 38 J.P. 245]

Rates—Assessment—Annual value—Matters to be considered—Competition by hypothetical tenants.

The appellants, a railway company, owned a branch line connecting their main line with three other main lines, and worked the branch line at low fares so as to divert traffic from other lines to their own line, the result being that the sum earned on the branch line was very small. If the branch line were in the market, any of the three companies which owned the other three main lines would, in consequence of the traffic it would bring into their line and not for the profit it would yield, be willing to acquire it upon the same terms in every respect as those upon which the appellants held it and would work it in much the same manner as the appellants did, and in consequence the traffic on it would not produce a higher rateable value calculated on the mileage principle of the branch line than it did at present.

Held: an element in ascertaining the hypothetical rental value of the branch line was the amount of competition there would be for the occupation of the hereditament, and that was a proper matter to be taken into account in assessing the rateable value.

Notes. The Parochial and Assessment Act, 1836, and the Union Assessment Committee Act, 1862, have been repealed by s. 147, Sched. 2 of the Local Government Act, 1948. Estimation of the rent at which a hereditament, as in this case, might reasonably be expected to let is dealt with by s. 22 (1) (b) of the Rating and Valuation Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 128).

Applied: *London and North Western Rail. Co.* v. *Irthlingborough* (1876), 35 L.T. 327. Distinguished: *London and North Western Rail. Co.* v. *Ampthill Union Assessment Committee* (1905), 94 L.T. 314. Considered: *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* (1912), 107 L.T. 126; *Racecourse Betting Control Board* v. *Brighton County Borough Rating Authority*, [1941] 2 All E.R. 595. Referred to: *Dodds* v. *South Shields Assessment Committee* (1895), 72 L.T. 355; *Lancaster Port Comrs.* v. *Barrow-in-Furness Overseers*,

[1897] 1 Q.B. 166; *East London Railway Joint Committee* v. *Greenwich and St. Olave's Unions and St. Matthew, Bethnal Green* (1902), Ryde & K. Rat. App. 59; *East London Railway Joint Committee* v. *Greenwich Union* (1907), 97 L.T. 404; *Great Central Rail. Co.* v. *Banbury Union, Sheffield Union* v. *Great Central Rail. Co.*, [1909] A.C. 78; *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee, Same* v. *Bermondsey Assessment Committee, Same* v. *Stepney Assessment Committee*, [1913] 1 K.B. 612; *Robinson Bros. (Brewers), Ltd.* v. *Houghton and Chester-le-Street Assessment Committee*, [1938] 2 All E.R. 79; *British Transport Commission* v. *Hingley*, [1961] 1 All E.R. 837.

As to the basis for assessment for rating and the hypothetical rent a tenant would pay, see 32 HALSBURY'S LAWS (3rd Edn.) 68; and for cases see 38 DIGEST (Repl.) 645 et seq.

Cases referred to:

(1) *Mersey Docks* v. *Liverpool Overseers* (1873), L.R. 9 Q.B. 84; 43 L.J.M.C. 33; 29 L.T. 454; 38 J.P. 21; 22 W.R. 184; 38 Digest (Repl.) 669, *1204.*

(2) *R.* v. *Bradford* (1815), 4 M. & S. 317; 105 E.R. 852; 38 Digest (Repl.) 672, *1224.*

(3) *Allison* v. *Monkwearmouth Shore Overseers* (1854), 4 E. & B. 13; 23 L.J.M.C. 177; 18 Jur. 1075; 119 E.R. 6; sub nom. *R.* v. *Allison*, 2 C.L.R. 1544; 23 L.T.O.S. 232; 18 J.P. 438; 2 W.R. 592; 38 Digest (Repl.) 673, *1236.*

(4) *South Eastern Rail. Co.* v. *Dorking Overseers* (1854), 3 E. & B. 491; 7 Ry. & Can. Cas. 877; 23 L.J.M.C. 84; 18 Jur. 673; 118 E.R. 1226; sub nom. *R.* v. *South Eastern Rail. Co.*, 2 C.L.R. 633; 22 L.T.O.S. 330; 18 J.P. 182; 38 Digest (Repl.) 647, *1062.*

Also referred to in argument:

Newmarket Rail. Co. v. *St. Andrew's the Less, Cambridge* (1854), 3 E. & B. 94; 7 Ry. & Can. Cas. 858; 23 L.J.M.C. 76; 23 L.T.O.S. 87; 18 J.P. 343; 18 Jur. 572; 118 E.R. 1076; 38 Digest (Repl.) 640, *998.*

R. v. *Llantrissant* (1869), L.R. 4 Q.B. 354; 10 B. & S. 328; 20 L.T. 364; 17 W.R. 671; sub nom. *Great Western Rail. Co.* v. *Pontypridd Union Assessment Committee and Llantrissant (Churchwardens and Overseers)*, 38 L.J.M.C. 93; 33 J.P. 613; 38 Digest (Repl.) 645, *1050.*

R. v. *Liverpool Exchange Proprietors* (1834), 1 Ad. & El. 465; 3 Nev. & M.K.B. 550; 2 Nev. & M.M.C. 327; 3 L.J.M.C. 107; 110 E.R. 1285; 38 Digest (Repl.) 614, *850.*

London and North Western Rail. Co. v. *Cannock Overseers* (1863), 10 B. & S. 334; 9 L.T. 325; 28 J.P. 181; 38 Digest (Repl.) 648, *1063.*

Great Eastern Rail. Co. v. *Haughley* (1866), L.R. 1 Q.B. 666; 7 B. & S. 624; 35 L.J.M.C. 229; 14 L.T. 548; 30 J.P. 438; 12 Jur.N.S. 596; 14 W.R. 779; 38 Digest (Repl.) 615, *854.*

Sunderland Overseers v. *Sunderland Union* (1865), 18 C.B.N.S. 531; 34 L.J.M.C. 121; 13 L.T. 239; 11 Jur.N.S. 688; 13 W.R. 943; 144 E.R. 551; 38 Digest (Repl.) 673, *1237.*

Appeal against an assessment for the relief of the poor of the parish of Kempston, in the county of Bedford, made Jan. 5, 1871. The London and North Western Rail. Co. were appellants, and the Assessment Committee of the Bedford Union and the overseers of the parish of Kempston were respondents. The Bedford Quarter Sessions dismissed the appeal subject to the opinion of the Court of Queen's Bench on a Case.

The appellants were the owners of the line of railway from Bletchley to Bedford, and of the line of railway from Bedford to Cambridge, which two lines formed one continuous railway from Bletchley to Cambridge, and are worked as part of the London and North Western railway system. Each of these lines passed through parishes in the respondents' union. The line from Bedford to Bletchley was a double line, and joined the appellants' main line at Bletchley. The line from Bedford to Cambridge was a single line; it joined the main line of the Great

Northern Railway at Sandy, and then ran on to Cambridge, where it joined the Hitchin Branch of the Great Northern at the main line of the Great Eastern Railway. At Bedford, the Bedford and Bletchley line crossed the main line of the Midland Railway upon the level, and for the purposes of goods traffic was connected with it, but the stations were some distance apart. The lines from Bletchley to Bedford, and from Bedford to Cambridge, were originally made by independent companies or individuals, but both these lines were now vested in the London and North Western Railway Company, the former by virtue of Act of Parliament (8 & 9 Vict., c. xliii), the shareholders becoming stockholders of the company, and having 4 per cent. guaranteed to them upon a sum of £365,000 agreed upon as representing the sum expended upon the line; and the latter by virtue of Act of Parliament (27 & 28 Vict., c. lxii), whereby the line became the property of the London and North Western Railway, subject to a like guarantee of 4 per cent. per annum upon a sum of £290,000. Either of these interests thus guaranteed would, if regarded as rent and taken as the basis of rateable value, give a much larger rateable value per mile than that contended for by the appellants. In order to compete on equal terms, as far as fares were concerned, with the Midland, the Great Northern Railway, and the Great Eastern Railway, the appellants charged the same fares for goods and other passengers carried to London or the North from any station on the Cambridge and Bletchley line, via Bletchley, and the appellants' main line, that the Midland, Great Northern, and Great Eastern Railway Companies respectively charged for carrying the same from the same station via Bedford, Sandy, or Cambridge respectively upon their main line.

The appellants ascertained what they contended to be the rateable value of the line in the respondents' parishes in the usual manner, treating the Cambridge and Bletchley line as a portion of the London and North Western system; that is to say, if a passenger was carried from Bedford via Bletchley to London, a distance of sixty-two and a half miles, they apportioned the fare as above described equally among the sixty-two and a half miles, and then deducted from the earnings of each mile so ascertained the expense of working it, and other usual deductions, the same being ascertained where practicable for each particular mile, and not being a general average of the whole system, but still treating the branch from Bletchley to Cambridge as a part of the North Western system for the purpose of calculating the general and miscellaneous expenses. The respondents contended: First, that in ascertaining the rateable value of the portion of the line in their parishes, if it was to be ascertained by deducting the working expenses from the actual receipts, they were entitled to allocate to the Bedford and Bletchley line so much of the fares charged, in such a case as that above described, as was equivalent to what was usually charged by the appellants to a traveller who travelled only from Bedford to Bletchley; and that this should be apportioned equally among the sixteen miles from Bedford to Bletchley; secondly, if the Bletchley, etc., line were now in the market, either of the three companies above mentioned would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants now held it. If so acquired by either of such other companies, they would work it in a similar manner to that in which it was now worked by the appellants; and under such circumstances the traffic upon it would not produce a higher rateable value calculated upon the principle now contended for by the appellants than what it now produced. The respondents contended that the above circumstances must be taken into consideration in estimating the rateable value of the appellants' line.

The Case stated that if the respondents were right in either of the above contentions, the rate was to be confirmed. If the appellants were right in their contention, their line in the parish of Kempston was to be assessed at £80 per mile net rateable value.

Graham for the respondents.
Field, Q.C., and *Byles* for the appellants.

BLACKBURN, J.—The respondents are entitled to our judgment on one of the two contentions submitted to us. Counsel for the respondents admits he cannot support the first, and we need not, therefore, further consider it.

The other point is thus raised: If the Bletchley line were now in the market, four companies, the appellants and three others mentioned, would be willing to acquire it upon the terms upon which it is now held; not for the value of the traffic upon it, but for the traffic it would bring to the line of the company occupying it. That being so, the respondents say something ought to be added to the rateable value of a similar ordinary branch on account of that circumstance; and, if we think so, the Case provides that the rate is to be confirmed. We must take the general principle of the Parochial and Assessment Act, 1836, s. 1, and the Union Assessment Committee Act, 1862 (25 & 26 Vict., c. 103), s. 15, and adopt it as nearly as we can. We have to find the rent at which the hereditament might reasonably be expected to let from year to year, free of certain taxes and expenses. It happens, unfortunately, that a great difficulty exists in applying this principle to the present case, because the appellants' property, in this particular case, could not be let by itself. No practicable tenant could reasonably be expected at all for a small piece of a line which, of itself, could not possibly be worked. We must, therefore, enter into a calculation, as nearly as possible, of all the circumstances which might, if such a letting were possible, regulate what Sir Robert Peel called the "higgling" of the market. One principle to be borne in mind is quite clear, that in letting from year to year no tenant can be obtained at a rent larger than the amount he would expect in some way to make by it. Another matter to be considered, in order to arrive at that amount, is the number of persons who would be willing to compete for the occupation.

As an illustration of the importance of this latter consideration, I would refer to what I said in a recent case (*Mersey Docks* v. *Liverpool Overseers* (1)), about chambers in the Temple. The same set of rooms might produce larger profits if occupied by the Attorney-General than by a young barrister without practice; the rateable value, however, would be the same. But if there should be a large competition for the occupation of the chambers of the Attorney-General, in consequence of their affording greater facilities for practice than others, and he should have in consequence to pay higher rent, then the rateable value would increase, although the Attorney-General might make no greater profits than he would in other chambers. So here, the value of the occupation must be taken to be enhanced by the benefits and advantages which it may give to the occupier. This may be found to be the adopted rule in all the cases down to the present time. As far back as *R.* v. *Bradford* (2), a canteen was held to be rateable not only upon its rental of £15, but also upon the annual aggregate sum which was paid for the privilege of using the premises for a canteen; so with respect to the brewery in *Allison* v. *Monkwearmouth Shore Overseers* (3) cited during the arguments.

The question always is: What is the value obtained by occupation? The facilities thus acquired would enhance the rateable value, whether realised in or out of the parish. Here there is but one railway along this particular piece of land, and the number of possible tenants are the four companies who could use the railway in connection with their own. In consequence of this facility, by which the occupation of this particular line would increase the traffic along the main line of the occupiers, either of these four companies, as the Case states, would be willing to acquire it upon the same terms, in every respect, as those upon which the appellants now hold it. If that means, as argued for the appellants, that either of these companies would be willing to acquire possession only upon a long lease or in perpetuity, as the appellants hold it, then I should consider it no enhancement of the value; but I think the Case means that either of the companies would accept these terms upon a new bargain at the end of each year, and would rent the line upon the same terms as the appellants would from year to year. I do not think that what these companies would pay in rent is the whole matter, but the actual rent at which the property might reasonably be expected to let from year to year

A would be enhanced by the fact that there are four competitors for the occupation. It is an element in the consideration of the rateable value, and if so the respondents' contention is right. The rate must, therefore, be affirmed.

QUAIN, J.—I am of the same opinion. All that we have to decide is whether the second contention on behalf of the respondents is to be considered in fixing the rateable value. Several companies are, it is said, ready to compete for this B railway, and willing to acquire it upon the same terms. This is because the occupation would be worth something to them, either directly or indirectly. I think, therefore, the fact is to be taken as part of the test of what a tenant would give. *South Eastern Rail. Co.* v. *Dorking Overseers* (4), as I understand it, decided by a majority of the court that the value of a branch railway for rating purposes may C consist of something besides the actual earnings on the branch. Here the competition is a fact to be considered as enhancing that value beyond the mere profits of the branch line alone. That is the only point about which our opinion is asked, and that we give in favour of the respondents.

ARCHIBALD, J.—I am of the same opinion. The first contention of the respondents contained in the Case is to be left out of the question, but the second D they still rely upon. All we can do is to apply as nearly as possible the general principle for rating all hereditaments. It is clear that we must take the value of the occupation from year to year to be enhanced by any advantages which may go along with the occupation. I think we must infer from the words of the Case that either of these companies would be willing to take the branch from year to year, and that fact must, therefore, be taken into consideration in fixing the rate-E able value.

Judgment for respondents.

Solicitors: *R. F. Roberts*; *Shum, Crossman & Crossman*, for *Turnley, Sharman & Small*, Bedford.

A

RICHMOND *v.* WHITE

[Court of Appeal (James, Brett and Cotton, L.JJ.), July 26, 1879]

[Reported 12 Ch.D. 361; 48 L.J.Ch. 798; 41 L.T. 570; 27 W.R. 878]

B

Executor—Retainer—Insolvent estate—Debt due to executor—Assets paid into court to credit of administration action with concurrence of executor.

In an administration action an ordinary decree was made and the estate found to be insolvent. Part of the testator's assets consisted of moneys payable under a life assurance policy which were subject to an equitable mortgage. Pursuant to an order made in chambers on the application of the plaintiffs, the infant residuary legatees, on which application the executor appeared, the insurance company paid off the equitable encumbrancer, and paid the balance of the policy moneys into court to the credit of the action. On the cause coming on for further consideration the executor, who was a creditor, claimed that he was entitled to retain his debt out of the fund so paid into court by the insurance company in priority to certain other debts.

C

D

Held: the executor's right of retainer was a well-established legal right and could not be taken away by the payment of the fund into court, and, therefore, he was entitled to retain his debt.

Notes. Explained and Applied: *Re Langley, Johnson* v. *Langley* (1899), 68 L.J.Ch. 361. Considered: *Re Wester Wemyss, Tilley* v. *Wester Wemyss*, [1939] 3 All E.R. 746. Referred to: *Re Birt, Birt* v. *Birt* (1883), 48 L.T. 67; *Re Jones, Calver* v. *Laxton* (1885), 31 Ch.D. 440; *Batten, Profitt and Scott* v. *Dartmouth Harbour Comrs.* (1890), 45 Ch.D. 612; *Trevor* v. *Hutchins*, [1896] 1 Ch. 844; *Re Rhoades, Ex parte Rhoades*, [1899] 1 Q.B. 905; *Re Lance, Sharp* v. *Rebbeck* (1900), 44 Sol. Jo. 243; *Re Marvin, Crawter* v. *Marvin* (1905), 93 L.T. 599; *Re Sutherland, Michell* v. *Bubna*, [1914] 2 Ch. 720.

E

As to executor's right of retainer, see 16 Halsbury's Laws (3rd Edn.) 307 et seq.; and for cases see 23 Digest (Repl.) 373 et seq.

F

Cases referred to in argument:

Chissum v. *Dewes* (1828), 5 Russ. 29; 38 E.R. 938; 23 Digest (Repl.) 376, *4459*.

Roskelley v. *Godolphin* (1683), T.Raym. 483; 83 E.R. 252; sub nom. *Rockelley* v. *Godolphin*, 2 Show. 403; sub nom. *Boskellet* v. *Godolphin*, Skin. 214; 23 Digest (Repl.) 381, *4515*.

G

Marriott v. *Thompson* (1739), Willes, 186; 7 Mod. Rep. 292; 125 E.R. 1123; 23 Digest (Repl.) 381, *4516*.

Appeal from a decision of Hall, V.-C., in an action brought by the infant residuary legatees under a will against the executor for administration of the estate.

H

The ordinary administration decree was made in the action, and the estate proved to be insolvent. Part of the testator's assets consisted of the moneys payable under a policy of assurance on his life, which moneys were subject to an equitable mortgage; and pursuant to an order made on the application of the plaintiffs in chambers, on which application the executor appeared, the insurance company paid off the equitable encumbrancer, and paid the balance of the policy moneys into court to the credit of the action. On the cause coming on for further consideration, the executor, who was a creditor, claimed to retain his own debt out of the fund so paid into court by the insurance company, in priority to the costs of the action and the debts of the other creditors. The order for payment of the moneys into court contained no reservation of the executor's right of retainer.

I

Hall, V.-C., refused to allow the executor's claim. He held that the executor might have protected himself when the fund was paid into court. The payment into court was not in substance a payment in by the executor, and in the absence of authority that it must be so treated, he could not allow the right of retainer.

He was not disposed to extend such a right. From this decision the executor appealed.

W. Pearson, *Q.C.*, and *Macnaghten* for the executor.
Graham Hastings, *Q.C.*, and *Phear* for the residuary legatees.

JAMES, L.J.—Having regard to the form of the order in this case, I am of opinion that the executor has not lost his right of retainer. The Vice-Chancellor says that the right of retainer is one which he is not disposed to extend. But here the court has nothing to do with extending or curtailing the right; it is a well-established right of the executor, which the court has to apply to the facts of this case without allowing any technicality to defeat it. An executor has a right to retain his debt out of the assets in his hands. Beyond all question, if the policy money in this case had been paid to the executor, as it ought to have been, because he had the clear legal right to recover it from the insurance company, he would have received it with the right to retain his own debt out of it. But the insurance company had notice from the residuary legatees not to pay it to him; and then an application was made in chambers, and it was said, what is the use of the money being paid to the executor, and then paid by him into court? It could only be paid in by the executor or in his presence, because he alone could give a receipt to the insurance company; but the trouble and expense of a double order were avoided by its being paid at once into court. That must have been without prejudice to the right of the executor, just as much as if the form had been gone through of the money being paid to him and then paid by him into court. I think the Vice-Chancellor's decision must be reversed, and the claim be allowed.

BRETT, L.J.—I am of the same opinion.

COTTON, L.J.—I am also of the same opinion. The foundation of the executor's claim is his right of retainer as executor, which is an admitted legal right; and the question is whether that right has been taken away by what has taken place in the suit. The Vice-Chancellor says in his judgment, "The executor might have protected himself when the money was paid into court"; that is, as I understand it, the executor might have had a clause put in the order that the money was paid in without prejudice to his right of retainer. But I am of opinion that the order must be read as if such a reservation had been contained in it. It was not for any fault of the executor that the money was paid into court, but for the convenience of the insurance company, that they might be discharged. The executor had a perfect right to recover the money from the insurance company, and he then might have paid it into court the next day. The court never allows an order for payment of money into court to prejudice the rights of the person paying it in. We are not extending the doctrine of retainer by allowing it in this case, but merely giving the executor the same right as he would have had, if that had been done which ought to have been done. The decision of the Vice-Chancellor must be reversed, and the residuary legatees must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Russell, Son & Scott*; *Pike & Son.*

[*Reported by* H. PEAT, ESQ., *Barrister-at-Law.*]

A

LONG *v.* MILLAR

[Court of Appeal (Bramwell, Baggallay and Thesiger, L.JJ.), May 8, 9, 14, 1879]

[Reported 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 27 W.R. 720]

B

Sale of Land—Contract—Memorandum—Contract contained in two documents—Vendor's name not mentioned in first document—Second document signed by defendant as agent for vendor.

The plaintiff applied to the defendant, an estate agent, with reference to the purchase of certain land. He signed a document agreeing to purchase the land for £310 and to pay £31 as a deposit and in part payment of the purchase money. The vendor's name was not mentioned in the document, nor was it signed by him. The defendant signed a receipt for the £31 "as a deposit on the purchase of three plots of land." The defendant afterwards wrote to the plaintiff stating that the owner of the land would not sell it for less than £450, and that, if the plaintiff was not prepared to give this sum, he could have the deposit back in return for the receipt. In an action by the plaintiff against the defendant for damages for breach of the contract to sell the land the defendant alleged that there was no note or memorandum sufficient to satisfy s. 4 of the Statute of Frauds, 1677.

C

D

Held: the two documents were sufficiently connected by the evidence to form an agreement binding on the defendant within the Statute of Frauds.

E

Notes. Section 4 of the Statute of Frauds in so far as it concerns the sale of land has been replaced by s. 40 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 500).

Considered: *Cave* v. *Hastings* (1881), 7 Q.B.D. 125; *Shardlow* v. *Cotterell* (1881), 20 Ch.D. 90. Applied: *Studds* v. *Watson* (1884), 28 Ch.D. 305; *Sidle* v. *Bond-Cabbell* (1885), 2 T.L.R. 44; *Oliver* v. *Hunting* (1890), 44 Ch.D. 205. Considered and Distinguished: *Taylor* v. *Smith*, [1893] 2 Q.B. 65. Considered: *Pearce* v. *Gardner*, [1897] 1 Q.B. 688; *Sheers* v. *Thimbleby* (1897), 76 L.T. 709; *Dewar* v. *Mintoft*, [1912] 2 K.B. 373. Applied: *Stokes* v. *Whicher*, [1920] All E.R.Rep. 771. Considered: *Fowler* v. *Bratt*, [1950] 1 All E.R. 662; *Burgess* v. *Cox*, [1950] 2 All E.R. 1212; *Timmins* v. *Moreland St. Property Co.*, [1957] 3 All E.R. 265. Referred to: *Last* v. *Hucklesby* (1914), 58 Sol. Jo. 431; *Chaprioniere* v. *Lambert* (1917), 117 L.T. 353; *Reading Trust, Ltd.* v. *Spero*, [1929] All E.R.Rep. 405; *Hill* v. *Hill*, [1947] 1 All E.R. 54; *L. D. Turner, Ltd.* v. *R. S. Hatton (Bradford), Ltd.*, [1952] 1 All E.R. 1286.

F

G

As to connected documents in a note or memorandum in the sale of land, see 8 Halsbury's Laws (3rd Edn.) 96 et seq.; and for cases see 40 Digest (Repl.) 21 et seq.

H

Cases referred to:

(1) *Ridgway* v. *Wharton* (1857), 6 H.L.Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 4 Jur.N.S. 173; 5 W.R. 804; 10 E.R. 1287, H.L.; 39 Digest 386, *234*.

(2) *Baumann* v. *James* (1868), 3 Ch. App. 508; 18 L.T. 424; 32 J.P. 643; 16 W.R. 877, L.JJ.; 12 Digest (Repl.) 157, *1006*.

(3) *Boydell* v. *Drummond* (1809), 11 East, 142; 103 E.R. 958; 12 Digest (Repl.) 133, *820*.

I

(4) *Allen* v. *Bennett* (1810), 3 Taunt. 169; 128 E.R. 67; 12 Digest (Repl.) 156, *998*.

Also referred to in argument:

Smith v. *Webster* (1876), 3 Ch.D. 49; 45 L.J.Ch. 528; 35 L.T. 44; 40 J.P. 805; 24 W.R. 894, C.A.; 12 Digest (Repl.) 177, *1173*.

Rishton v. *Whatmore* (1878), 8 Ch.D. 467; 47 L.J.Ch. 629; 26 W.R. 827; 40 Digest (Repl.) 25, *103*.

A *Williams* v. *Jordan* (1877), 6 Ch.D. 517; 46 L.J.Ch. 681; 26 W.R. 230; 12 Digest (Repl.) 162, *1039*.

Calder v. *Dobell* (1871), L.R. 6 C.P. 486; 40 L.J.C.P. 224; 25 L.T. 129; 19 W.R. 978, Ex. Ch.; 39 Digest (Repl.) 390, *261*.

Eley v. *Positive Assurance Co.* (1875), 1 Ex.D. 20; 45 L.J.Q.B. 58; 33 L.T. 743; 24 W.R. 252; 12 Digest (Repl.) 139, *870*.

B *Vandenbergh* v. *Spooner* (1866), L.R. 1 Exch. 316; 4 H. & C. 519; 35 L.J.Ex. 201; 14 L.T. 701; 30 J.P. 646; 12 Jur.N.S. 527; 14 W.R. 843; 12 Digest (Repl.) 162, *1041*.

Caton v. *Caton* (1867), L.R. 2 H.L. 127; 36 L.J.Ch. 886; 16 W.R. 1, H.L.; 40 Digest (Repl.) 507, *186*.

Dobell v. *Hutchinson* (1835), 3 Ad. & El. 355; 1 Har. & W. 394; 5 Nev. &
C M.K.B. 251; 4 L.J.K.B. 201; 111 E.R. 448; 40 Digest (Repl.) 24, *99*.

Jones v. *Victoria Graving Dock Co.* (1877), 2 Q.B.D. 314; 36 L.T. 347; 25 W.R. 501, C.A.; 12 Digest (Repl.) 149, *948*.

Higgins v. *Senior* (1841), 8 M. & W. 834; 11 L.J.Ex. 199; 151 E.R. 1278; 39 Digest 390, *260*.

Jones v. *Littledale* (1837), 6 Ad. & El. 486; 1 Nev. & P.K.B. 677; Will. Woll. &
D Dav. 240; 6 L.J.K.B. 169; 112 E.R. 186; 1 Digest (Repl.) 727, *2727*.

Short v. *Spackman* (1831), 2 B. & Ad. 962; 109 E.R. 1400; 39 Digest 662, *2525*.

Appeals by the plaintiff from a decision of GROVE and DENMAN, JJ., on a rule nisi obtained by the defendant for a new trial on the ground that the verdict of the jury was against the weight of the evidence, and by the defendant from a
E decision of MANISTY, J., in an action brought to recover damages for breach of a contract for the sale of land, and for misrepresentation of authority.

The plaintiff also claimed the return of £31 which he had paid as a deposit. The £31 was paid into court, and the defendant, among other defences, pleaded that there was no written contract within the Statute of Frauds.

The action was tried before MANISTY, J., and the following facts were proved.
F The plaintiff, who was a builder, applied to the defendant with reference to the purchase of certain land at Hammersmith. After some negotiations had taken place between the parties, the plaintiff paid a deposit of £31 to the defendant, and signed the following document:

"Auction and Estate Agency Offices, 8 Wellington Road, Sept. 21, 1877.
G I hereby agree to purchase the three plots, 48 ft. frontage, of freehold land in Richford Street, Hammersmith, for the sum of £310, and I agree to pay as a deposit, and in part payment of the aforesaid purchase money, the sum of £31, and to complete the purchase and pay the balance of the purchase money on or before Oct. 5 next.

GEORGE LONG."

H The defendant gave the plaintiff the following receipt for the deposit:

"Auction and Estate Agency Offices, Sept. 21, 1877.
Received of Mr. G. Long the sum of £31 as a deposit on the purchase of three plots of land at Hammersmith.

C. W. MILLAR."

I The defendant afterwards wrote to the plaintiff stating that the freeholder would not sell for less than £450, and that, if the plaintiff was not prepared to give this sum, he could have the deposit back in exchange for the receipt.

The jury in answer to questions left to them, found that the defendant contracted to sell the land absolutely for £310; that the defendant contracted as principal as between himself and the plaintiff; and that the defendant represented to the plaintiff that he had authority to sell the land for £310, and that the defendant had such authority. The jury assessed the damages at £70. After reserving the case for further consideration, MANISTY, J., held that the defendant was entitled

to judgment on the claim for misrepresentation. On the claim for damages for breach of contract, he held that there was a binding contract within the meaning of s. 4 of the Statute of Frauds, and gave judgment for the plaintiff for £70, the amount of damages assessed by the jury. The defendant obtained a rule nisi for a new trial on the ground that there was no evidence to support the second finding of the jury, and that the verdict was against the weight of evidence. This rule was made absolute by GROVE and DENMAN, JJ., and the plaintiff appealed from their judgment. The defendant appealed from the judgment of MANISTY, J., and the two appeals were heard together.

By the Statute of Frauds, s. 4:

". . . no action shall be brought . . . whereby to charge any person . . . upon any contract or sale of lands, tenements, or hereditaments or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Holl, Q.C., and *Sills* for the defendant.

F. Turner (*M'Intyre, Q.C.*, with him) for the plaintiff.

Cur. adv. vult.

May 14, 1879. **BRAMWELL, L.J.**—There are two questions to be considered. In the first place, Is there a sufficient agreement within the Statute of Frauds? I am of opinion that there is, omitting the question as to the vendor's name, as to which I shall say a few words presently. I think *Ridgway* v. *Wharton* (1) and *Baumann* v. *James* (2) are in point. Here the plaintiff has signed a document containing all the terms of the agreement, and the question is, Has the defendant signed so as to bind himself? The receipt is in these terms: "Received of Mr. George Long the sum of £31, as a deposit on the purchase of three plots of land at Hammersmith," and is signed by the defendant. The word "purchase" there means that there is some agreement to purchase, and collocation of the documents would show a written agreement. It is proved by parol evidence that the agreement for purchase made by Long is the paper signed by him. If we place the two documents together, then it is plain that the word "purchase" is shown to mean that there is an agreement to purchase, and so there is an identification of the transaction.

In *Ridgway* v. *Wharton* (1) there was a reference in a written document to "instructions," and evidence was admitted to show what the instructions referred to were. The principle is this: suppose A. writes to B. saying, "I will give £1,000 for your estate," stating the terms on which he is willing to purchase, and B. in a hurry says, "I accept your offer," and writes those words and signs his name to them; then B. signs only the words, "I accept your offer," but then on identification of the offer by putting the papers together there is an agreement in writing.

The other point is this: it is said that, supposing there is a sufficient memorandum in other respects, there is no seller's name. That depends on this question, is the defendant the seller? Because if he is, the seller's name appears, and if he is not there is no binding contract. On this appeal the question does not arise. This disposes of the point on the Statute of Frauds.

Then, as to a new trial, the Common Pleas Division has decided that there ought to be one, and we should want a very strong case to induce us to overrule their discretion.

But it is said that we ought to enter judgment for the defendant. The defendant says, "Received of Mr. George Long," etc., but he does not say, "for the vendor," or say anything whatever about a principal. I am, therefore, of opinion that both appeals ought to be dismissed, and there ought to be a new trial.

BAGGALLAY, L.J.—I am of the same opinion. As to there being a sufficient memorandum in writing to satisfy the Statute of Frauds, the defendant only says,

A "Received of Mr. George Long," etc., and signs that receipt, and the question is whether we can look at the other document. I think that if we are at liberty to read the documents together there can be no doubt that there is a sufficient memorandum. It is not necessary that there should be a specific description of the second document in the first, or of the first in the second, if we can clearly infer from the later document that there is a reference in it to the earlier. As to B the question of a new trial, I do not think that the result has been satisfactory. I, therefore, agree that there ought to be a new trial.

THESIGER, L.J.—As to the first question, whether, assuming that there has been a parol agreement made, there is a sufficient memorandum to satisfy the Statute of Frauds, it is clear that unless the documents can be in some way connected there is none; the receipt does not contain all the terms, because it does C not contain the amount.

It is a clear principle, as laid down in *Boydell* v. *Drummond* (3) that the documents must not be connected by parol; the connection must appear on the face of the written instruments. If they are part of one transaction, that is not of itself enough. But this principle has also been laid down that, although parol D evidence cannot be given to connect the documents, parol evidence may be given to earmark any particular document that is referred to. There is a clear illustration of this in the case in *Ridgway* v. *Wharton* (1). It is only the same as the rule as to a latent ambiguity. The connection must appear on the documents, and the only question here is whether there is sufficient applicability in the receipt to the earlier document. The words were not used by lawyers, but by the parties E hastily drawing up informal documents, and it may well be that the words "the purchase" mean the agreement to purchase. It seems to me that by adopting this view we are not unduly straining the language used any more than the court in *Allen* v. *Bennett* (4) and in *Baumann* v. *James* (2).

Then, assuming that the two documents are connected, an objection is raised that the name of the vendor is not stated. But the documents are exchanged by F the parties, and one of them is drawn up as an absolute and final agreement under which the deposit is to be made, and the other party signs a receipt for the deposit, not limiting his signature so as to sign as agent, but affixing an unqualified signature. I think the fair interpretation is that this is the signature of the vendor. I am of opinion that there is no ground for entering judgment for the defendant, but that there ought to be a new trial.

G *Appeals dismissed.*

Solicitors: *Paterson, Sons & Garner*; *Dod & Longstaffe.*

[*Reported by* B. P. HUTCHINS, ESQ., *Barrister-at-Law.*]

A

TAMPLIN *v.* JAMES

[Court of Appeal (James, Brett and Cotton, L.JJ.), July 12, 13, 1880]

[Reported 15 Ch.D. 215; 43 L.T. 520; 29 W.R. 311] B

Specific Performance—Sale of land—Contract—Breach—Defence—Purchaser misled by vendors as to property subject of contract.

The only cases in which relief in an action against a purchaser for specific performance of a contract for the sale of land will be granted to him on the ground of mistake are those where the purchaser has been bona fide misled as to the nature or extent of that which he was buying and the conduct of the vendors has been such as to put him off his guard and to contribute to the mistake. C

A property put up for sale was described as follows: "All that well-accustomed inn, with the brewhouse, outbuildings, and premises, known as the Ship, together with the messuage, saddler's shop, and premises adjoining thereto, situate at . . . and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. K. and Mr. M." Plans of the property were in the saleroom. At the rear of the premises were pieces of garden ground, not belonging to the vendors, but which for some years past had been occupied by the tenants of the Ship inn and saddler's shop respectively. The defendant, who knew the property well and that the plots of garden ground had been occupied with the inn and the saddler's shop, did not look at the plans, and bought in the full belief that he was buying all that was in the occupation of the tenants. On discovering his mistake, he refused to complete. In an action for specific performance brought by the vendors, D E

Held: the description of the property was accurate and free from ambiguity and the vendor's agents had said nothing to mislead the defendant; the defendant had acted under a mistake caused only by his own failure to ascertain what he was buying; and, therefore, he must abide by the consequences of such failure, and the vendors' action must succeed. F

Notes. Considered: *Goddard* v. *Jeffreys* (1881), 51 L.J.Ch. 57; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266. Distinguished: *Hodson* v. *Thétard* (1907), 51 Sol. Jo. 482. Considered: *Eastes* v. *Russ*, [1914] 1 Ch. 468. Referred to: *Preston* v. *Luck* (1884), 27 Ch.D. 497; *Aspinalls to Powell and Scholefield* (1889), 60 L.T. 595; *Pope and Pearson* v. *Buenos Ayres New Gas Co.* (1892), 8 T.L.R. 758; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93; *Holliday* v. *Lockwood*, [1916–17] All E.R.Rep. 232; *Stromdale and Ball, Ltd.* v. *Burden*, [1952] 1 All E.R. 59. G

As to legal consequences of mistake, see 26 Halsbury's Laws (3rd Edn.) 892 et seq.; and for cases see 35 Digest (Repl.) 101 et seq. H

Case referred to:

(1) *Webster* v. *Cecil* (1861), 30 Beav. 62; 54 E.R. 812; 35 Digest (Repl.) 115, *140.*

Also referred to in argument: I

Malins v. *Freeman* (1837), 2 Keen, 25; 6 L.J.Ch. 133; 1 Jur. 19; 48 E.R. 537; 42 Digest 486, *532.*

Wycombe Rail. Co. v. *Donnington Hospital* (1866), 1 Ch. App. 268; 14 L.T. 179; 12 Jur.N.S. 347; 14 W.R. 359, L.JJ.; 42 Digest 482, *496.*

Manser v. *Back* (1848), 6 Hare, 443; 67 E.R. 1239; 42 Digest 481, *491.*

Webster v. *Cecil* (1861), 30 Beav. 62; 54 E.R. 812; 35 Digest (Repl.) 115, *140.*

Denny v. *Hancock* (1870), 6 Ch. App. 1; 23 L.T. 686; 35 J.P. 295; 19 W.R. 54, L.JJ.; 42 Digest 484, *512.*

A *Moxey* v. *Bigwood* (1864), 10 L.T. 466; 10 Jur.N.S. 597; 12 W.R. 811, H.L.; 42 Digest 484, *518*.

Weston v. *Bird* (1853), 2 W.R. 145; 42 Digest 483, *509*.

Appeal by the defendant from a decision of BAGGALLAY, L.J., sitting for MALINS, V.-C., by which specific performance was granted of an agreement for the B sale by the plaintiffs to the defendant of a small freehold property at Newerne in the county of Gloucester.

On July 25, 1877, the plaintiffs, who were trustees of a will, put up for sale certain parts of their testator's property. The property thus contracted to be sold was described as follows:

"All that well-accustomed inn, with the brewhouse, outbuildings, and premises C known as the Ship, together with the messuage, saddler's shop, and premises adjoining thereto, situate at Newerne in the same parish, No. 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. Knowles and Mr. S. Merrick, situate close to the Lydney Town station on the Severn and Wye Railway and abutting on other premises of the vendors on the canal and on lands now or late of D the Rev. W. H. Bathurst."

At the rear of the property so described were certain pieces of garden ground which for some years past had been occupied by the tenants of the Ship inn and saddler's shop respectively, and at the date of the contract these were occupied by Mrs. Knowles and Mr. Merrick. They did not belong to the vendors but had been purchased some years before by the Severn and Wye Rail. Co. The tenants each E held his house and garden ground at one rent, which was paid to the vendor's agent, who accounted to the owners of the garden ground for their proportions of the rent. Each of these pieces was partially divided by a fence from the premises with which it was occupied, but there was no boundary of such a nature as to lead to the belief that it belonged to a different owner. An enlarged copy of the tithe map, showing the exact boundaries in colours, had been prepared by the F vendors, was referred to in the particulars of sale, and was on the table in the auction-room at the time of the sale. The property in question, described as lot 1, was not sold at the auction, but afterwards the defendant, who had been present at the auction, made an offer of £750 for it, which was accepted, and he thereupon signed a contract for purchase according to the conditions of sale. After signing the contract, and paying the deposit, the defendant refused to complete, on the G ground that when he bought he was under the bona fide impression, from his long knowledge of the property, that the gardens formed part of what was sold, and that this belief was confirmed by what took place in the auction-room. The defendant deposed that he had not seen the plans, and was not aware of there being any plans in the auction room.

BAGGALLAY, L.J., held that the defendant appeared to have purchased the H premises in reliance upon his knowledge of the occupation of them, without looking at the plans, and probably without paying any attention to the details of the particulars of the lot, and a person was not justified in relying upon knowledge of that kind when he had the means of ascertaining what he was buying. The description of the property was accurate and free from ambiguity, and nothing was said or done by the vendor's agents which would lead the defendant to mis- I construe the particulars. He, therefore, made a decree for specific performance. The defendant appealed.

Higgins, *Q.C.*, and *W. Barber* for the defendant.

J. Pearson, *Q.C.*, and *Cozens-Hardy*, for the plaintiffs, were not called on to argue.

JAMES, L.J.—In my opinion the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to

give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of the tenants, and he asked no questions about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all;" or "I thought it contained 100 acres and it only contains eighty." It would open the door to fraud if such a defence was to be allowed.

Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster* v. *Cecil* (1) is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well known to be made by mistake, and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realising their testator's estate, and the reckless conduct of the defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse, he ought to be held to his bargain.

BRETT, L.J.—It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of law and equity, for, if the court refuses specific performance, it must now, in my opinion, consider the question of damages. Here the property was put up for sale by a description which could not mislead anybody who took reasonable care, for it is defined by reference to numbers on the tithe map, what follows being only a further description of what is included in the two specified closes on the tithe map. According to the finding of BAGGALLAY, L.J., the defendant bought under a mistake, but it was a mistake into which he was led solely by his not taking reasonable care.

The defendant, therefore, has to support the proposition that, although there is nothing misleading in the particulars, and his mistake was not on a point of vital importance, and arose entirely from his own negligence, he is to be relieved. I think that such a proposition cannot be maintained. In *Webster* v. *Cecil* (1) the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.

COTTON, L.J.—It has been urged that, if specific performance is refused, the action must simply be dismissed. But in my judgment as both legal and equitable remedies are now given by the same court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages. In my opinion the decision of BAGGALLAY, L.J., is right.

I will not attempt to define the cases in which the court will refuse specific performance on the ground of mistake. The circumstances of each case have to be considered. Here in the particulars there is no specific reference to gardens, but there is a specific reference to the closes 454, 455 on the tithe map as comprising the property. The defendant says, "I was under a mistake, and believed that my purchase comprised something not included in those closes." He had no right to make such a mistake, and though he knew the gardens had for years been occupied and held together with these tenements, he was bound to take notice of the description. In one sense he was not bound to look at it, but he cannot abstain

from looking at it and then say that he bought under a reasonable belief that he was buying something not included in it. There is no injustice in holding a man to a contract which specifically describes the property sold in a way not calculated to mislead.

Appeal dismissed.

Solicitors: *Abbott, Jenkins & Abbott*; *James J. James.*

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

MANCHESTER BONDED WAREHOUSE CO., LTD. *v.* CARR

[COMMON PLEAS DIVISION (Lord Coleridge, C.J., Grove and Lindley, JJ.), May 12, June 16, 1880]

[Reported 5 C.P.D. 507; 49 L.J.Q.B. 809; 43 L.T. 476; 45 J.P. 7; 29 W.R. 354]

Landlord and Tenant—Liability of landlord—Warranty that premises fit for purposes for which used.

Landlord and Tenant—Waste—Destruction of premises—Use in reasonable and proper manner.

Landlord and Tenant—Repair—Liability of landlord—Covenant to repair—Need for notice of want of repair.

The defendant was the lessee of some floors of a warehouse demised to him by the plaintiffs. By the lease he covenanted to keep the inside of the premises in repair, and deliver them up at the end of the lease, damage by fire, storm, or tempest, or other inevitable accident and reasonable wear and tear excepted. The lessors covenanted to keep the walls and main timbers in good repair. The lease contained a clause for the suspension of rent in the event of the premises being destroyed by fire, storm, or tempest, and a clause against underletting without the consent in writing of the lessors. The building fell down in consequence of some of the floors being overloaded by a sub-lessee to whom the defendant had sublet a portion of the warehouse without the consent of the lessors. After re-building, the lessors brought an action against the lessee for rent since the premises fell and for damages. The lessee denied his liability, and claimed damages from the plaintiffs.

Held: (i) the lessee was liable to pay the rent as if the building had never fallen; (ii) there was no implied warranty by the lessors that the premises were fit for the purpose for which they were used, for the decisions whereby a warranty had been implied that furnished apartments and houses were fit for residential purposes ought not to be extended to ordinary leases of lands, houses or warehouses; (iii) the lessors were not liable to pay damages by reason of their covenant to keep the walls and main timbers in repair, because they had no notice of any danger or want of repair before the building fell, and because, it was understood, they had re-built with all reasonable diligence; (iv) the destruction of the property was not waste if it was caused by using the property in a reasonable and proper manner, having regard to the purposes for which it was intended, and the lessee would not be liable to pay damages unless he ought to have known of the danger: *Saner* v. *Bilton* (1) (1878), 7 Ch.D. 815; (v) the lessee was liable, under his express covenant to repair, to make good the cost of putting the floors demised to him, and the fixtures within the premises, in good and tenantable repair.

Notes. Considered: *Haskell* v. *Marlow*, [1928] 2 K.B. 45. Applied: *Cruse* v. *Mount*, [1933] Ch. 278. Referred to: *Huggall* v. *McKean* (1884), Cab. & El. 391;

Murphy v. *Hurly*, [1922] All E.R.Rep. 169; *Taylor* v. *Webb*, [1937] 1 All E.R. 590; *McCarrick* v. *Liverpool Corpn.*, [1946] 2 All E.R. 646.

As to landlord's implied duty to repair, see 23 HALSBURY'S STATUTES (3rd Edn.), 562–563; as to liability for waste, see ibid., 566 et seq.; as to construction of covenants to repair, see ibid., 578–587; and for cases see 31 DIGEST (Repl.) 197–199; 278–281.

Cases referred to:

(1) *Saner* v. *Bilton* (1878), 7 Ch.D. 815; 47 L.J.Ch. 267; 38 L.T. 281; 26 W.R. 394; 31 Digest (Repl.) 379, *5077*.

(2) *Hart* v. *Windsor* (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 8 Jur. 150; 152 E.R. 1114; 31 Digest (Repl.) 280, *4151*.

(3) *Sutton* v. *Temple* (1843), 12 M. & W. 52; 13 L.J.Ex. 17; 2 L.T.O.S. 150; 7 Jur. 1065; 152 E.R. 1108; 31 Digest (Repl.) 194, *3252*.

(4) *Smith* v. *Marrable* (1843), 11 M. & W. 5; Car. & M. 479; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 693; 31 Digest (Repl.) 195, *3266*.

(5) *Wilson* v. *Finch Hatton* (1877), 2 Ex.D. 336; 46 L.J.Q.B. 489; 36 L.T. 473; 41 J.P. 583; 25 W.R. 537; 31 Digest (Repl.) 196, *3268*.

(6) *Makin* v. *Watkinson* (1870), L.R. 6 Exch. 25; 40 L.J.Ex. 33; 23 L.T. 592; 19 W.R. 286; 31 Digest (Repl.) 346, *4768*.

(7) *London and South Western Rail. Co.* v. *Flower* (1875), 1 C.P.D. 77; 45 L.J.Q.B. 54; 33 L.T. 687; 7 Digest (Repl.) 400, *249*.

Action and counterclaim which came on for trial at the Manchester Assizes, before LORD COLERIDGE, C.J., and was adjourned, in order that certain questions of law might be decided; and in which the plaintiffs, the lessors of a warehouse, and the defendant, the lessee, each claimed damages from the other as a result of the collapse of the warehouse.

By a lease made in December, 1875, the plaintiffs demised to the defendant certain floors in a warehouse for seven years at a rent of £450. By that lease the lessor covenanted to repair, maintain, and keep the inside of the demised premises in good and tenantable repair and condition, and to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear only excepted. The lessors, on the other hand, covenanted to keep the walls, roof, and main timbers of the premises in good and substantial repair and condition. The lease also contained a provision for the suspension of the rent in the event of the premises being burnt down or damaged by fire, storm, or tempest. There was also a clause against assigning or under-letting without the written consent of the lessors. The defendant, in fact, sublet some of the floors without the written consent of the plaintiffs. Some one of these under-lessors put a quantity of flour into one of the upper storeys let to the defendant, and in fact over-loaded it, in consequence of which the whole building fell. The plaintiffs have since re-built it, and they claim against the defendant, (i) rent since the fall of the building during the time that it was unoccupied; (ii) damages occasioned by the fall, the whole cost of reconstruction, or at least the cost of reconstructing the interior of the demised floors, as distinguished from the walls, roof, and main timbers thereof. The defendant, on the other hand, denies his liability to pay the rent sued for, or any damages; and he himself claims damages from the plaintiffs for a breach by them of their covenant to repair the walls and main buildings of the warehouse, and upon an implied warranty by the plaintiffs that the premises were in a fit condition for the purposes for which they were let.

Sir Farrer Herschell, Q.C., and *Crompton* for the plaintiffs.

Ambrose, Q.C. (*C. Russell, Q.C.*, and *S. Taylor* with him), for the defendant.

Gully, Q.C., and *R. Henn Collins* for the sub-lessees.

Cur. adv. vult.

June 16, 1880. **LORD COLERIDGE, C.J.**, read the following judgment of the court.—This action came on for trial at Manchester before me at the last winter

A assizes, and was for convenience adjourned here for the determination of several questions of law which the parties desired to have decided before any disputed facts were gone into. The undisputed facts were as follows. [His Lordship stated the facts as set out above, and continued:] At the trial, it was arranged that the various questions of law raised by these conflicting views should be determined, and that the facts in dispute, if there then should be any, should be afterB wards investigated. Accordingly the case was adjourned to London, and was discussed before us, and several points submitted to us which we now proceed to decide.

First, we are of opinion that, notwithstanding the fall of the building, the defendant is liable to pay rent for it as if it had never fallen. His covenant to pay rent is qualified, but the proviso qualifying it does not include such a case as has C actually happened. As applied to the facts of this case, the defendant's covenant to pay rent is express and without qualification, and he must pay rent accordingly: see *Saner* v. *Bilton* (1), and the cases there cited.

Secondly, we are of opinion that the plaintiff is not liable to damages by reason of any implied covenant or warranty by him that the building was fit for the purposes for which it was to be used, no authority has been found which decides D that there is any such warranty; what authority there is on the point is against its existence: *Hart* v. *Windsor* (2), *Sutton* v. *Temple* (3), and we are of opinion that no such warranty can be implied. There are, it is true, some cases relating to furnished apartments and houses which tend to show that a person who lets them impliedly warrants that they are fit for residential purposes: *Smith* v. *Marrable* (4), and *Wilson* v. *Finch Hatton* (5); but we are not prepared to extend E these decisions to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty.

Thirdly, we are of opinion that the plaintiffs are not liable to pay any damages to the defendant by reason of the express covenant binding the plaintiffs to keep the walls, roof, and main timbers of the building in repair. Before the building fell F the plaintiffs had no notice of any danger or want of repair, and such notice is essential to render them liable to be sued on their covenant: *Makin* v. *Watkinson* (6), approved and followed in *London and South Western Rail. Co.* v. *Flower* (7). After the building fell the plaintiffs, as we understand, re-built it with all reasonable diligence. If we are correct in this respect it will follow that neither before nor after the fall of the building was there any breach by the plaintiffs of their G express covenant to keep its walls, etc., in repair. If, indeed, the defendant can show unreasonable delay in the re-building by the plaintiffs, he will be entitled to such damages, if any, as such delay may have caused him, and if the case is retried this point will be open to him.

Fourthly, we have to consider whether the defendant is liable for the fall of the building. His covenant to repair the inside of the demised premises clearly H is not extensive enough to render him liable to re-build the whole warehouse; but it was contended that as he or his under-tenants in fact overloaded the building and caused its fall, he is liable to re-build it, although there may be no express covenant on his part binding him so to do. It was contended that he was liable for waste or destruction, and it was argued that whenever a tenant actually destroys the property demised he must restore it or compensate his landlord for its loss, I unless of course in cases where destruction is contemplated, as in leases of mines and quarries. We have no doubt that this contention is well founded where the destruction is wilful or negligent, but there is no authority to show that it applies to destruction by using the property demised in what was apparently a reasonable and proper manner having regard to its character and to the purposes for which it was intended to be used. On the other hand this very question had to be considered by Fry, J., in *Saner* v. *Bilton* (1), and he came to the conclusion that in such a case the tenant was not guilty of waste and was not liable for the destruction of the property. The question in these cases is whether it is the tenant's

duty to ascertain what he can do with safety to the property, or whether he is not entitled to assume that it is fit to be used for the purposes for which it is let and for which it is apparently fit.

We are of opinion that the latter is the view, and that in the absence of an express agreement to that effect a tenant is not liable for the destruction of the property let to him, if such destruction is in fact due to nothing more than a reasonable use of the property, and any use of it is in our opinion reasonable, provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property and to what the tenant knew of it, and to what as an ordinary business man he ought to have known of it. To hold a tenant liable for the destruction of property by its reasonable use as above explained would be to hold him liable for latent faults and defects in the property demised. We are of opinion that he is not liable for such faults and defects in the absence of some express agreement on his part imposing such liability upon him. We are, however, of opinion that prima facie a tenant is bound to restore the property demised to him, and that if such property is destroyed by the acts of himself or his under-tenants the presumption is against him, and he must in order to exonerate himself show that the destruction was owing to causes for which he was not responsible. If, therefore, this case should go back for trial the jury should be directed in accordance with the above principles, and should be asked whether the loading of the warehouse in this case was reasonable or unreasonable; and the jury should be told that this question cannot be decided simply by the fact that the warehouse fell from overloading, but that they must inquire further and see whether there was before the overloading took place any reason for supposing that the goods put into the warehouse were too heavy in kind or quantity for its apparent strength or for its strength as known to the defendant, or as he ought as a business man to have known it.

Fifthly and lastly, we have to consider what liability, if any, the defendant is under by virtue of his express covenant to repair the inside of those parts of the warehouse which were demised to him. The inside does not in this case include the walls, roof, or main timbers, for these are to be kept in repair by the landlord. The defendant's covenant, however, extends to the rest of the inside—the floors demised to him; but this covenant is, we think, subject to the exception in case of damage by fire, storm, or tempest, or other inevitable accident and reasonable wear and tear. Fire, storm, and tempest, are out of the question; and we agree with Fry, J., in thinking that inevitable accident means some accident ejusdem generis, and does not extend to use of the property by the tenant: see *Saner* v. *Bilton* (1). It only remains to consider whether reasonable wear and tear can include destruction by reasonable use. These words, no doubt, include destruction to some extent—destruction of surfaces by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party. It follows that the defendant is liable under his express covenant to make good the cost of putting the floors demised to him and the fixtures within the premises in good and tenantable repair. We were told that there were no main timbers as distinguished from iron beams; whether there is so or not we are of opinion that iron beams are main timbers within the meaning of the lessor's covenant to repair, and that the tenant is not bound under his covenant to replace them. This, we believe, disposes of all the legal questions raised before us, and the case must now go back to be tried if the parties cannot agree about the facts if any still in dispute, or the measure of the defendant's liability under his express covenant.

Solicitors: *Worthington*, for *Sale, Seddon, Hilton & Lord*; *Marsland*, for *Addleshaw & Warburton.*

[*Reported by* H. D. Bonsey, Esq., *Barrister-at-Law.*]

LEGGOTT *v.* BARRETT

[Court of Appeal (James, Brett and Cotton, L.JJ.), July 27, 1880]

[Reported 15 Ch.D. 306; 51 L.J.Ch. 90; 43 L.T. 641; 28 W.R. 962]

Partnership—Dissolution—Retirement of partner—Transfer of goodwill to continuing partner—Right of retired partner to deal with customers of firm.

B. and L., who were carrying on business in partnership, agreed that the partnership should be dissolved, that the stock and goodwill should be taken over by L., who would continue the business on his own account, and that B. would retire from the business. A deed of dissolution was drawn up which recited the agreement at length, and the operative part contained an assignment of B.'s share in the partnership effects in terms equivalent to an assignment of the goodwill, but it did not expressly state that B. would retire from the business. B. then commenced to solicit the customers of the business. In an action for an injunction to restrain him from dealing with the customers of the partnership,

Held: (i) there was in fact no difference between the terms of the agreement and of the deed, the provision that B. should retire from the business meaning simply that L. should continue the partnership with its goodwill and effects; (ii) B., having transferred the goodwill to L., he was not entitled to solicit customers of the partnership, but he was entitled to deal with them if they did not come to him by reason of his solicitation.

Document—Construction—Preliminary verbal or written agreement—Re-expressed in deed—Rights of parties governed by superior document.

Document—Construction—Parol evidence as to effect—Prior agreement re-expressed in more formal agreement—Admissibility of evidence of prior agreement.

Per Brett, L.J.: Where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed entirely in the first case by the writing, and in the second case entirely by the deed, and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document. If there is any doubt about the construction of the governing words of that document, the recital may be looked at to determine what is the true construction, but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed.

Notes. Considered: *Walker* v. *Mottram* (1881), 19 Ch.D. 355; *Pearson* v. *Pearson* (1884), 27 Ch.D. 145. Distinguished: *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351. Considered: *Trego* v. *Hunt*, [1895–9] All E.R.Rep. 804. Applied: *Greswolde-Williams* v. *Barneby* (1900), 83 L.T. 708; *Millbourn* v. *Lyons*, [1914] 2 Ch. 231. Referred to: *Mogford* v. *Courtenay* (1881), 45 L.T. 303; *Mason* v. *Schuppisser* (1899), 81 L.T. 147; *Coleridge-Taylor* v. *Novello & Co.*, [1938] 2 All E.R. 318; *Knight Sugar Co.* v. *Alberta Railway & Irrigation Co.*, [1938] 1 All E.R. 266.

As to admission of extrinsic evidence, see 11 Halsbury's Laws (3rd Edn.) 396 et seq.; as to recitals, see ibid. 418 et seq.; as to rights of partners inter se in relation to dissolution, see 28 Halsbury's Laws (3rd Edn.) 559–562; as to sale of goodwill, see 38 Halsbury's Laws (3rd Edn.) 11–14; and for cases see 17 Digest (Repl.) 347–350; 36 Digest (Repl.) 601–602.

Cases referred to:

(1) *Ginesi* v. *Cooper & Co.* (1880), 14 Ch.D. 596; 49 L.J.Ch. 601; 42 L.T. 751; 43 Digest 78, *826*.

(2) *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322; 41 L.J.Ch. 427; 25 L.T. 894; 36 J.P. 404; 20 W.R. 309; 43 Digest 82, *866*.

(3) *Churton* v. *Douglas* (1859), John. 174; 28 L.J.Ch. 841; 33 L.T.O.S. 57; 5 Jur.N.S. 887; 7 W.R. 365; 70 E.R. 385; 43 Digest 78, *823*.

Also referred to in argument:

Hudson v. *Osborne* (1869), 39 L.J.Ch. 79; 21 L.T. 386; 43 Digest 83, *874*.

Hookham v. *Pottage* (1872), 8 Ch. App. 91; 27 L.T. 595; 21 W.R. 47, L.JJ.; 43 Digest 292, *1189*.

Crutwell v. *Lye* (1810), 1 Rose, 123; 17 Ves. 335; 34 E.R. 129; 43 Digest 84, *880*.

Appeal by the defendant, O. Barrett, against the terms of an injunction granted by Sir George Jessel, M.R., to his former partner, the plaintiff Leggott.

Prior to July, 1879, the plaintiff and defendant carried on business at Bradford, in partnership, as general and furnishing ironmongers, under the style of "Barrett and Leggott." In July, 1879, they dissolved partnership upon the following terms, which were embodied in a written agreement of July 23:

> "(1) The partnership to be dissolved as from July 23. (2) The stock-in-trade, book-debts, trade effects, and fixtures, and the goodwill of business to be taken by Henry Leggott, who will continue the business on his own account. (5) The said Obadiah Barrett will retire from the business, and agrees not to commence business as an ironmonger either on his own account, or in partnership with any other person, or to take any situation in Bradford, or within ten miles thereof, for the space of ten years from the date of dissolution (except in Leeds, and in that case he undertakes not to do business in Bradford directly or indirectly.) (8) A proper deed of dissolution to be prepared and signed as soon as practicable, such deed to contain all necessary releases, clauses, covenants, and conditions usually inserted in deeds of a like nature."

The consideration money under this agreement was paid by Leggott, and a deed was executed by both parties on Nov. 10, 1879, which, after reciting at length the agreement of July 23, and reciting that, in order more effectually to carry out the said agreement for dissolution, and to vest the partnership estate and effects in the said Henry Leggott, the said parties thereto had mutually agreed to enter into and execute the deed; It was witnessed that Barrett assigned to Leggott, his executors, administrators and assigns, his undivided share in the stock-in-trade, horses, carts, trade fixtures, credit, and estate and effects of the partnership business, and of the debts. And the deed contained a covenant, that he the said Obadiah Barrett

> "shall not, nor will, within the space of ten years from the date of the said dissolution of co-partnership, commence business either on his own account, or in co-partnership with any other person or persons, or take any situation in the trade or business of an ironmonger, in Bradford aforesaid, or within ten miles thereof, except in Leeds, and in that case he will not do business in Bradford aforesaid, directly or indirectly."

In January, 1880, the defendant commenced business in Leeds as an ironmonger in co-partnership with one Russell, under the firm of Barrett and Russell. On May 6, 1880, the plaintiff commenced the present action, claiming an injunction to restrain the defendant, his partners, servants, travellers, or agents from applying to any customer of the firm of Barrett and Leggott privately, by letter, personally, or by a traveller, asking such customer to deal or continue to deal with the defendant or not to deal with the plaintiff, or from actually dealing with such customer as customer, or from otherwise prejudicially interfering with the goodwill of the said business so purchased by the plaintiff, or from advertising the new business of the defendant in Denton's "Railway Time Table," published in Bradford, or in any newspaper or advertising medium published in Bradford, or from otherwise infringing the covenant of the defendant in the deed of dissolution that the defendant would not do business in Bradford directly or indirectly.

The plaintiff on May 26 moved on notice for an order in the terms of the claim endorsed on his writ, and produced evidence that the defendant had been soliciting the customers of the former firm of Barrett and Leggott in Bradford and other towns, and had sent them circulars, and that some of the customers, in and out of Bradford, had been personally called upon by the defendant or his travellers. The defendant denied that he had personally solicited orders from the old customers anywhere, and that any one in his employ had solicited orders in Bradford; but he admitted sending circulars soliciting custom to old customers elsewhere than in Bradford. The Master of the Rolls made the following order:

"This court doth order that the defendant, his partners, servants, travellers, or agents, be restrained by injunction until judgment in this action or further order from applying to any customer of the firm of Barrett and Leggott, privately, by letter, personally, or by a traveller, asking such customer to deal or continue to deal with the defendant or not to deal with the plaintiff (or from actually dealing with such customer as customer) or from otherwise prejudicially interfering with the goodwill of the firm of Barrett and Leggott purchased by the plaintiff, and from advertising the new business of the defendant in 'Denton's Railway Time Table,' published in Bradford, or in any advertising medium published in Bradford, or from otherwise infringing the covenant of the defendant in the deed of dissolution that the defendant would not do business in Bradford directly or indirectly."

The defendant appealed from so much of the order as ordered that the defendant, his partners, servants, travellers, or agents, should be restrained by injunction until judgment in the action or further order from actually dealing with any customer of the firm of Barrett and Leggott as customer.

Chitty, Q.C., and *Ingle Joyce* for the defendant.
Roxburgh, Q.C., and *Maidlow* for the plaintiff.

JAMES, L.J.—The defendant does not complain of the injunction so far as it restrains him from applying to any customer of the firm of Barrett and Leggott privately, by letter, or by traveller, asking such customer to deal, or to continue to deal with the defendant, and not to deal with the plaintiff; but he does complain of the words "or from actually dealing with such customer as customer," which of course mean actually dealing with any customer or customers of the firm of Barrett and Leggott.

For those words there is no authority whatever, except the authority of the same judge in *Ginesi* v. *Cooper* (1), in a similar matter, when the same judge for the first time thought himself called upon to enlarge the injunction which had hitherto been granted, so as to prevent what he thought would be a wrong. I do not like going much into the case, because what I should say might perhaps be considered to mean that the injunction which is submitted to is too wide; but I cannot help saying that I think it is very important, according to my view of the law of contracts, both at common law and in equity, or wherever else you take them, that if parties have made an executory contract, which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in that deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing, or modifying the contract, which is to be found in the deed itself. A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as showing what the object of the parties was, and what they were about to do, so as to give them a guide in the construction of their words; but you have no right to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.

Looking at the deed, I can find no covenant from which I can imply an agreement not to deal with any person or persons who had been a customer or customers of the firm of Barrett and Leggott. I assume that there is to be found in it, by implication, the prohibition to which the injunction applies, that is to say, from applying to any customer by letter or by traveller, asking such customer to deal, or continue to deal, with the defendant. At first it did appear to me that we might, from the equitable view of the case, say that the man shall be prevented from dealing with any customer or customers whom he had solicited, but it afterwards appeared to me that that was too vague and too wide. It does not seem to me that we can, upon any just principle, prevent the defendant from supplying a man with goods afterwards. A man might give an order afterwards without any reference to the previous solicitation. He might have forgotten it, and seen the shop as he was passing by. In order to prove damages at law, the person would have to show that the customer had come there by reason of the solicitation, and would have gone to the other man but for the solicitation—that he had been seduced from the one to the other. I do not think that we are warranted on any authority in holding that. Certainly I am unable to see any principle upon which we could extend the injunction, beyond the very wide terms in which it is submitted to, to actual dealing with the customers of the firm.

The Master of the Rolls seemed to assume that a man, in dealing with a customer, was really doing something which was absolutely dishonest, and was plainly stealing that which he had sold. I need hardly say that I am unable to come to that conclusion. It is very plain what was agreed to. I cannot find that the words "Obadiah Barrett will retire from the business" (those are the strongest words, and the only words from which any such contention could be derived) mean that he will never directly or indirectly, under any circumstances, have any dealings with any customer who chooses to come to him, and who happens to have been a customer of the former firm. The words mean that the defendant is not to solicit customers. If the man were to open a shop in a place where he was authorised to do it, and not within ten miles of Bradford, I cannot see any implied obligation on him, either legal or moral, to shut his doors against a customer who comes to him of his own free will.

BRETT, L.J.—I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed entirely in the first case by the writing, and in the second case entirely by the deed, and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document, and by the governing part of that document. If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed.

If, therefore, there had been any difference here between what was called the preliminary contract and the deed, I should have thought that it must have been the deed which governed; but I confess I can see myself no difference at all. In this case the subject-matter of the agreement was a dissolution of partnership. It was not a case of the sale of a goodwill by a person who had been in possession of the business to another who had nothing to do with the business. It was a dissolution of a partnership, and the first part of the agreement contains these words: "The goodwill of business to be taken by Henry Leggott"—that is, by the partner left in the business. The mere fact of the other going out of the partnership, if nothing else was stated, left the goodwill in Henry Leggott, the person who had been the partner, and I presume that is the reason why nothing is said about goodwill in the deed. It being a deed dissolving a partnership, it follows

A that the goodwill is left to the partner who retains the business. If it had been a sale of a goodwill to a stranger, I should be very apt to agree entirely with the doctrine of *Labouchere* v. *Dawson* (2), and I think that there would be an implied contract on the part of a person who sold the goodwill that he would not immediately afterwards solicit the customers, who are really the people who form the goodwill; and I should say the same where there is a dissolution of partnership B for valuable consideration—that the outgoing partner who dissolves the partnership for good consideration does impliedly contract that he will not immediately afterwards do away with that for which he has been paid by soliciting the customers, and so practically destroy the goodwill which he has agreed to leave with the surviving partner.

In either case, I should be inclined to think that the doctrine of *Labouchere* v. C *Dawson* (2) was right, and that the doctrine really consisted of this, that there is such an implied contract in either case. But that implied contract only goes to the extent of *Labouchere* v. *Dawson* (2), and goes no further. It is, therefore, an implied contract that he will not solicit the former customers. If that be so, upon the mere fact of the agreement to dissolve the partnership for a consideration, that implied contract arose at once, the goodwill remained thereupon with the D existing partner, and there was an implied contract that the other would not disturb it; but neither upon the sale of the goodwill, nor upon such a dissolution of partnership as there is here, is there a contract from those facts alone that he will not set up business himself—not the same business and not the same firm's name; that cannot be but a similar business. If there had been no further covenant in this case, Barrett might have set up the business which he has opened at Leeds E at Bradford, or anywhere within the ten miles. It required a new and independent covenant to prevent that, and that he should agree that he would not exercise that right which was left in him. That covenant he has made. That new and independent covenant seems to me to be that he will for ten years, and within ten miles of Bradford, retire from the business of an ironmonger to this extent; that he will not commence business on his own account; that he will not commence such a F business in partnership with anybody else, and that he will not take a situation in an ironmonger's business within those ten miles, except in Leeds. Therefore, out of that new and independent covenant Leeds is excepted. Therefore, in Leeds he may do exactly that which he might have done if that new and independent covenant had not existed. He may do in Leeds precisely what he might have done, but for that covenant, in Bradford or anywhere within ten miles.

G It was said that he might have set up business next door, subject only to this, that he was not to solicit customers; but not subject to this, that if customers chose to come and deal with him without being solicited, he might not deal with them. The truth is, that to enjoin a man, or to prevent him by means of damages when he does it, against dealing with people whom he has not solicited, is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty, H which anybody in the country might have, of dealing with whom they like. If they are induced by his solicitations, that is a different thing; but it seems to me that it would be quite wrong to imply any contract that he will not deal with people who come to him of their own accord to deal, even though they were former customers of the former firm. There has been no authority cited for such extension of the rule, except the view of the Master of the Rolls in *Ginesi* v. *Cooper* (1). I Of course, one hesitates when one finds that the Master of the Rolls had such a strong view; but we are bound to act upon our own convictions, and having heard all that can be said in support of the view of the Master of the Rolls, I confess I cannot agree with it, and, therefore, I think that the additional words objected to ought not to be put into this injunction.

COTTON, L.J.—We have only to deal with part of this injunction. In considering this case, both as regards the deed and as regards the words of the contract, there is a principle which I think applies, that where parties have made a bargain, and

have contracted as to what rights one party shall gain over the other by the bargain, we ought not to put a forced interpretation on particular words used in the bargain in order to remedy what we may think in the particular case is a hardship on one of the parties. I apply that in two ways. First of all, we have here a deed deliberately entered into after agreement, and the parties have done what they thought necessary, besides what had been already done, in order to give effect to the terms of the contract previously entered into by them. The deed recites that a sum of money had been paid, that the partnership had been dissolved, and that for more effectually carrying the agreement into effect certain things ought to be done. Those things are an assignment of the share of the defendant in the partnership effects in terms which I think would be equivalent to an assignment and sale of the goodwill. Then there is a covenant corresponding with the fifth clause of the preliminary agreement, which says nothing about retiring from the business, but does contain a stipulation that Barrett shall not, except in Leeds, carry on the business of an ironmonger within ten miles of Bradford for a period of ten years.

If there is any difference between the agreement and the deed, the deed is that which the parties have thought it right to adopt as effectually protecting the rights of the purchaser under the previous contract of purchase and sale, and if there was any difference that deed must cover the rights of the parties. But there is not the slightest difference. When one looks at the agreement, it is simply that the defendant shall retire from, and the plaintiff shall continue in and carry on, the partnership business, that is to say, the business theretofore carried on by the partnership that he shall have the goodwill and effects of the partnership. That is what is carried into effect by the deed. But it is said that cl. 5 shows that retiring from the business must have a special and peculiar effect here because of the covenant not to carry on the business within ten miles. Retiring from business, read with the other clause, in my opinion means simply that the plaintiff shall continue the old partnership business with the goodwill and effects. That covenant is added to give the plaintiff something which he would not have had, because the sale of the goodwill, according to the decision of the Master of the Rolls, would not have prevented the person who sold the goodwill from carrying on business in Bradford, where the previous partnership business was carried on. It is a question whether or not there is anything in the sale of a goodwill which can prevent you from dealing with customers of the old firm.

Assuming that the contract and the deed are in the same terms, is there anything which will justify the court in construing a sale of goodwill as an implied contract not to deal with any customers of the old business, the goodwill of which was sold? In my opinion there is not. Here the parties were dealing with that upon which the law had put a definite and fixed interpretation. It was well known what a sale of goodwill implied, and subject to the question as to whether it does justify the previous part of the injunction in this case, which I am not in any way dealing with, although many cases have dealt with the effect of the sale of a goodwill, no case has ever laid down that a man who had sold his goodwill, although he set up a shop next door, was not justified in dealing with the customers of the old firm whom he did not solicit to come there. Goodwill possibly, in some of the later cases, has been a little extended; but undoubtedly the cases have established that a sale of goodwill does prevent a man from representing that he is carrying on the old business, or that he is the successor of it, and in that way trying to get the customers of the partnership. But in *Churton* v. *Douglas* (3) the judgment of Wood, V.-C., quite concurs, I think, with the previous decisions in assuming that the defendant might, if he thought fit, have carried on business with the customers of the old firm, provided that he did not represent to them that his was the old business, or that he was the successor in business of the old firm; and, therefore, to say that the defendant should not be at liberty to deal with any customer whom he did not solicit to deal with him, is, in my opinion, giving a forced interpretation to the words used. That is not the fair meaning of a sale of goodwill.

A What I had a doubt about was whether the injunction ought not to be modified in such a way that the defendant would be prohibited from getting the benefit of acts which he is at present prohibited from doing. Of course the injunction could only go to restrain him from dealing with customers who had been induced by his solicitation to come to him. Assuming the injunction to be right, it would be wrong of him to go to the customers of the old firm and solicit them to come to B him. Suppose the customer said, "No; I will stick to the old firm," but afterwards the person so solicited had reason to be dissatisfied. Being so dissatisfied, he would find it exceedingly inconvenient to him, that, although he wished to go to the person who had the goodwill, he could not consistently with his engagements do so. Are we, because the solicitation had no effect, or because there had been solicitation, to prevent the person from dealing? In my opinion that would not C be right, and the proper mode of dealing with the defendant's previous wrongful act, assuming it to be wrongful, that is to say, against the law, would be to give the plaintiff damages in respect of the loss which he might have sustained, and not cause the excessive inconvenience of giving an inquiry whether the parties were induced to deal with him in consequence of his solicitations. I think we ought entirely to dissolve the part of the injunction appealed against, and not to D modify it or give any qualified injunction with reference to customers of the firm who have been solicited.

Appeal allowed.

Solicitors: *Richard Smith & Wilmer*, for *Ford & Warren*, Leeds; *Wynne, Baxter & Rance*, for *Walter Beverley*, Bradford.

E [*Reported by* FRANK EVANS, ESQ., *Barrister-at-Law.*]

F

R. *v.* PHILLIPS AND OTHERS

[QUEEN'S BENCH DIVISION (Lush and Manisty, JJ.), May 13, 1880]

G [Reported 5 Q.B.D. 382; 49 L.J.M.C. 67; 42 L.T. 772; 28 W.R. 918]

Bastardy—Affiliation order—Application—Second application—Competency—Order made on first application quashed by quarter sessions, but not on merits.

H The mother of a bastard child obtained a bastardy order from the petty sessions against the putative father who appealed to the quarter sessions. At the hearing of the appeal, through an accident, the mother and her witnesses failed to appear, and the court refused an adjournment and allowed the appeal of the putative father, stating that the decision was not on the merits. The mother was ordered to pay the costs of the appeal, but had not done so. The mother made a fresh application for a bastardy order to the petty sessions; I and the putative father moved for a writ of prohibition against the justices.

Held: since the decision of quarter sessions was not a decision on the merits, the mother was entitled to make a fresh application, though the result might have been different if she had deliberately kept away from the hearing of the appeal and had prevented the witnesses from attending.

Per Curiam: If the petty sessions were to refuse to hear the matter until the costs of the appeal were paid, that would be a matter for consideration whether mandamus should be granted.

Notes. For the procedure as to affiliation orders, see now generally the Affiliation Proceedings Act, 1957.

Referred to: *R.* v. *London Quarter Sessions, Ex parte Rossi*, [1956] 1 All E.R. 670.

As to second application in affiliation proceedings, see 3 HALSBURY'S LAWS (3rd Edn.) 115–116; as to costs, see ibid. 122; and for cases see 3 DIGEST (Repl.) 445–448. For the Affiliation Proceedings, Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 36.

Case referred to:

(1) *R.* v. *Glynne* (1871), L.R. 7 Q.B. 16; 41 L.J.M.C. 58; 26 L.T. 61; sub nom. *R.* v. *Flintshire Justices*, 36 J.P. 406; 20 W.R. 94; 3 Digest (Repl.) 447, *380*.

Also referred to in argument:

R. v. *Jenkin* (1736), Cas. temp. Hardwicke, 301; 95 E.R. 194.

R. v. *Tenant* (1726), 2 Ld. Raym. 1423; 2 Stra. 716.

Pridgeon's Case (1634), Cro. Ch. 341; Bulst. 355.

R. v. *Bridgman* (1846), 2 New Sess. Cas. 232; 15 L.J.M.C. 44; 6 L.T.O.S. 353; 10 J.P. 187; 10 Jur. 159, 738; 3 Digest (Repl.) 447, *383*.

R. v. *Herrington* (1864), 3 New Rep. 468; 12 W.R. 420; sub nom. *R.* v. *Harrington*, 9 L.T. 721; 28 J.P. 485; 3 Digest (Repl.) 454, *435*.

Ex parte Harrison (1852), 19 L.T.O.S. 114; 16 J.P. 343; 16 Jur. 726; 3 Digest (Repl.) 448, *386*.

R. v. *Buckinghamshire Justices* (1849), 3 New Sess. Cas. 500; 18 L.J.M.C. 113; 13 Jur. 1053; 3 Digest (Repl.) 468, *509*.

R. v. *Robinson* (1849), 6 Dow. & L. 295.

R. v. *Gloucestershire Justices* (1849), 3 New Mag. Cas. 198; 13 L.T.O.S. 507; 13 J.P. 535; 13 Jur. 765; 3 Digest (Repl.) 446, *374*.

R. v. *Machen* (1849), 14 Q.B. 74; 18 L.J.M.C. 213; 117 E.R. 29; sub nom. *Jones* v. *Machen*, 3 New Sess. Cas. 629; 3 Digest (Repl.) 446, *373*.

Rule Nisi calling upon the justices of the petty sessional division of Dengie, Essex, and Emma Phillips to show cause why a writ of prohibition should not issue to prohibit them from hearing a summons against James Frost alleging that he was the father of her illegitimate child.

On Oct. 25, 1879, Emma Phillips (the defendant) obtained a bastardy order against James Frost (the applicant). James Frost gave proper notice of appeal against such order, and duly served it upon the said Emma Phillips. On Jan. 6, 1880, the appeal came on to be heard by the justices sitting in quarter sessions. At the hearing of the appeal Emma Phillips (the then respondent) and her witnesses were not present. Her counsel, however, asked for an adjournment which was not granted, on the ground that the court did not think it had the power to do so. The justices thereupon made an order to the effect that the appeal was allowed, and the order of petty sessions quashed, but that their decision was "not on the merits." The costs of this appeal were not, and have not yet been paid by the then respondent. On Mar. 6, 1880, Emma Phillips again applied to the justices in petty sessions for the Latchington hundred of the Dengie Division of the County of Essex for a fresh summons calling upon James Frost to show cause why he should not support the bastard child of which she alleged he was the father. On Apr. 13, 1880, the Queen's Bench Division was moved for a writ of prohibition to the justices in petty sessions, and a rule nisi was granted.

Wightman Wood, on behalf of Phillips and the justices, showed cause.

C. E. Jones, for the putative father, in support.

LUSH, J.—This is a question of considerable nicety, and we hesitated before we arrived at our conclusion. This prohibition ought not to go, and the rule must be discharged.

A It is a well-understood point that if a woman fails in her first application for a summons for a bastardy order, she may apply again, because the decision of the tribunal is not final, but yet there is no appeal for the woman. But while the Bastardy Act, 1845, gives the putative father power to appeal, it requires on such appeal the evidence of the mother herself and corroborative testimony besides; and the statute contemplates that the whole case should be gone into and decided; B and this decision is final between the parties. *R.* v. *Glynne* (1) supports the principle applicable to this case. There the witnesses were heard; and upon the evidence adduced the magistrates gave their decision; but this court expressly recognised the law that the order upon appeal is only final where the case has been heard on the merits. It is further to be observed that the Bastardy Act, 1845, s. 2 (repealed), enabled the mother to apply at petty sessions for another order C "where any order shall be quashed for any defect therein, and not on the merits." There is no case which speaks of the decision of the justices in quarter sessions being final in cases of this description except they were heard and determined on the merits. This is a new case, for here the order of the inferior court was quashed by the justices in quarter sessions, because no evidence was produced before them by the respondent. If it had been made out that the woman had deliberately kept D away, and had prevented her witnesses from attending, a different view of the proceedings might be taken; but it appears to have been an accident that she was not present, and that she had intended to be there. The court, however, did not allow time enough for her to come, but proceeded after the interval of an hour to quash the order of the petty sessions. In order that the proceedings might have constituted an estoppel between the parties, the court of quarter sessions should E have heard the evidence; but, as in this case the party appealed against did not appear, and evidence was not heard, she ought not to be bound by that decision. Therefore she may apply to the petty sessions for a fresh summons.

With reference to the fact that the costs in the abortive proceedings before the quarter sessions have not been paid by the woman, although we do not intimate any opinion as to what course the magistrates ought to take or dictate to them F their decision, but if they were to refuse to hear the matter until these costs had been paid, I think that would be a matter for consideration whether we should grant a mandamus to compel them to proceed.

MANISTY, J.—I concur.

Rule discharged.

G Solicitors: *Dowell*, for *Jones*, Colchester; *Digby & Jones*, for *Evans & Digby*, Maldon.

[*Reported by* W. P. Eversley, Esq., *Barrister-at-Law.*]

Re EMMET'S ESTATE. EMMET *v.* EMMET

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Cotton, L.JJ.), January 21, 1880]

[Reported 13 Ch.D. 484; 49 L.J.Ch. 295; 42 L.T. 4; 28 W.R. 401]

Will—Class gift—Ascertainment of class—Time—Gift to tenant for life, with remainder to children of another, their shares to be paid at 21.

A testator by his will gave his real and personal estates to his trustees upon trust for H. for life, and after his death as to one undivided third part for all the children of H. equally, the shares to be conveyed and paid to them as they should attain twenty-one in the case of sons and twenty-one or marriage in the case of daughters. The testator gave another third part of his estates, after the death of H., in favour of the children of his sister; and the remaining third part in trust for all and every the children of G., the shares to be conveyed and paid at the above-mentioned ages and times. In case H. should die without children, the share given for them was to be divided between the children of the sister and of G. in like manner as the two-thirds given to them. H. died without children, at which time G. had two children. G. had four more children who were born before his eldest child (a son) attained twenty-one, and another was born subsequently.

Held: all the children of G. who were born before the eldest of them attained twenty-one were entitled to share in the estate.

Notes. Considered: *Re Knapp's Settlement, Knapp* v. *Vassall*, [1895] 1 Ch. 91; *Re Stephens, Kilby* v. *Betts*, [1904] 1 Ch. 322. Applied: *Re Canney's Trusts, Mayers* v. *Strover* (1910), 101 L.T. 905; *Re Chartres, Farman* v. *Barrett*, [1927] All E.R.Rep. 408; *Re Bleckly, Bleckly* v. *Bleckly*, [1951] 1 All E.R. 1064. Referred to: *Re Mervin, Mervin* v. *Crossman*, [1891] 3 Ch. 197; *Re Faux, Taylor* v. *Faux* (1915), 84 L.J.Ch. 873; *Re Wernher's Settlement Trusts*, [1961] 1 All E.R. 184.

As to class gifts, see 39 HALSBURY'S LAWS (3rd Edn.) 1033–1044; and for cases see 44 DIGEST 768–771.

Case referred to:

(1) *Berkeley* v. *Swinburne* (1848), 16 Sim. 275; 17 L.J.Ch. 416; 12 Jur. 571; 60 E.R. 880; 43 Digest 1077, *9298*.

Appeal by Charles A. Emmet, the eldest son of George Nelson Emmet, from a decision of HALL, V.-C., reported 13 Ch.D. 484, holding that under the will of Edward Emmet, the six children of George Nelson Emmet who were born before Charles A. Emmet attained twenty-one years were entitled to participate, notwithstanding that four of them were born after the death of the life tenant, Henry Emmet.

Edward Emmet, by his will made in October, 1833, bequeathed all his estates and effects, real and personal, to his trustees upon trust to get in and convert his personal estate into money, and after payment of his debts, funeral and testamentary expenses, and of a certain specific bequest, to invest the residue as in the will mentioned, and during the life of Henry Emmet to pay or permit him to receive the rents of the real and the income of the personal estates for his own benefit, and after his decease, which event happened in March, 1839, upon trust to stand possessed of one undivided third part of the real and personal estates for all and every the children of Henry Emmet, to be equally divided between them, as tenants in common, the shares of such of them as should be sons to be conveyed and assigned, paid, or transferred to them when and as they should attain the age of twenty-one years, and the shares of such of them, as should be daughters to be conveyed, assigned, paid, or transferred to them when and as they should attain the age of twenty-one years, or marry with the consent of their guardians; and

A he declared that in case any of the children of Henry Emmet should be under age at his decease the rents and income of the shares of such children, or part thereof, might be applied towards their maintenance, education, and advancement, and directed that the surplus, if any, should be accumulated and become part of the original shares; and that if any of such children, being sons, should die before they should attain the age of twenty-one years, and without leaving issue, or being B daughters should die before they should attain that age, and without having been married, the shares as well original as accruing of them so dying should accrue to the survivors, or others of such children, and be equally divided between them as tenants in common, and be conveyed and paid, etc., as above mentioned; the testator declared a like trust, after the decease of Henry Emmet, as to one other undivided third part of the said estates in favour of the children of his sister, and C as to the remaining undivided third part of the estates he declared a like trust for all and every the children of his brother George Nelson Emmet, the shares of the children to be conveyed, assigned, etc., to them at the ages and times aforesaid, and with a like power of maintenance as above mentioned; but in case Henry Emmet should die without having any child, then after his decease and such failure of children and issue the trustees were to stand possessed of the said un- D divided third part given for such children, in trust as to one undivided moiety thereof for all and every the children of his sister, and as to the other undivided moiety in trust for all and every the children of his brother George Nelson Emmet, to be equally divided between them respectively, as tenants in common; the shares of the children to be conveyed and paid to them at the same ages and times and with the like power of advancement as above mentioned, as declared concerning E the shares of the children of Henry Emmet in the same undivided third part and the income thereof.

The testator died in January, 1836. Henry Emmet died without having a child in 1839. At the time of Henry's death George Nelson Emmet was a widower with two children, viz., Charles A. Emmet and Robert A. Emmet, neither of whom had then attained the age of twenty-one years. In 1840 George Nelson F Emmet married again, and by such marriage had issue five children, four of whom were born before Charles A. Emmet attained the age of twenty-one years, and one child was born after he had attained that age, and these five children, all surviving, had attained the age of twenty-one. Robert A. Emmet attained twenty-one, and died in 1865.

The plaintiffs were the four children of George Nelson Emmet by his second G marriage. They claimed a declaration that on the true construction of the will of the testator Edward Emmet, they and Charles A. Emmet and the trustees of the will of Robert A. Emmet, were entitled in equal sixth parts to one moiety of the estates of Edward Emmet, and they further claimed, if necessary, to have the administration of the estates.

Hall, V.-C., held that the children of George Nelson Emmet, who were born H before the eldest attained the age of twenty-one years, or their legal personal representatives, were entitled to shares in these estates.

From this decision, Charles A. Emmet appealed.

Robinson, *Q.C.*, and *W. W. Cooper* for Charles A. Emmet.

Dundas Gardiner for a party in the same interest.

Hastings, *Q.C.*, and *Rigby* for the plaintiff.

I *W. Pearson*, *Q.C.*, for the defendant George Nelson Emmet.

SIR GEORGE JESSEL, M.R.—The present appeal is from a decision of Hall, V.-C., on the construction of a will, which appears to me as clearly and well drawn as any will need be. Under that will any layman would understand that all the children of George Nelson Emmet, at whatever time they were born, would become entitled, and in the absence of authority so should I. There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment

of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable. That rule is admitted in *Berkeley* v. *Swinburne* (1).

What is the period of division in this will? No son is to take till twenty-one; no daughter till twenty-one or marriage. The period of division, therefore, is when any son attains twenty-one or any daughter attains twenty-one or marriage. That is the period when the fund is to be divided, and according to the rule of convenience to which I have referred children born after that time are to be excluded. This the vice-chancellor did. The present appeal is brought because in *Berkeley* v. *Swinburne* (1), on a will materially different from the present one, though somewhat similar to it, the court came to the conclusion that the death of the tenant for life was the period of division. Four grounds are given for the decision.

> "The original gift to the children, the gift over and the clauses for their maintenance and advancement, are all of them inconsistent and incompatible with the death of the tenant for life not being the period of division."

The lords commissioners decided on the ground of four clauses, three of which are absent from the present will, that the death of the tenant for life was the period of division. With all respect to them, I should not have decided so on that will, and I have some doubt whether they meant finally to decide it, for they made an order without prejudice to the question what shares the children might eventually take. When the case finally came before the vice-chancellor to decide that question he considered himself bound by the decision of the lords commissioners, and did not give any independent opinion of his own. Whether they meant to say all they are reported to have said about the actual point is not to my mind clear. If that case establishes anything it only establishes that according to the true construction of that particular will the death of the tenant for life was the period of division, and if so, there was no ground for resorting to the rule of convenience. In the present case there is no reason for doubting that, apart from that rule, all the children would take.

BAGGALLAY, L.J.—I am of the same opinion, and will only add that I entirely agree with the statement near the close of the vice-chancellor's judgment as to the result of the authorities.

COTTON, L.J.—I think that in *Berkeley* v. *Swinburne* (1), the lords commissioners never meant to decide that because there is a tenancy for life the determination of that estate must be taken as the period after which the class cannot be increased, although the fund is not divisible till a later period. If they intended to deal with the question now before us, all they decided was that under that particular will the testator had fixed upon the determination of the tenancy for life as the time after which the shares should not be capable of diminution.

Appeal dismissed.

Solicitors: *Vallance & Vallance*; *Emmet & Son.*

[*Reported by* E. S. Roche, Esq., *Barrister-at-Law.*]

VERNON AND OTHERS *v.* ST. JAMES' VESTRY, WESTMINSTER

[Court of Appeal (James, Cotton and Lush, L.JJ.), November 27, 29, 30, 1880]

[Reported 16 Ch.D. 449; 50 L.J.Ch. 81; 44 L.T. 229; 29 W.R. 222]

Nuisance—Statutory powers—Exercise—Powers capable of being exercised without committing nuisance—Power to erect public convenience—Commission of nuisance not authorised.

The defendants had power, under the Metropolis Management Act, 1855, s. 88, to provide conveniences where they deemed such accommodation to be required. The section did not expressly authorise the commission of a nuisance. They proposed to erect a public urinal in a cul de sac which the plaintiffs claimed was private property not dedicated as a highway. In fact, the cul de sac was always open to the public, there being no gate or other impediment to their entering it at any time, and for certainly seventy or eighty years it had been lighted, cleansed, and paved by the parish. Latterly it had in every respect been treated by the parish authorities as one of the public places under their control. The proposed urinal was to be within eight feet of the back door of the shop of one plaintiff and close to the entrance of the wine vaults of another, and it would have to be constantly passed very closely by numerous young women and girls. In an action for an injunction,

Held: (i) the defendants did not have power to erect a urinal on private property which was not in any way subject to their control: however (per Malins, V.-C.), on the facts, the cul de sac had been dedicated to the public as a highway, and the Court of Appeal would assume this finding was correct; (ii) (per Court of Appeal) the statute did not authorise the commission of a nuisance, since it need not necessarily cause a nuisance to erect a urinal; but (iii) the proposed urinal would constitute a nuisance, and an injunction would be granted.

Notes. The Metropolis Management Act, 1855, s. 88, has been repealed; see now the Public Health (London) Act, 1936, s. 113.

Considered: *Gas Light and Coke Co.* v. *St. Mary Abbots, Kensington, Vestry* (1884), Cab. & El. 368. Applied: *Sellors* v. *Matlock Bath Local Board* (1885), 14 Q.B.D. 928. Considered and Applied: *Graham* v. *Newcastle-upon-Tyne Corpn.* (1892), 67 L.T. 260. Applied: *Pethick* v. *Plymouth Corpn.* (1894), 70 L.T. 304. Considered: *Parish* v. *London City Corpn.* (1901), 67 J.P. 55; *East Fremantle Corpn.* v. *Annois*, [1900–3] All E.R.Rep. 73. Distinguished: *A.-G. and London Property Investment Trust* v. *Richmond Corpn. and Gosling* (1903), 89 L.T. 700. Referred to: *Mayo* v. *Seaton U.D.C.* (1903), 2 L.G.R. 127; *A.-G.* v. *Dorchester Corpn.* (1906), 4 L.G.R. 675; *Mudge* v. *Penge U.D.C.* (1916), 115 L.T. 679; *Roberts* v. *Hopwood*, [1925] All E.R.Rep. 24; *Edgington* v. *Swindon Borough Council*, [1938] 4 All E.R. 57; *Dormer* v. *Newcastle-upon-Tyne Corpn.*, [1940] 2 All E.R. 521.

As to dedication and acceptance of highways, see 19 Halsbury's Laws (3rd Edn.) 43 et seq.; as to exercise of statutory functions by public authorities, see 30 Halsbury's Laws (3rd Edn.) 685 et seq.; as to public conveniences, see 31 Halsbury's Laws (3rd Edn.) 192–195; and for cases see 26 Digest (Repl.) 322–324; 38 Digest (Repl.) 34 et seq. For the Public Health (London) Act, 1936, s. 113, see 15 Halsbury's Statutes (2nd Edn.) 953.

Cases referred to:

(1) *R.* v. *Lloyd* (1808), 1 Camp. 260, N.P.; 26 Digest (Repl.) 274, *43*.

(2) *R.* v. *Barr* (1814), 4 Camp. 16, N.P.; 26 Digest (Repl.) 302, *224*.

(3) *Poole* v. *Huskinson* (1843), 11 M. & W. 827; 152 E.R. 1039; 26 Digest (Repl.) 294, *166.*

(4) *Bermondsey Vestry* v. *Brown* (1865), L.R. 1 Eq. 204; 35 Beav. 226; 13 L.T. 574; 30 J.P. 118; 11 Jur.N.S. 1031; 14 W.R. 213; 55 E.R. 882; 26 Digest (Repl.) 320, *385.*

(5) *R.* v. *East Mark* (*Inhabitants*) (1848), 11 Q.B. 877; 3 New Mag. Cas. 36; 17 L.J.Q.B. 177; 11 L.T.O.S. 63; 12 J.P. 504; 12 Jur. 332; 3 Cox, C.C. 60; 116 E.R. 701; 26 Digest (Repl.) 297, *188.*

(6) *R.* v. *Petrie* (1855), 4 E. & B. 737; 3 C.L.R. 829; 24 L.J.Q.B. 167; 24 L.T.O.S. 271; 19 J.P. 483; 1 Jur.N.S. 752; 3 W.R. 243; 6 Cox, C.C. 512; 119 E.R. 272; 26 Digest (Repl.) 292, *159.*

(7) *Bateman* v. *Bluck* (1852), 18 Q.B. 870; 21 L.J.Q.B. 406; 17 J.P. 4; 17 Jur. 326; 118 E.R. 329; 26 Digest (Repl.) 274, *44.*

(8) *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375, n.; 103 E.R. 1049; 26 Digest (Repl.) 305, *253.*

(9) *Woodyer* v. *Hadden* (1813), 5 Taunt. 125; 128 E.R. 634; 26 Digest (Repl.) 347, *639.*

(10) *Souch* v. *East London Rail. Co.* (1873), L.R. 16 Eq. 108; 42 L.J.Ch. 477; 37 J.P. 644; 21 W.R. 590; 26 Digest 309, *269.*

(11) *Grand Surrey Canal Co.* v. *Hall* (1840), 1 Man. & G. 392; 1 Scott, N.R. 264; 9 L.J.C.P. 329; 133 E.R. 386; 26 Digest (Repl.) 295, *176.*

(12) *A.-G.* v. *Thames Conservators*, *Thornton* v. *Same*, *City of London Brewery* v. *Same*, *Clothworkers' Co.* v. *Same* (1862), 1 Hem. & M. 1; 1 New Rep. 121; 71 E.R. 1; 26 Digest (Repl.) 350, *660.*

(13) *Baines* v. *Baker* (1752), Amb. 158; 27 E.R. 105; sub nom. *Anon.*, 3 Atk. 750, L.C.; 36 Digest (Repl.) 310, *577.*

Also referred to in argument:

Biddulph v. *St. George's*, *Hanover Square* (1863), 3 De G.J. & Sm. 493; 2 New Rep. 212; 33 L.J.Ch. 411; 8 L.T. 558; 27 J.P. 579; 9 Jur.N.S. 953; 11 W.R. 739; 46 E.R. 726, L.JJ.; 38 Digest (Repl.) 39, *200.*

A.-G. v. *Metropolitan Board of Works* (1863), 1 Hem. & M. 298; 2 New Rep. 312; 9 L.T. 139; 27 J.P. 597; 11 W.R. 820; 71 E.R. 130; 38 Digest (Repl.) 34, *175.*

Appeal by the defendants, St. James' Vestry, Westminster, from a decision of MALINS, V.-C., granting an injunction restraining them from erecting a public urinal in Old Burlington Mews.

Old Burlington Mews was situated on the west side of Regent Street, London. It was not a thoroughfare, and the only access to it was by a gateway immediately to the south of No. 185, Regent Street. In the mews at the back of and adjoining the northern part of 185, Regent Street, was a building known as No. 95, Old Burlington Mews. St. James' Vestry proposed to erect a public urinal close to the south wall of No. 95. The plaintiffs were (i) the trustees of the will of the Rev. George Pollen, who were entitled under that will to the freehold of an estate, called the Pollen Estate, comprising the whole of the mews except a narrow strip of land at the entrance (which had been sold to the Commissioners of Woods and Forests under the Act for making Regent Street, 53 Geo. 3, c. 121), and most of the adjoining houses, and who claimed the soil of the mews as private property. They resisted the erection of the urinal on the ground of interference with their property, and also on the ground that it would be such a nuisance as to materially diminish the letting value of their houses. (ii) Messrs. Lewis and Allenby, who occupied extensive premises on the north side of the mews as a show-room and offices, under a lease from the trustees of the Pollen Estate. They complained of the proposed erection as a nuisance and annoyance. It was shown that it would be about 31 ft. distant from the windows of their show-room, and that the numerous young women and girls in their employ would constantly have to pass close to the proposed erection in going to and from their work, the access to the work

and show-rooms being by a narrow passage opening into the mews close to the proposed erection. (iii) Mr. C. B. Bingley, who was the lessee from the Pollen Estate of No. 95, Old Burlington Mews, and from the Commissioners of Woods and Forests of No. 185, Regent Street; Mr. Thomas Thorne, who held the ground and basement floors of both these buildings on a sub-lease from Mr. C. B. Bingley, and occupied the ground floor for his business as a tailor; and Mr. A. W. Bingley, who occupied the basement of both buildings as wine-vaults, under a sub-lease from Mr. Thorne.

Mr. Bingley's wine-vaults in the basement of No. 95 were ventilated by perforated bricks in the south wall, against which it was proposed to erect the urinal, and it was alleged that the smell would penetrate through these and injure the wine during the process of bottling. The back door of Mr. Thorne's shop, No. 185, Regent Street, opened into the mews at the corner of that building, and No. 95, Old Burlington Mews. The end of the urinal first proposed would have been only 4 ft. 6 in. from this door. As finally planned the distance would, it was admitted, be not more than 8 ft., but the exact distance was disputed. It was shown that this door was in hot weather frequently left open for ventilation, and was much used by Mr. Thorne's workpeople, and by women bringing home their work. The entrance to Mr. Bingley's wine cellars was by trap-doors in the mews at the back of No. 185, Regent Street, and it was shown that these when open left so narrow a passage between them and the south wall of No. 95, Old Burlington Mews, that persons could not pass into Mr. Thorne's back door without touching anyone who happened to come out of the urinal at the same time.

As to the question of dedication to the public, it was shown that the gateway had always been open, that no barrier had ever been erected by the trustees, and that the mews had always been included in the contracts for lighting and cleansing made by the vestry, and had been looked after by the police; that requests had been made by the occupiers of the houses to the vestry for authority to make erections upon or disturb the soil of the mews, e.g., the contractors for a new building erected by Messrs. Lewis and Allenby had applied for leave to erect a porch, and the plaintiff, A. W. Bingley, had himself applied for leave to fix in the soil of the mews a socket for a movable post. It was shown that the Pollen trustees had never paid for lighting, cleansing, or paving; but it was not shown that the vestry had done any paving, except that they had at the request of the occupiers of adjoining houses, including the plaintiff's, put down asphalt over the entrance to the mews, on the strip of land sold to the Commissioners of Woods and Forests. Evidence was produced of the necessity for such accommodation in the neighbourhood of Regent Street, and the extent of the nuisance which would be caused by the erection of the urinal.

Malins, V.-C., granted the injunction sought. He held that Old Burlington Mews had been dedicated to the public, but that the proposed urinal would constitute an unauthorised nuisance.

Giving judgment on the question of whether there had been dedication, he said: The mews is private property, and not in any way subject to the control of the vestry, the plaintiffs are clearly entitled to the injunction they ask for. It appears that some years before the death of the late Mr. Pollen in 1812, Old Burlington Mews had been, and it has ever since been, used by the public as a public place just as freely and constantly as any other public place or street in the parish. It is a cul de sac entered by a gateway from the west side of Regent Street, which is always open, there being no gate or other impediment to the public entering it at all times by day and by night. It has certainly been lighted, cleansed, and paved by the parish for the last seventy or eighty years, and latterly has been in every respect treated by the parish authorities as one of the public places under their control. During the whole of this period there has not been a single instance of Mr. Pollen himself, or the trustees under his will, who have always been seised in fee, raising any objection to, or putting the slightest obstruction in the way of, the free use of the mews by the public on foot, or on horseback, or in carriages,

nor have the trustees ever paid anything for lighting, paving, or cleansing it. These are strong and, as it appears to me, overwhelming reasons for considering that there has been a complete dedication of the site of the mews to the public.

The question of what amounts to dedication is one of fact, and it is the duty of the court to draw a just conclusion from the acts and omissions of the parties. I think the principles upon which the court should act are well laid down by LORD ELLENBOROUGH in *R.* v. *Lloyd* (1). That was a very similar case to this [HIS LORDSHIP stated the facts from the report], and LORD ELLENBOROUGH says (1 Camp. at pp. 261, 262), and what he said has been confirmed by every case since:

> "I think that if places are lighted by public bodies there is strong evidence of the public having a right of way over them, and to say that this right cannot exist because a particular place does not lead conveniently from one place to another would go to extinguish all highways where (as in Queen Square) there is no thoroughfare. If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it nor excludes persons from passing over it, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it after being allowed to use it so long without interruption."

R. v. *Barr* (2) is to the same effect. The case cited by counsel for the plaintiffs, and much relied on by him, of *Poole* v. *Huskinson* (3) also lays down the rules, which I think are applicable to the present case. All the authorities agree that there must be an intention to dedicate, without which there can be no dedication, but that intention to dedicate is inferred from long use. That is very expressly and distinctly laid down by PARKE, B., in *Poole* v. *Huskinson* (3). He says (11 M. & W. at p. 830):

> "There may be a dedication to the public for a limited purpose, as for a footway, etc., but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned judge was quite correct; not so the alternative, that as such a partial dedication was invalid at law, it would nevertheless operate against the intention of the owner of the soil in favour of the whole public. I think it would be merely void."

That point is also shown by *Bermondsey Vestry* v. *Brown* (4). Then comes this very material passage (11 M. & W. at p. 830):

> "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be animus dedicandi of which the use by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment."

Then there is *R.* v. *East Mark* (*Inhabitants*) (5), a very important decision which has been followed in many others, in which the circumstances were peculiar. [HIS LORDSHIP read the headnote from 11 Q.B. 877.] So in that case it was uncertain to whom the soil belonged; it did not belong to the lord because it had not been allotted to him, therefore, it was presumed it belonged to the Crown.

Then it was said that there was no person in a situation to dedicate it to the use of the public. LORD DENMAN, C.J., says (11 Q.B. at pp. 882, 883):

> "The law, as lately laid down, has led the courts into very inconvenient inquiries. If a road has been used by the public between forty and fifty years without objection, am I not to use it unless I know who has been the owner of it? The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights, and to assert them, and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence

A of dedication, unless the state of the property had been such as to make a dedication impossible. The direction of the learned judge seems quite right: he evidently stopped short of any inquiry as to the ownership of the soil."

PATTISON, J., expresses himself to the same effect, and ERLE, J., says (ibid. at p. 884):

B "In this case there has been uninterrupted user of the road by the public for about fifty years. I think the learned judge would have been quite justified in telling the jury that although there must be an intention on the part of the owner to dedicate, such user was so strong an evidence of his intention that the jury ought to find in favour of the dedication unless there was some evidence that he did not consent."

C *R.* v. *Petrie* (6) is precisely to the same effect, and follows the decision which I have just read. *Bateman* v. *Bluck* (7) is also a very important decision on this subject. There it was held that

"a public highway may in law exist over a place which is not a thoroughfare; whether in fact it does or not is a question for the jury."

D I need not read the whole of the judgment. LORD CAMPBELL, C.J., says (18 Q.B. at pp. 876, 877):

"The jury found that there was a highway, and we are bound to assume that finding to be good unless, as is contended, there cannot in law be a highway through a place which is no thoroughfare. It seems to me that such a doctrine
E is incorrect; there may or may not be a highway under these circumstances. Take the case of a large square with only one entrance [exactly the case here with regard to these mews, which has only one entrance, viz., under the gateway from Regent Street], the owner of which has for many years permitted all persons to go into and round it, it would be strange if he could afterwards treat all persons entering it except the inhabitants as trespassers. In *Rugby*
F *Charity Trustees* v. *Merryweather* (8) LORD KENYON laid down that there might be a highway through a place which was not a thoroughfare, and seems to have left it to the jury to say whether there was such a thoroughfare or not. In *Woodyer* v. *Hadden* (9), the court did not think that there would not be a highway under such circumstances, but only that in that particular case there was none, and I do not find anything decided there which is necessarily in-
G consistent with what was laid down by LORD KENYON."

The other judges express themselves to the same effect.

That a cul de sac may be a highway or a public street just as much as a place where there is a thoroughfare was decided by myself in *South* v. *East London Rail. Co.* (10), and my decision in that case agrees with the decision in *Rugby Charity Trustees* v. *Merryweather* (8), which must now be considered as good law
H after the decision in *Bateman* v. *Bluck* (7), notwithstanding the observation of the judges in *Woodyer* v. *Hadden* (9). To my mind the decision of LORD KENYON appears as sound as anything could possibly be. The decision in *Grand Surrey Canal Co.* v. *Hall* (11) is to the same effect.

In addition to these circumstances there was an application to the vestry by the plaintiff Bingley to be allowed to put down a socket, and an application by
I the builders of Messrs. Lewis and Allenby for permission to erect a portico in the mews. Although there is nothing to show that these applications were known to the Pollen trustees, yet they go to show that it was generally considered that the soil of the mews belonged to the parish as public property, that the Pollen trustees did not claim to be the owners of it, or take any heed of what was done by the parish. Under the consideration of all these circumstances and the authorities to which I have referred, I cannot hesitate in coming to the conclusion that the mews has been dedicated to the public and is a street, being a highway within the meaning of s. 96 of the Act, and as such vested in the defendants by virtue of that

section. I am, therefore, of opinion that this ground on which the plaintiffs oppose the erection of the urinal fails.

From this decision the defendants appealed.

By the Metropolis Management Act, 1855, s. 88:

"It shall be lawful for every vestry and district board to provide and maintain urinals, waterclosets, privies, and like conveniences, in situations where they deem such accommodation to be required, and to supply the same with water, and to defray the expense thereof, and any damage occasioned to any person by the erection thereof, and the expense of keeping the same in good order, as expenses of sewerage are to be defrayed under this Act."

Fox Bristowe, Q.C., and *Gregory Walker* for the defendants.
Glasse, Q.C., and *S. Dickinson* for the plaintiffs.

JAMES, L.J.—I think the judgment of the Vice-Chancellor ought to be affirmed. If the erection in question were made by a private landowner on his own soil, and freehold, it would seem to be, beyond all question, a nuisance so grave and so serious that the neighbours would be entitled to apply to this court for an injunction to restrain its continuance. The question is whether the thing being done, not by a private owner on his private soil, but by the parish vestry on a place that is said to be a public highway, and which is believed to be a highway, makes any difference. That depends entirely upon the true construction of s. 88 of the Metropolis Management Act, 1855, which says, "It shall be lawful for a vestry to provide certain accommodation in situations where they deem such accommodation to be required, and to supply water," and so on. But there are no powers authorising them in doing this to commit a nuisance.

Prima facie nobody is authorised to commit a nuisance under an Act of Parliament, unless it appears by express words or necessary implication that the act is to be done or may be done notwithstanding it may tend to the creation of a nuisance. In all the Sewage Acts that I am aware of there are express words forbidding the creation of a nuisance. To some extent that may be an argument here, that the omission of these words in this clause may show it was intended to make a difference. I do not think that is sufficient. If the rights of private persons are to be interfered with, they must be interfered with by clear legislation, and I am of opinion that there is no clear legislation in this case authorising the vestry, though they may be called a local parliament, or authorising any other body, to interfere with those private rights. It is said that those private rights would be compensated for by the clause for compensation. I am of opinion that that clause would not apply to such a case as this. I am of opinion that the real true intent and meaning of that section is to authorise and empower the parish vestry out of their public moneys—the moneys levied by parish rates—to provide such accommodation, and to that extent, no doubt, the minority must submit to be overridden by the majority; that is to say, with reference to the parish rates which are to be levied, and the application of the parish rates, the parish vestry is a competent authority appointed and authorised by the legislature; but with respect to private rights or public nuisances the parish is not the representative of the minority so as to enable that minority's rights to be interfered with.

I am of opinion, therefore, that this body being authorised to do a thing, would be justified in doing it in just the same way as the trustees of the estate could do it, and not otherwise; and that they could no more, under the colour of this provision, make an erection to the nuisance of the neighbours, than the owners of the estate themselves could have done it upon their own property, if they had been minded to do it, for the convenience of the public. In my opinion, the public body has exceeded its authority in doing that which, in my opinion, is a plain nuisance to the neighbourhood, and that the Vice-Chancellor's decision is correct.

COTTON, L.J.— I am of opinion that the Vice-Chancellor in this case arrived at a correct conclusion, and that the appeal fails. For the purposes of my judg-

ment, I assume, without deciding, that this is a public highway. Assuming that to be so, is what has been done justifiable? It was said by the defendants that it was done under s. 88 of the Metropolis Management Act, 1855, and that as that Act, and especially that section, gives to the vestry a discretion as to the erection of these conveniences, and as to the place where they were to be erected, and the number to be erected, this court ought not to interfere with the discretion which is committed by Act of Parliament to the vestry. If the vestry had in this matter exercised a discretion given to them by Act of Parliament, in my opinion the appeal would be right; but the very ground of the decision is that the vestry has been guilty of excess in exercising the power given to it by the Act of Parliament; that is, that in this matter it is acting ultra vires, without Parliamentary authority, and had no more power to do this, if it be a nuisance, than any person would have who had not any pretence for saying that he was acting under Parliamentary authority.

It was said that this was a nuisance, and I quite agree with the Vice-Chancellor on that point, and with what has been said by JAMES, L.J. If this case were tried without any reference to Parliamentary authority, could it be held to be otherwise than a nuisance to erect a thing of this sort in this particular place where young women going to the different shops of which we have heard are constantly passing at all hours of the day and all hours of the evening; and when this place is in the immediate proximity to the door of one large employer of labour, immediately at the entrance of a passage leading to two other doors, one going to the shop of the same employer of labour, and another going to the premises of another employer of labour who has coming to his shop from 300 to 400 young women with work for the purposes of the shop? In my opinion, to state that, is sufficient to show that this erection is a nuisance placed in absolute proximity to those who are necessarily going for their daily work to these doors.

Is it then authorised by this section of the Act of Parliament? As I understand, one of the arguments of counsel for the defendants, who pressed everything upon us that could be said, was that the selection of the site is left to the board by s. 88, and that when the board has once selected a site, it is not open to say that in consequence of the selection of the site that which elsewhere might not be a nuisance was a nuisance. In my opinion that argument cannot prevail. In the first place the words, "in situations where they deem such accommodation to be required," point, in my opinion, not to the particular position of the urinal, but to the street or locality where they desire to provide such accommodation. One must look to the whole of the section, and see whether there is in it that which will justify the erection and maintenance of a nuisance. It is impossible to say that a urinal or water-closet must necessarily be a nuisance. If it could be made out that such an erection, wherever made, and however guarded, must of necessity be a nuisance, then indeed it might be truly said that the Act of Parliament had authorised a nuisance, and that the court ought not to interfere. But counsel's argument here was that this was not a nuisance, and, therefore, it is impossible to say, and common sense tells us that we cannot say, that no water-closet or urinal can possibly be erected without being a nuisance.

The mere fact that a urinal is authorised to be erected does not necessarily, or by necessary implication, give Parliamentary power to do it, if it is a nuisance. It is assumed that power is given to the vestry; no doubt, but subject to this, that the vestry must not do it except in such a way as not to be a nuisance, because vestries are not exempted from the general law which prevents anyone from erecting and maintaining a nuisance. The constitution of the body is this: a vestry having large power of spending money, powers are given to it in some instances to interfere with private rights, and to make orders requiring people to do that which they would not otherwise be compellable to do, and authorising the vestry to spend the public money in order to do that which it thinks is for the convenience of the public; but subject always to this, that where vestries are not exempted from the bonds and obligations of the law, they must comply with those obligations, and not

do that which the law considers to be a nuisance. In my opinion, it not being necessarily a nuisance to erect or maintain a urinal, and there being nothing in terms in this clause which enables the vestry to do it, if it is a nuisance the proper construction of this Act of Parliament is to say, although the vestry is authorised as regards the public expenditures, and as regards anything else, to erect and maintain urinals, yet it cannot do it if, as in the present case, what it has proposed to do, or has done, is a nuisance.

Probably it is unnecessary to refer to cases, but we were pressed a good deal with *A.-G.* v. *Thames Conservators* (12), a case before Wood, V.-C. But there the erection complained of by the Attorney-General was a pier in a public navigable river, and the Act of Parliament clearly authorised the conservators to erect piers where they thought it necessary and desirable in that public navigable river; that is, authorised them to erect that which, without Parliamentary authority, would of necessity have been a public nuisance (for any erection in the bed of a public navigable river, in the waterway, would of necessity be a nuisance); and, therefore, the only question was whether as regards the public they had fairly exercised their discretion in fixing on this place, or rather, whether it was shown that their discretion had been so unfairly and improperly exercised that they could not be considered as exercising their parliamentary powers. The private right there was not interfered with, that private right having been saved by the Act of Parliament. Another case which has been referred to, *Baines* v. *Baker* (13), before Lord Hardwicke, of the small-pox hospital, was an application to restrain, before the erection or use of the hospital, the contemplated erection; but that of course could only be if of necessity a small-pox hospital when erected must be a nuisance, and that is all that Lord Hardwicke in that case laid down. He said, in effect: "You ask me to interfere, to prevent the erection by the parish of this small-pox hospital. Why? On the ground that it must of necessity be a public nuisance, I cannot accede to that"; and, therefore, no injunction was granted. If, when it had been erected, it had been so conducted as to prove a public nuisance, there would have been a very different question, namely, that which arose in the case of the Hampstead Hospital.

However, all that is necessary to decide in this case is, that this Act does not in this particular, as regards the erection of urinals, authorise them to be erected when and if they would be a nuisance, and when, as in this case, as the Vice-Chancellor has already decided, the maintenance and use of the urinal is a nuisance.

LUSH, L.J.—The judgment of the Vice-Chancellor was, in my opinion, right upon both points. It has not been imputed that the vestry was actuated by any improper motive in fixing upon this site for the erection of a urinal. It cannot be doubted that that spot was selected in the honest exercise of the vestry's discretion. The vestry thought it the most convenient and fit spot for the purpose. Therefore, the only question for us is whether or not the statutory authority has been exceeded by placing a urinal on that spot.

It is not easy at first sight to define the exact meaning of s. 88. Its terms are wide and vague; but one thing strikes us at once upon the reading of it—that it must receive some limitation. All that it says is, that it shall be lawful for every vestry and district board to provide and maintain urinals and so on in places where they deem such accommodation to be required, and to supply the same with water and to defray the expense thereof, and any damage occasioned to any person by the erection thereof, and the expense of keeping the same in good order, as expense of sewerage, are to be defrayed under this Act. Some limitation must obviously be put upon that section, and one limitation is, that the vestry cannot have any power to erect a urinal within a private enclosure. That must be obvious. What other limitations (if any) the section is to receive, we may, I think, be better able to decide by considering what was the state of the common law upon this subject before the Act was passed.

A It was well established at common law that an indictment lay against any person, any individual, or any body, whether a vestry, or the trustees of a turnpike road, or a private individual, for obstructing any part of a public highway, and it could not be deemed a sufficient defence that the obstruction was for a purpose more beneficial to the public than the use of that part of the road would have been. That was well established. A road could not be diverted so as to get rid B of an ugly angle. No person could erect anything upon the highway, whatever it was, and justify it by saying, "Why it does far more good to the public than it does harm." A telegraph company could not lay a line of posts along a public highway without the authority of Parliament. I remember a very singular case of that kind in which I was engaged. A telegraph company, while its Bill was in the House, in anticipation of its passing into law, began to lay down its wires, and C erected, with the consent of the trustees of a turnpike road, a line of telegraph posts. Another company indicted the company which had erected the posts for the nuisance, and the company was found guilty, and judgment would have been passed requiring them to take up the posts and abate the nuisance, but, fortunately for the defendant company, on the very day before the time came for moving for judgment the statute received the Royal assent, and the proceedings were author- D ised. I mention that by way of illustration of how strict the law was as to occupying by any permanent structure any part of that which had been dedicated to the public, however beneficial to the public, and whatever collateral advantages might have accrued to the public from it.

The situation of the vestry, but for s. 88 and other enactments of this Act, was that it could not have erected any urinal in the middle of a public street, but this E Act authorises the vestry to do so. There are other provisions of the same kind, some of which I have looked out. I daresay there may be others which I have overlooked, but there is one express power to erect lamp-posts anywhere in the public highway. There is another which allows the vestry to authorise the erection of hoarding for a longer or shorter time while buildings are in course of erection; and there is another (s. 108) which authorises the vestry to place what are now F called "refuges" in the middle of a road, and another to erect drinking-fountains. These things the vestry could not do without the authority of Parliament. I think this affords a key to the construction of this clause, and suggests to us what its true limitation is. Vestries are authorised to deprive the public of a portion of the public right, which they had before, to traverse every part of the public highway, in return for the accommodation which they receive, and it is confined to G that. The intention is, to authorise these things for the public accommodation, and, in return for that, the public right of passage may be infringed to the extent necessary for the affording of that accommodation. That, in my judgment, is the true limit of the Act, and the extent of the enactment, therefore, is to authorise the erection of these things upon, and to that extent to obstruct, a public thoroughfare and highway; to erect them in a place where otherwise their erection would H have been an obstruction to the public passage, and an indictable offence. It is impossible to conceive that the vestry could have put up this urinal in a private enclosure, or in a place where an individual happened to have a private right of way, so as to obstruct his right of way. There is nothing whatever to suggest that any private right could be interfered with or a private nuisance created. The vestry is authorised to take away from the public so much of the right which the I public enjoyed at common law, of demanding that every foot of a public highway should be kept open for them to pass over, in return for the accommodation which the Act enables the vestry to offer. That being so, it at once decides the question. This is in a cul de sac, where the erection necessarily occasions a private nuisance, and I am of opinion, for the reasons I have mentioned, that the authority of the vestry does not extend to authorise such an erection.

One word about the provision in s. 88 which speaks of damage. It authorises vestries "to pay any damage occasioned to any person by the erection thereof." I confess my mind fluctuated during the argument upon that part, as well as

upon the general intention of the Act, and it occurred to me at one time that the word "damage" there meant compensation; but I quite assent to what has been suggested by JAMES, L.J., that it cannot have that extensive meaning and was not intended to have it, and I am fortified upon this point by recurring to the Public Health Act, 1875, which affects to provide the same accommodation in country towns, but says nothing at all about compensation or damages. Section 39 of that Act says:

> "Any urban authority may, if they think fit, provide and maintain in proper and convenient situations urinals, water-closets, earth-closets, privies, and ashpits, and other similar conveniences for public accommodation."

There is not a word about damage. That fortifies the view I have ultimately taken in conjunction with my learned brethren, that the word "damage" there does not at all help the interpretation so as to give it a wider sense than the clause would otherwise have. It merely means any direct damage by reason of the mere erection of the thing itself. The result, therefore, is that s. 88 authorises the board to take away so much of the public right of transit as they had before in highways and in streets in return for the accommodation which the Act authorises the board to give, and which this structure presumably does give. That is the whole extent of it, and, therefore, in putting it up in this spot, though it is a public place, the vestry has infringed a private right, and so has exceeded the statutory power. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Son*; *Janson, Cobb & Pearson.*

[*Reported by* FRANK EVANS, ESQ., *Barrister-at-Law.*]

Re SIDEBOTHAM. Ex Parte SIDEBOTHAM

[COURT OF APPEAL (James, Baggallay and Bramwell, L.JJ.), May 13, 14, 1880]

[Reported 14 Ch.D. 458; 49 L.J.Bcy. 41; 42 L.T. 783; 28 W.R. 715]

Bankruptcy—Appeal—Person aggrieved—Report by Comptroller in Bankruptcy that trustee guilty of misfeasance—Refusal by court to make order against trustee—Appeal by bankrupt—Competency.

The Comptroller in Bankruptcy reported to the court that a trustee in bankruptcy had been guilty of misfeasance, and applied for an order against him to pay the amount thereby lost to the estate. The order having been refused, the bankrupt appealed.

Held: under the Bankruptcy Act, 1869, s. 71 [now s. 108 of Bankruptcy Act, 1914], "a person aggrieved" was not a person who was disappointed of a benefit which he might have received if some other order had been made, but a person against whom had been pronounced a decision which had been an injury or grievance in respect of his property or otherwise; accordingly, no one but the Comptroller was entitled to appeal; but it was open to the bankrupt to apply to the court under the Bankruptcy Act, 1869, s. 20 [s. 80 of the Act of 1914], and make out a case of his own against the trustee.

Notes. Applied: *Re Burn, Ex parte Dawson*, [1931] All E.R.Rep. 389. Referred to: *Sevenoaks Urban District Council* v. *Twynam*, [1929] 2 K.B. 440; *Re*

Baron, Debtor v. *Petitioning Creditors and Official Receiver*, [1943] 2 All E.R. 662; *R.* v. *Nottingham Quarter Sessions, Ex parte Harlow*, [1952] 2 All E.R. 78.

As to appeals in bankruptcy cases, see 2 HALSBURY'S LAWS (3rd Edn.) 580 et seq.; and for cases see 4 DIGEST (Repl.) 249–250. For the Bankruptcy Act, 1914, ss. 80, 81, 108, see 2 HALSBURY'S STATUTES (2nd Edn.) 405, 418.

Cases referred to:

(1) *Re Ellis, Ex parte Ellis* (1876), 2 Ch.D. 797; 34 L.T. 705, C.A.; 4 Digest (Repl.) 60, *518*.

(2) *Re Webb, Ex parte Walter* (1876), 2 Ch.D. 326; 45 L.J.Bcy. 105; 34 L.T. 701; 24 W.R. 834, C.A.; 5 Digest (Repl.) 1143, *9228*.

(3) *Re Woods, Ex parte Ditton* (1879), 11 Ch.D. 56; 40 L.T. 297; 27 W.R. 401, C.A.; 4 Digest (Repl.) 570, *5058*.

Also referred to in argument:

Re Ryley, Ex parte Ryley (1834), 4 Deac. & Ch. 50, Ct. of R.; 4 Digest (Repl.) 258, *2332*.

Re Austin, Ex parte Sheffield (1879), 10 Ch.D. 434; 40 L.T. 15; 27 W.R. 622; C.A.; 4 Digest (Repl.) 258, *2335*.

Re Foulds, Ex parte Learoyd (1878), 10 Ch.D. 3; 48 L.J.Bcy. 17; 39 L.T. 525; 27 W.R. 277, C.A.; 4 Digest (Repl.) 195, *1761*.

Appeal by the bankrupt, Sidebotham, from a decision of BACON, Chief Judge, dismissing his appeal from a judgment of the county court judge at Manchester, whereby the county court judge refused to make an order against the trustee in bankruptcy to refund moneys reported by the Comptroller in Bankruptcy to have been lost by the trustee's misfeasance.

Sidebotham had been made bankrupt in 1873. In March, 1879, the Comptroller in Bankruptcy made a report to the court that the trustee in the bankruptcy had been guilty of misfeasance, and inter alia had failed to comply with a requisition to credit the estate with a sum of £1,253, being the loss which, in the Comptroller's opinion, had been sustained by the estate through the misfeasance, neglect, or omission of the trustee. The bankrupt's debts amounted to £2,200, and the trustee had realised assets to the amount of £1,200. The Comptroller applied to the county court to enforce the requisition against the trustee, but the judge refused to make the order. The bankrupt appealed to the Chief Judge who, thinking that the bankrupt had no locus standi to appeal, ordered the case to stand over in order that a meeting of the creditors might be held to consider the Comptroller's report, and what steps should be taken thereon. A meeting of creditors was accordingly held on Nov. 14, 1879, at which resolutions were passed by a majority in value of creditors present approving the Comptroller's report, requiring the trustee to pay the amount found due from him, and removing the trustee and committee of inspection, but the resolutions were not passed by a majority of three-fourths in value. On the appeal coming on again before the Chief Judge, the Comptroller was represented by counsel, but did not join in the appeal, the Comptroller thinking he had no locus standi to appeal. The creditors were not represented. The Chief Judge dismissed the appeal. From this decision the bankrupt appealed.

By the Bankruptcy Act, 1869, s. 20:

> "The bankrupt, or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the court, and the court may confirm, reverse, or modify the act complained of, and make such order in the premises as it thinks just."

By s. 57 [now s. 81 of Bankruptcy Act, 1914]:

> "The comptroller shall examine the statements transmitted to him, and shall call the trustee to account for any misfeasance, neglect, or omission which may appear on such statements, and may require the trustee to make good any loss the estate of the bankrupt may have sustained by such misfeasance,

neglect, or omission. If the trustee fail to comply with such requisition of the comptroller, the comptroller may report the same to the court; and the court, after hearing the explanation, if any, of the trustee, shall make such order in the premises as it thinks just."

By s. 71:

"Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it in pursuance of this Act. Any person aggrieved by any order of a local Bankruptcy Court in respect of a matter of fact or of law made in pursuance of this Act may appeal to the Chief Judge in Bankruptcy, and it shall be lawful for such judge to alter, reverse, or confirm such order as he thinks just. Any order made by the Chief Judge in Bankruptcy, whether in respect of a matter brought before him on appeal or not, shall be subject to an appeal to the Court of Appeal in Chancery (which court, for the purposes of this Act, shall be and form a Court of Record, and shall have all the jurisdiction, powers, and authorities of the Court of Bankruptcy, to be exerciseable either originally or on appeal, and shall have all the powers and authorities of the Court of Chancery relative to the trial of questions of fact, by jury, issue, or otherwise), and also, with the leave of the Court of Appeal, to the House of Lords, but no appeal shall be entertained under this Act, except in conformity to such rules of court as may for the time being be in force in relation to such appeal."

Ambrose, *Q.C.*, and *E. Cooper Willis* for the bankrupt.
Winslow, *Q.C.*, and *S. Taylor* for the trustee.

Cur. adv. vult.

May 14, 1880. **JAMES, L.J.**—Since this case was argued yesterday we have had an opportunity of considering it, and we have arrived at the conclusion that the preliminary objection must prevail as it did before the Chief Judge. On considering the sections of the Act which provide for the audit of the accounts and the Comptroller's action, it is clear that a proceeding taken thereunder by the Comptroller does not raise anything like a litis contestatio. Neither the trustee nor the Comptroller stands in the position of a litigant. The Comptroller is to make a representation to the court, and if he does so, and the trustee does not give a satisfactory explanation, whatever the court does upon that it does ex mero motu. There is no lawsuit either in form or substance between Comptroller and trustee. The trustee of course would be entitled to appeal from the order of the court if he thought it unjust. But the judge having rightly or wrongly determined not to make any order on the Comptroller's report, there ought to be no appeal from his decision. There is nothing to form the ground of an appeal. It is said that any "person aggrieved" by the order of the court is entitled to appeal, but the words "person aggrieved" do not really mean a person who is disappointed of a benefit which he might have received if some other order had been made. A person aggrieved is a person who has suffered a grievance, a man against whom a decision has been pronounced, which has been an injury or grievance in respect of his property or otherwise.

In *Re Ellis*, *Ex parte Ellis* (1), we held that where an adjudication of bankruptcy had been made, founded upon the execution of a bill of sale as an act of bankruptcy, the holder of the bill of sale was a person aggrieved by the adjudication, and entitled to appeal from it because it affected his property. In *Re Webb*, *Ex parte Walter* (2), we held that a creditor who had not been heard before the registrar on the question of the registration of liquidation resolutions was entitled to appeal from the registrar's order, because the registration or non-registration of such resolutions affects the interests of all the creditors equally.

In the present case no one is prejudiced by the refusal of the court to act on the Comptroller's report, except in so far as he has lost any benefit which he might have obtained if an order had been made; there is nothing to embarrass the

bankrupt in any proceedings which he may wish to make against the trustee. If there has been any misfeasance on the part of the trustee the bankrupt or any creditor has a right to apply to the court under s. 20, not because the Comptroller has made a report to the court, but because he is entitled to make his own case against the trustee. And that is really the course which ought to have been taken in the present case, and then the person who made the application would have been in the position of a litigant, and would have had the right of appealing from an order which might have been made by the court. In the present case I am of opinion that the bankrupt has suffered no grievance; he has hardly suffered a damnum, and, if he has suffered a damnum, it is damnum sine injuria.

BAGGALLAY, L.J.—I entirely agree.

BRAMWELL, L.J.—I also agree. Upon an examination of s. 57 it seems to me that the report of the Comptroller is a matter between him and the trustee. There is no decision or judgment or finding of the court upon the report. I cannot see that any other person would have a right to attend the proceedings. Supposing that the Comptroller has a right to appeal from the refusal of the judge to act upon his report, and he does not think fit to do so, is there to be an appeal by the bankrupt or any of the creditors? Is the Comptroller to be satisfied, and yet is the bankrupt or any creditor to be entitled to appeal? I do not say that such a state of things is impossible, but certainly the general rule is that an appeal must be by the party who has endeavoured to maintain the contrary of that which has taken place. It is not so much that there is a disability on the part of the bankrupt to appeal as that no one but the Comptroller is entitled to appeal. I come to this conclusion the more readily because under s. 20 there can be a litis contestatio between the bankrupt and the trustee.

JAMES, L.J.—I wish to add that in *Re Woods, Ex parte Ditton* (3) the question in what case a creditor was entitled to appeal was not really argued. We stopped counsel, who appeared for the trustee, on the point, and we only heard him on the question whether the bankrupt should be allowed a further opportunity of proving. All that we decided was that a person who said he was a creditor, but who had not tendered any proof of debt could not appeal.

Appeal dismissed.

Solicitors: *Le Riche & Son*, for *Jas. Gardner*, Manchester; *Phelps, Sidgwick, & Biddle*, for *Sale, Seddon & Co.*, Manchester.

[*Reported by* C. A. COOK, ESQ., *Barrister-at-Law.*]

RIGBY *v.* CONNOL

[Chancery Division (Sir George Jessel, M.R.), February 24, 1880]

[Reported 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 28 W.R. 650]

Trade Union—Action against union—Action by member—Enforcement of contract for application of funds for members' benefit—Claim for declaration that member entitled to benefits of union—Interest of member in property of union.

The rules of a trade union provided that members' subscriptions should be applied in providing benefits for members. They also provided for the operation of a "closed shop" and one rule provided that if any member apprenticed his son where non-unionists were employed in the trade he would be liable to be fined. The plaintiff broke this rule, refused to pay the fine, and was expelled. He brought an action against the trustees and committee of the union claiming a declaration that he was entitled to participate in the benefits of the union, an injunction restraining the defendants from excluding him from such participation, and damages.

Held: but for the Trade Union Act, 1871, the union was an illegal association; that Act did not intend that contracts entered into by members of a trade union should be made legal contracts inter se enforceable by courts of justice; and, therefore, the action would be dismissed.

Per Curiam: The foundation of the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom is the right of property vested in the member of the society of which he is unjustly deprived. No court has jurisdiction to decide upon the rights of persons to associate together when the association possesses no property.

Notes. The decision in this case has not been expressly overruled; but as to how far it may still be regarded as good law, see 38 Halsbury's Laws (3rd Edn.) 378 note (r). A trade union can now certainly be sued for damages by a member who has been wrongfully expelled: see *Bonsor* v. *Musicians' Union*, [1956] A.C. 104, H.L.

Applied: *Duke* v. *Littleboy* (1880), 49 L.J.Ch. 802. Distinguished: *Wolfe* v. *Matthews* (1882), 21 Ch.D. 194. Applied: *Millican* v. *Sulivan* (1888), 4 T.L.R. 203. Considered: *Baird* v. *Wells*, [1886–90] All E.R.Rep. 666. Distinguished: *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1892), 62 L.J.Ch. 252. Applied: *Chamberlain's Wharf* v. *Smith*, [1900] 2 Ch. 605. Considered: *Taff Vale Rail. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A.C. 426; *Cullen* v. *Elvin* (1904), 90 L.T. 840. Applied: *Mullet* v. *United French Polishers' London Society* (1904), 91 L.T. 133. Explained: *Yorkshire Miners' Association* v. *Howden*, [1904–7] All E.R.Rep. 602. Explained and Distinguished: *Osborne* v. *Amalgamated Society of Railway Servants*, [1911–13] All E.R.Rep. 102. Explained: *Braithwaite* v. *Amalgamated Society of Carpenters*, [1921] 2 Ch. 399. Criticised: *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*, *General Union of Operative Carpenters and Joiners* v. *Ashley*, [1922] All E.R.Rep. 53. Followed: *Wing* v. *Burn* (1928), 44 T.L.R. 258. Referred to: *Winder* v. *Kingston-upon-Hull Incorporation for the Poor* (1888), 58 L.T. 583; *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252; *Old* v. *Robson* (1890), 59 L.J.M.C. 41; *Steele* v. *South Wales Miners' Federation*, [1907] 1 K.B. 361; *Cope* v. *Crossingham*, [1908] 2 Ch. 624; *Cassel* v. *Inglis*, [1916] 2 Ch. 211; *A.-G.* v. *Swan*, [1922] 1 K.B. 682; *National Union of General and Municipal Workers* v. *Gillian*, [1945] 2 All E.R. 593; *Abbott* v. *Sullivan*, [1952] 1 All E.R. 226; *Lee* v. *Showmen's Guild of Great Britain*, [1952] 1 All E.R. 1175; *Bonsor* v. *Musicians' Union*, [1955] 3 All E.R. 518.

As to trade combinations at common law, see 38 HALSBURY'S LAWS (3rd Edn.) 55–59; as to trade union agreements, see ibid. 371–378; and for cases see 43 DIGEST 98–101. For the Trade Union Act, 1871, ss. 2–4, see 25 HALSBURY'S STATUTES (2nd Edn.) 1245.

Cases referred to:

(1) *R.* v. *Friendly Societies Registrar* (1872), L.R. 7 Q.B. 741; 41 L.J.Q.B. 366; 27 L.T. 229; 37 J.P. 262; 43 Digest 97, *1024.*

(2) *Re St. James's Club* (1852), 2 De G.M. & G. 383; 19 L.T.O.S. 307; 16 Jur. 1075; 42 E.R. 920, L.C.; 8 Digest (Repl.) 650. *1.*

(3) *Hopkinson* v. *Marquis of Exeter* (1867), L.R. 5 Eq. 63; 37 L.J.Ch. 173; 17 L.T. 368; 32 J.P. 195; 16 W.R. 266; 8 Digest (Repl.) 659, *49.*

Action by the plaintiff against the defendants, the trustees and committee of the Journeymen Hatters' Fair Trade Union of Great Britain and Ireland, claiming a declaration that, as long as he conformed to the rules of the Union, which he offered to do, he was entitled to participate in the enjoyment of the property and effects of the union and in its rights, privileges and benefits, and that his pretended expulsion from the union was invalid, an injunction restraining the defendants from excluding him from such participation, and damages for his expulsion.

The plaintiff was a member of the Journeymen Hatters' Fair Trade Union of Great Britain and Ireland, registered under the Trade Unions Act, 1871, and had for twenty-seven years prior to his expulsion been a member, and had duly paid his subscriptions to the union. The defendants were the trustees and committee of the union. Rule 73 of the union rules provided that any journeyman binding his son in a foul shop should be fined £5, and not be entitled to any benefit until he had paid his fine and contributed twenty-six weeks according to rule. By a foul shop was meant a shop in which non-unionists, or journeymen who were not members of this particular union, were employed. Some time prior to the year 1878 the plaintiff apprenticed his son to a firm where members of another union, called the Hatters' Mutual Association, were employed. This firm having failed, the son's indentures were cancelled, and he shortly afterwards obtained employment with another firm, who also employed members of the Hatters' Mutual Association. On May 3, 1878, the secretary of the Journeymen Hatters' Fair Trade Union wrote to the plaintiff, telling him that if he did not remove his son further proceedings would at once be taken against him by the committee. The plaintiff, however, declined to remove his son, and the committee then fined him £5, under r. 73; and, upon the plaintiff refusing either to pay the fine or to remove his son, the defendants expelled the plaintiff and sent a note to his employers stating that the members of the union would refuse to work with him, and thereupon the plaintiff was discharged by his employers and had been unable to obtain employment elsewhere. The plaintiff had tendered to the defendants the contributions which as a member he was liable to pay, but the defendants refused to receive the same, as they alleged that the plaintiff was no longer a member of the union. By the statement of claim it was alleged that the plaintiff had in all other respects conformed to the rules, and that his expulsion was capricious and wrongful, and had caused serious injury to him, and that the defendants intended to continue to exclude him from the union. The statement of claim did not contain any allegation that the union possessed any property. By the rules of the union the funds arising from the contributions of members were to be appropriated as to part for purposes similar to those to which the funds of benefit societies are applied, and as to the remainder in payments to men out of work or on strike, and other similar purposes.

By the Trade Union Act, 1871:

"Section 2. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy

or otherwise. Section 3. The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. Section 4. Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely, 1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed: 2. Any agreement for the payment by any person of any subscription or penalty to a trade union: 3. Any agreement for the application of the funds of a trade union,—(a.) To provide benefits to members; or (b.) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or (c.) To discharge any fine imposed upon any person by sentence of a court of justice; or, 4. Any agreement made between one trade union and another; or, 5. Any bond to secure the performance of any of the above-mentioned agreements. But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful."

Chitty, *Q.C.*, and *Crompton* for the defendants.
Ince, *Q.C.*, and *J. T. Edwards* for the plaintiff.

SIR GEORGE JESSEL, M.R.—I am called upon now to give an opinion as to the construction of the Trade Union Act, 1871. It does not appear to me that the case referred to of *R.* v. *Friendly Societies Registrar* (1) has any bearing whatever upon the point I have now to decide. Section 4 of the Act was not then before the court, and no opinion was expressed as to its meaning. The matter, therefore, appears to me to be free from authority.

The first question that I will consider is: What is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed in any court of this country, at least in any of the Queen's courts, to decide upon the rights of persons to associate together when the association possesses no property. Many persons do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, there is not any jurisdiction in any court of justice in this country, so far as I am aware, to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other, but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, that the courts, as such, never dreamt of enforcing what I may call personal agreements; that is, agreements strictly personal in their nature, where they are agreements of hiring and service, being the common relation of master and servant, or where they are agreements for the purpose of pleasure or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy, no court of justice can interfere so long as there is no property, the rights to which are taken away from the person complaining.

If that is the foundation of the jurisdiction, the plaintiff, if he can succeed at all, must succeed on the ground that some rights of property to which he is entitled have been taken away from him. That this is the foundation of the interference of the court as regards clubs is I think quite clear. Lord St. Leonards, L.C., in *Re St. James's Club* (2), says this (2 De G.M. & G. at p. 387):

"What then were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and if the club was broken up while he was a member he might file a bill to have its assets administered in this court, and he would be entitled to share in the furniture and effects of the club."

So that he puts it that the member has an interest in the assets. In *Hopkinson* v. *Marquis of Exeter* (3), Lord Romilly, M.R., says this (L.R. 5 Eq. at pp. 66, 67):

"This is an application by the plaintiff, asking for a declaration that he is entitled to the enjoyment of the property and effects of the Conservative Club, and to participate in its rights, privileges, and benefits; and also that the defendants, the committee of the club, may be restrained by injunction from excluding him therefrom."

So that he starts with the enjoyment of property, and the subsequent cases have gone on the same ground. The present plaintiff certainly does not state in his statement of claim that there is any property at all here, and I think that that is a fatal objection to the statement of claim altogether, and I might, if I thought fit, dismiss the action simply on that ground.

That is, however, a very technical ground, and I intend to base my judgment also on the larger ground that if he had stated fully the position and rules of this trade union to which he belonged the result would have been the same for the reasons I am about to state If he had stated the rules it would have been discovered from them—that the members pay the subscriptions, and are liable also to the payment of certain fines, and that the moneys subscribed in that way are applicable to various purposes which may be divided into two, those which I will call benefit purposes, and those which I will call trade purposes. The benefit purposes are the usual provisions of benefit societies among workmen; provisions for sickness, for want of employment, for the deaths of the members and of their families, for providing funerals, for making provision for their widows and children, and so forth. Those are personal benefits to the members of the societies, and no doubt the law of benefit societies confers on the member of the benefit society rights of property in consideration of their having paid their subscriptions—the right to participate in the benefits according to the rules of the society. The other purposes which I will call trade purposes are of a totally different character. Their object is to regulate the carrying on of the trade of journeymen hatters, to provide, in substance, that the number of apprentices to the trade shall be limited; that the number of persons employed shall be limited; that they shall work in shops in which no other persons work than persons who are recognised by the Journeymen Hatters' Union; and generally to control the affairs of the trade. There are some other special and peculiar provisions and privileges as well, which it is very difficult to put under the trade rules, but they really are portions of the trade rules, and all regulate the trade and the conduct of the people in the trade. Those are the trade purposes. As regards them there is no actual property at all, they raise money but it is to be applied for the purpose of regulating the trade. It is the first portion of the rules in which the plaintiff has a direct interest—that is, he had a right to participate in benefits by virtue of having paid his subscriptions. What does he ask me to do? I will take the claim that

"It may be declared that so long as the plaintiff shall conform to the rules of the said Journeymen Hatters' Fair Trade Union of Great Britain and Ireland, which the plaintiff hereby offers to do, he is entitled to participate in the enjoyment of the property and effects of the said trade union [as I said before, they have no property and effects except the subscriptions, including the fines which are applicable in the way I have mentioned] and in its rights, privileges, and benefits, and that the pretended expulsion of the plaintiff from the said trade union shall be and is unlawful, and that the defendants may be restrained

by the order and injunction of this honourable court from excluding the plaintiff from such participation as aforesaid."

That is to say, from participating in the property. And then he also asks damages by reason of his improper expulsion.

That being the position of the plaintiff, we must consider what the Trade Union Act, 1871, provides. That Act no doubt was passed primarily with a view to preventing the treasurers and secretaries and officers of these societies from robbing them; that was the chief object. It was discovered that some of these men, abusing the confidence reposed in them, took advantage of the law which made these societies illegal by appropriating their funds and property to their own use. That no doubt was one of the principal objects, and, therefore, the Act was passed to get at these men. Another object was this: there was a great difficulty in suing and getting their property from third persons; and another object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property in a house or office; but it was not intended that the contracts entered into by members of the society should be made legal contracts inter se, so that courts of justice should interfere to enforce them. If that had been intended the result would have been this: that an agreement between a number of workmen once entered into, compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced a certain portion of the workmen to a condition of something like serfdom and slavery. Of course the legislature by interfering had no idea of doing anything of that sort. Again, men may enter into any contract they think fit. There is an exception to a contract of borrowing in this country, and I hope that exception will always remain, in whatever form that contract may be expressed.

Then the Act goes on to say this: first of all it says, in s. 2, that the purposes of a trade union shall not, by reason that they are in restraint of trade, be deemed to be unlawful so as to render the members criminally liable; and then by s. 3, for the same reason, the purposes shall not be unlawful so as to render void or voidable any agreement or trust. That applies to these rules, and does not render them unlawful for being in restraint of trade, and then there comes this provision in s. 4:

"Nothing in this Act shall enable the court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements."

Then it specifies what they are, and one of the agreements is "any agreement for the application of the funds of a trades union to provide benefits for members." I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that if I decide in favour of the plaintiff I directly enforce that agreement, because I declare him entitled to participate in their property, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation. It seems to me, that is directly enforcing that agreement; in fact, it is in substance directing and enforcing the specific performance of it, nothing more or less.

The only question remaining, therefore, is whether the negative words in this Act, "nothing in this Act shall enable," really prevent me giving him any relief whatever, because those words do not say that the court may not otherwise enforce, and all the section says is "nothing in the Act shall enable." The question, therefore, which I have to consider is what would have happened without the Act. And it appears to me that without the Act it is clearly an unlawful association; it is an association by which men are not only restrained in trade, but they are bound to do certain acts under a penalty. Take the very act for which this man was expelled. He was expelled because he bound his son apprentice in a shop where the workmen did not belong to this union, but another union. That is the allegation. And the rule is, that any journeyman binding his son in a foul shop, which, as it has been

explained to me, includes a shop of this description, where the members employed belong to another union, and not to this union, shall be fined £5, and so on, according to the rules. I see a great number of other stipulations of a character which are not only a restraint on trade, but so much in restraint of trade, limiting the subject of it, that I have no doubt that before this Act was passed these rules would have been altogether illegal, and if nothing in the Act, therefore, will assist the plaintiff, he must still be in the position of a member of an illegal association coming to a court of justice to assist him to enforce his rights under that illegal association. If that is so, it is impossible for me to say it ever was intended by the legislature, looking to the terms of the Act of Parliament, to enable the courts to interfere on behalf of the members of these societies, for the purpose of getting that relief inter se with respect to rights and liabilities contrary to the Act; and in construing the Act as I do, I believe I am not only fairly construing it, as is my habit, according to the literal meaning, but according to the manifest intention of the legislature. The action will be dismissed with costs.

Solicitors, *Spencer & Gibson*; *C. W. T. Yielding.*

[*Reported by* G. Welby King, Esq., *Barrister-at-Law.*]

CANNON *v.* VILLARS

[Chancery Division (Sir George Jessel, M.R.), March 7, 1878]

[Reported 8 Ch.D. 415; 47 L.J.Ch. 597; 38 L.T. 939; 42 J.P. 516; 26 W.R. 751]

Easement—Right of way—Grant—Construction—Nature of locus in quo over which right granted.

The defendant, the owner of a house with a gateway and paved passage under it leading to a yard and piece of vacant ground at the rear, agreed to grant to the plaintiff a 14 years' lease of the house and vacant ground. The agreement provided that the plaintiff should have power to erect on the vacant ground a workshop for the purposes of his business as a gas engineer and that he should not obstruct the entrance and gateway except by the use of the entrance for the purpose of ingress and egress. The workshop was duly erected, the only access thereto from the street, save by the house door, being through the gateway and yard. Both before and after the agreement the defendant used the gateway and yard as a standing place for his carts and vans when not in use, thus blocking up the passage so as to prevent carts and vehicles having access to the plaintiff's workshop. In an action to restrain the defendant from obstructing the entrance or yard so as to interfere with the reasonable use thereof by the plaintiff with trucks and other vehicles for the purpose of his business,

Held: prima facie the grant of a right of way was to be construed having regard to the nature of the locus in quo over which the right of way was granted and the purposes for which it was intended to be used, and, in the circumstances of the present case, the plaintiff had a general right of way, and was, therefore, entitled to an injunction in the terms sought.

Notes. Considered: *Pettey* v. *Carsons*, [1914] 1 Ch. 704; *Kain* v. *Norfolk*, [1949] 1 All E.R. 176. Applied: *Bulstrode* v. *Lambert*, [1953] 2 All E.R. 728. Referred to: *Baxendale* v. *North Lambeth Liberal and Radical Club*, [1902] 2 Ch. 427; *Milner's Safe Co.* v. *Great Northern and City Rail. Co.*, [1907] 1 Ch. 208.

As to rights of way, see 12 HALSBURY'S LAWS (3rd Edn.) 569 et seq.; and for cases see 19 DIGEST (Repl.) 108 et seq.

Action for an injunction to restrain the defendant from obstructing the plaintiff in the enjoyment of a right of way.

The defendant was the owner of a house, No. 1, Bath Street, Southwark, which had a gateway under it and a partly covered in yard and a piece of vacant ground at the rear. The way through the gateway was paved, and formed the only approach to the stables belonging to, and in the occupation of, the defendant. The defendant carried on his business of an upholsterer in adjoining premises, and was in the habit, both before and after the date of the agreement hereafter mentioned, of keeping his carts and vans, when not in use, standing in the covered part of the yard. On June 24, 1876, the defendant entered into an agreement with the plaintiff to grant him a lease of No. 1, Bath Street, with the vacant piece of ground in the rear thereof, for a term of fourteen years. The agreement provided that the lease should contain all usual and proper covenants, and particularly power for the tenant to erect on the vacant piece of ground a workshop for the purpose of his business as a gas engineer, such lease and the counterpart thereof to be prepared at the expense of the tenant; and also that the tenant was in no way to obstruct the entrance and gateway except by the use of the entrance for the purposes of ingress and egress. The plaintiff thereupon entered into possession of the premises and erected a workshop at the back of the yard, where he carried on his business. The only approach to the workshop from the street, except by the house door, was through the gateway and yard.

The plaintiff alleged that it was necessary for the purposes of his business that there should be a free and unobstructed means of ingress, egress, and regress for trucks, carts, vans, and horses through the gateway and across the yard; that in June, 1877, the defendant began, and had since continued, to block up and obstruct the gateway and yard by permitting his vans to be drawn within the same, and to remain there at all hours of the day and night, so that frequently only a passage of from two to four feet was left, and sometimes there was no room for a single person to pass; and that the plaintiff was, therefore, prevented from using the gateway and yard for the purpose of taking into or removing from his workshop any work or materials requiring for their conveyance a truck, cart, or van, and from enjoying such right of access as he was entitled to enjoy. He also alleged that he had sustained loss and injury by these acts of the defendant, and claimed an injunction to restrain the defendant from obstructing or blocking up the gateway and yard, or from interfering with the free ingress and egress of the plaintiff with or without trucks, vans, carts, and other vehicles.

The defendant contended that the agreement gave the plaintiff only a right of footway, and not a right of way for trucks, carts, or other vehicles; and also that he had been in the habit of using the covered part of the yard for his vans and carts before the agreement was entered into, and was still entitled to place them there when not in actual use.

Chitty, *Q.C.*, and *Tremlett* for the plaintiff.

Davey, *Q.C.*, and *W. C. Harvey* for the defendant.

SIR GEORGE JESSEL, M.R.—This case has been elaborately argued, but there is really no question either as to what is the law or as to what is the true construction of this agreement.

In construing all instruments one must know what the facts were when the agreement was entered into. The first fact here is, that the only access to the piece of ground let to the plaintiff for the purpose of erecting the workshop, available for any cart, wagon, or other vehicle, was through a paved gateway, which was the entrance to a long yard also paved in a manner fitted for the passing of carts, wagons, and other carriages. It was a stone-paved way, so paved as to be sufficient and proper for that passage. The only other access at all to the locus in quo was through the door of a house through which it is admitted carts, wagons, and

carriages could not pass. The ownership, both of the land, of the yard, and of the gateway, was in the landlord, the defendant, Mr. Villars. The plaintiff is a gas engineer, and wished to take the piece of land up the yard for the purpose of building a workshop on it. At the time the agreement was entered into, the landlord had some stables up the yard, to which, I am told, no coach-house was attached, and he used vans for the purpose of his business, and those vans, of course, when in use were outside in the streets of the town, and when not in use were put under the covered portion of the yard, which immediately adjoined the gateway or entrance. It was stated that these vans did not go out for a whole day, although on working days they usually went out for part of the day.

The grant of a right per se and nothing else, may be a right of footway, or a general right of way, that is, a right of way, not only for people on foot, but for people on horseback, for carts, carriages, and other vehicles. Which kind of right of way it is, is a question of construction of the grant and that construction will of course depend on the circumstances surrounding the execution of the instrument. Now, one of these circumstances, and a very material circumstance, is the nature of the locus in quo over which the right of way is granted. If one finds a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed, which is obviously the passage, not only of foot passengers, but of horsemen and carts. Again, if one finds the right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used or to be actually used for a purpose which would necessarily or reasonably require the passing of carriages, there, again, it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used.

Where one finds a road constructed so as to be fit for carriages, and of the requisite width, leading up to a dwelling-house, and there is a grant of a right of way to that dwelling-house, it would be a grant of a right of way for all reasonable purposes required for the dwelling-house, and would include, therefore, the right to the user of carriages by the occupant of the dwelling-house if he wanted to take the air, or the right to have a wagon drawn up to the door when the wagon was to bring coals for the use of the dwelling-house. If the road is not to a dwelling-house, but to a factory, or a place used for business purposes which would require heavy weights to be brought to it, or to a wool warehouse which would require bags or packages of wool to be brought to it, then a right of way would include a right to use it for reasonable purposes, sufficient for the purposes of the business, which would include the right of bringing up carts and wagons at reasonable times for the purpose of the business. This again would afford an indication in favour of the extent of the grant. If, on the other hand, one finds that the road in question, over which the grant was made, was paved only with flagstones, and that it was only four or five feet wide, over which a wagon or cart or carriage ordinarily constructed could not get, and that it was only a way used to a field or close, or something on which no erection was, there one would say that the physical circumstances showed that the right of way was a right for foot passengers only. It might include a horse under some circumstances, but could not be intended for carts or carriages. Of course, where one finds restrictive words in the grant, that is to say, where it is only for the use of foot passengers, stated in express terms, or for foot passengers and horsemen, and so forth, there is nothing to argue. I take it that is the law.

Prima facie, the grant of a right of way is to be construed having regard to the nature of the road over which it is granted, and the purposes for which it is intended to be used. Both these circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers, horsemen and cattle, which is generally called a drift way.

Applying these rules to the case before me, I have no doubt whatever as to the meaning of the agreement. What do we find in this agreement? First, we find that the plaintiff is to have power to build on the vacant piece of land. That is very material, because it is admitted on the part of the defendant that for the purpose of building in London you require the right to bring up carts or wagons with building materials, as otherwise you cannot build conveniently or reasonably. To this extent then, at all events, it is absolutely necessary that he must have the right to come with carriages or carts. How does he get it? Only under the words "ingress and egress," for I agree entirely with the argument on the part of the defendant, that where you find an express right of way granted (for there is no question about way of necessity) it is a mere question of construction as to what the extent of the right of way granted is. That being so, it is plain that he must have the right for wagons and carts, at all events, while he is building. What is to limit it? I see no words of limitation. If he has ingress and egress for wagons and carts for building, why not at all times?

The matter does not stop there. What is he to use it for? He is to use the workshop for his business as a gas engineer. That the plaintiff has a right to bring up trucks, which he constantly does, cannot be and indeed is not contested. Whether he absolutely wants to take up carts is more in contest, but has he not a right to take up coals in a cart or wagon? A gas engineer wants coal; indeed, everybody wants coal in this climate at some period of the year, whether he is a gas engineer or not, and is it to be suggested that the man who is to build a workshop and use it for the purpose of a gas engineer has not a right to bring a cartful of coals up to the shop? When looked at in that way it is obvious, without going into evidence, that it is a reasonable use of the right of way, and a use suitable for the business which is to be carried on, that he should use the right of ingress and egress for the purpose of bringing up a truck or a cart when wanted. That being so, it seems to me this is clearly to be held a general right of way.

Then there is this consideration also: it is admitted from the width and character of the way, and from the mode in which the way was paved, that it is a cartway or carriage way and nothing else, except in so far as a cartway or carriage way always includes a footway. It was constructed for that purpose and used for that purpose. As to the position of the vans, it is true the owner of the stables and vans did at one time put his vans on his own freehold, as he had a right to do before he executed the grant. Is there anything in that circumstance to show that he is to continue to put them there, obstructing the right of way granted? I cannot find it. It may be that after he granted the right of way he could not keep his vans there quite so long as before; probably he could not keep them there all day at times when the plaintiff wanted to take his trucks up. That, however, is not a permanent physical obstruction, forming a portion of the property demised at the time the right of way is granted over it; it is a temporary accident of the business carried on by the grantor, which might be discontinued at any moment. Even if it had been necessary, which it is not, that his vans should be removed altogether, I should not think that circumstance was one which interfered with the proper legal construction of the grant.

I am of opinion, therefore, that the plaintiff is right and is entitled to an injunction to restrain the defendant, his servants, agents, workmen and others, from blocking up or obstructing the entrance or yard, so as to interfere with the reasonable use by the plaintiff, his servants, workmen, and agents, with trucks, vans, carts and other vehicles, for the purpose of his business as a gas engineer. It is not intended to prevent the defendant putting his vans there as he did before, or to prevent the plaintiff from moving them as he did before.

Order accordingly.

Solicitors: *Woodbridge & Sons*; *W. Maynard.*

[*Reported by* G. W. King, Esq., *Barrister-at-Law.*]

SWIRE AND OTHERS *v.* FRANCIS AND OTHERS

[Privy Council (Sir James Colvile, Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier), November 23, 1878]

[Reported 3 App. Cas. 106; 47 L.J.P.C. 18; 37 L.T. 554]

Master and Servant—Liability of master for act of servant—Act by servant in course of employment—Fraudulent appropriation of money.

The respondents were the appellants' agents at K., a port on the river Yangtsze. The respondents' business at K. was carried on by S., their manager, who had full authority, inter alia, to sign the respondents' name per procurationem. The respondents rendered accounts to the appellants and would sometimes draw on the appellants for payment. When the agency was transferred from the respondents to another firm, S. submitted a final cash account to the appellants on the respondents' behalf representing that the respondents had advanced money on goods awaiting shipment on the appellants' behalf and at the same time he drew in the name of the respondents upon the appellants for the balance. The draft was duly honoured. In fact, S. had acted fraudulently, no such advances had been made, and S. appropriated the sum paid.

Held: it was within the scope of S.'s authority to make out the account, to insert in it the advances made on goods on the appellants' account, and to draw the bill for the purpose of covering the balance of the account, and the respondents were liable to repay to the appellants the sum fraudulently obtained by S.

Principle in *Barwick* v. *English Joint Stock Bank* (1) (1867), L.R. 2 Exch. 259; and in *Mackay* v. *Commercial Bank of New Brunswick* (2) (1874), L.R. 5 P.C. 412, applied.

Notes. Applied: *Citizens' Life Assurance Co.* v. *Brown*, [1904–7] All E.R.Rep. 925. Considered: *Lloyd* v. *Grace, Smith & Co.*, [1911–13] All E.R.Rep. 51. Referred to: *Houldsworth* v. *City of Glasgow Bank* (1880), ante p. 233; *Hambro* v. *Burnand*, [1903] 2 K.B. 399.

As to a principal's liability for agent's conversion, misappropriation, or failure to deliver goods and funds of third parties, see 1 Halsbury's Laws (3rd Edn.) 210, 221 et seq.; and for cases see 1 Digest (Repl.) 692 et seq.

Cases referred to:

(1) *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 1 Digest (Repl.) 681, *2425*.

(2) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 1 Digest (Repl.) 682, *2428*.

Also referred to in argument:

Swift v. *Jewsbury (Jewesbury) and Goddard* (1874), L.R. 9 Q.B. 301; 43 L.J.Q.B. 56; 30 L.T. 31; 22 W.R. 319, Ex. Ch.; 1 Digest (Repl.) 321, *89*.

Re United Service Co., Johnston's Claim (1871), 6 Ch. App. 212; 40 L.J.Ch. 286; 24 L.T. 115; 19 W.R. 457, L.JJ.; 10 Digest (Repl.) 1234, *8679*.

Western Bank of Scotland v. *Addie, Addie* v. *Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145; 1 Digest (Repl.) 686, *2453*.

Udell v. *Atherton* (1861), 7 H. & N. 172; 30 L.J.Ex. 337; 4 L.T. 797; 7 Jur.N.S. 777; 1 Digest (Repl.) 683, *2433*.

Mackersy v. *Ramsays, Bonars & Co.* (1843), 9 Cl. & Fin. 818; 8 E.R. 628; 1 Digest (Repl.) 452, *1036*.

Appeal from an order of the acting judge at Shanghai on a Special Case in which the questions stated for the opinion of the court were whether the respondents were liable to the appellants in the sum of taels $6{,}073^{30}$ and taels 57^{18} respectively together with interest, from April 2, 1876. The court ordered the respondents to

pay the sum of taels 57[18] to the appellants, but dismissed the remainder of the appellants claim with costs.

The appellants acted as general agents in China of the China Navigation Co., Ltd., an English joint stock company owning a line of steamers running between ports on the River Yangtsze. The respondents, who resided and carried on business at Shanghai, also carried on business under the style of Francis & Co., at Kiukiang, one of the ports on the river, and they acted as agents of the company at Kiukiang, under the direction of the appellants. The business of the respondents at Kiukiang was carried on for all practical purposes by one W. H. Shaw, who was employed and paid by the respondents, and who signed the name of Francis & Co., per procurationem. The respondents were remunerated by a commission on the freight and passage moneys earned through their agency. It was part of the business of the appellants to make advances through the respondents and other local agents, at the various ports on the river, to Chinese merchants upon goods intended for shipment, or in the course of shipment. Such advances were from time to time made through the respondents at Kiukiang, and they were made either with sycee remitted for the purpose by the appellants, or with the proceeds of drafts drawn in respect of them by the respondents on the appellants. The respondents' firm rendered accounts to the appellants monthly, or if required oftener.

On April 1, 1876, the agency of Kiukiang was transferred from the respondents to Messrs. Robert Anderson & Co., and W. H. Shaw entered the service of the latter firm, but he still continued to represent the respondents' firm, which from that date went into liquidation. Early in April, 1876, the appellants received a final cash account from the respondents' firm, dated Mar. 31, and signed "per pro R. Francis & Co., W. Hy. Shaw, agents, C. N. Co." In this account the respondents credited themselves with the following items, which make up the sum now in question:

			K.Tls.
1876.	March 26.	By advances Yock-sing on paper	2,600
		Loong-kee	3,200
		Kiukiang Taels	5,800

This was a representation that the respondents had advanced the money on parcels of paper awaiting shipment, and entitled the appellants to assume that the goods were in the company's hulk or godown, or otherwise under the control of the company. In fact no such goods ever were received, or ever were under the control of the company, or of the respondents, nor were any such sums advanced on account of the appellants. The whole entry was a fiction. At the time this account was rendered, W. H. Shaw, in the name of the respondents' firm, drew upon the appellants for the balance shown by it, and the draft was duly honoured.

On or about Mar. 31 the respondents' firm handed to Messrs. R. Anderson & Co., a letter, the material part of which was as follows:

"We also hand you copy list of advances upon cargo to go forward

Yock-sing	Tls.	2,600
Loong-kee		3,200
	Tls.	5,800

These bear interest at 12% per annum, from Mar. 26, 1876."

In June, 1876, Messrs. R. Anderson & Co. rendered to the appellants a statement of their account, dated May 31, 1876, and signed "p. Robert Anderson & Co., W. H. Shaw, Agents, C. N. Co.," in which they gave credit under date May 10, for the said advance of tls. 5,800 as repaid, and for K. tls. 87 as interest thereon. This whole entry was likewise a fiction. No advances had been made and no

repayment made. On Nov. 25, 1876, Robert Anderson & Co., informed the appellants that they had found out that the sums of K. tls. 5,800 and K. tls. 87 had never been received by them, and that they had accordingly written back the amounts in an account they were then forwarding. In consequence the appellants had to pay the sum of K. tls. 5,800 or its equivalent Shanghai taels 6,076[30]. The sums of K. tls. 2,600 and 3,200 said to have been advanced by the respondents to native merchants had in fact never been advanced, and Shaw appropriated them to his own use, out of moneys of the respondents under his control as agent and manager of respondents.

G. Bruce (*Benjamin, Q.C.*, with him) for the appellants.

The respondents did not appear.

Nov. 23, 1878. **SIR ROBERT COLLIER** stated the facts, and continued: Their Lordships are of opinion that it was within the scope of the authority of Mr. Shaw, as that expression has been defined in many cases, to make out the account which is spoken of, to insert in it the advances made on goods on account of the plaintiffs; and to draw the bill for the purpose of covering the balance of the account. All this was in the ordinary course of business. It is, of course, not to be assumed that he was authorised to commit a fraud by making the false entry of the advances of 5,800 taels, but it would have been within the scope of his authority to make an advance of that kind, and to enter it in the account when made.

The case, therefore, in their Lordships' opinion, falls within the principle which is well stated by WILLES, J., in *Barwick* v. *English Joint Stock Bank* (1), where he observes (L.R. 2 Exch. at p. 266):

> "In all these cases it may be said, as it was said here, that the master had not authorised the act. It is true he had not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

This doctrine has been also laid down by this Board in *Mackay* v. *Commercial Bank of New Brunswick* (2).

Their Lordships are disposed to infer that Shaw, instead of advancing the 5,800 taels, which he pretended had been advanced to merchants upon cargoes to be shipped, in reality appropriated so much of his master's money to his own use, and having so misappropriated it, drew a bill in the name of his master and in the course of business upon the appellants for replacing that money, and that the appellants have repaid to Mr. Francis the money of his own, which had been misappropriated by his agent. But even if it be assumed, as perhaps it was in the court below, that Shaw appropriated only the proceeds of the bill which had been drawn for the increased balance to the extent of 5,800 taels, still it appears to their Lordships that no substantial difference would arise in the legal bearings of the case. The bill was drawn by him in pursuance of a general authority which he had to draw on behalf of Francis & Co., whose sole representative he was in the business which Francis carried on at Kiukiang; it was paid by the respondents to the account of Francis & Co. for a general balance, which was improperly increased by the amount of 5,800 taels. The proceeds of this bill belonged to Francis & Co., and the case comes to this, that 5,800 taels were paid to Francis & Co. by the appellants without any consideration whatever, and that Shaw fraudulently misappropriated that money. In either aspect of the case it appears to their Lordships to fall within the authority of the case which has been referred to of *Barwick* v. *English Joint Stock Bank* (1), as well as within the authority of *Mackay* v. *Commercial Bank of New Brunswick* (2).

Their Lordships have only further to observe that it would appear to them that the court below was somewhat misled by the assumption that the law concerning the relations of bailor and bailee applies to this case. If the question had arisen

with respect to an actual transmission of bullion or coin which had been stolen by Shaw, the observations of the court would have been applicable, but it appears to their Lordships that this case is governed by other considerations, to which they have referred.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment of the court below be reversed, and that judgment be entered for the appellants for 6.037½ taels (Shanghai currency) in addition to the sum for which it is at present entered, together with interest to be fixed and calculated, in the manner provided by the Special Case, and that the record be remanded to the Supreme Court at Shanghai for this purpose. The appellants will have the costs of the appeal.

Solicitors: *Flux & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

FISHER *v.* DREWETT

[Court of Appeal (Bramwell, Baggallay and Thesiger, L.JJ.), June 24, 1878]

[Reported 48 L.J.Q.B. 32; 39 L.T. 253; 27 W.R. 12]

Agent—Commission—Commission payable "in the event of your procuring me [a loan of] £2,000 or such other as I shall accept"—Procurement by agent of person ready to pay sum required—Acceptance by principal—Default of principal regarding security—Agent's right to commission.

The defendant, who wished to obtain a loan on the security of certain of his property, entered into a contract with the plaintiff, a mortgage broker, in the following terms: "In the event of your procuring me the sum of £2,000 or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff procured a building society which offered to advance £1,625 to the defendant, which the defendant accepted. Subsequently, however, the defendant refused on the grounds of expense, to furnish a further abstract of title to the building society and the loan was never made. The plaintiff claimed that he was entitled to the commission.

Held: the plaintiff, having procured for the defendant a good contract for a loan, was entitled to the commission.

Per Bramwell, L.J.: . . . the tendency of decisions has been to hold that persons who for commission effect bargains are entitled to receive it when they have done all that they bargained to do, without reference to the agreement between the other parties.

Notes. Distinguished: *Peacock* v. *Freeman* (1888), 4 T.L.R. 541; *Re Sovereign Life Assurance Co., Salter's Claim* (1891), 7 T.L.R. 602. Followed: *Fuller* v. *Eames* (1892), 8 T.L.R. 278. Distinguished: *Beal* v. *Bond* (1901), 84 L.T. 313. Considered: *Price, Davies & Co.* v. *Smith* (1929), 141 L.T. 490; *Trollope (George) & Sons* v. *Martyn Brothers* (1934), 50 T.L.R. 544; *Trollope and Sons* v. *Caplan*, [1936] 2 All E.R. 842. Referred to: *Kahn* v. *Aircraft Industries Corpn., Ltd.*, [1937] 1 All E.R. 757.

As to an agent's right to remuneration where the transaction is not completed due to the act or omission of the principal, see 1 Halsbury's Laws (3rd Edn.) 201–202; and for cases see 1 Digest (Repl.) 585 et seq.

Case referred to:

(1) *Green* v. *Lucas* (1875), 33 L.T. 584; 40 J.P. 390, C.A.; 1 Digest (Repl.) 590, *1899.*

Also referred to in argument:

Prickett v. *Badger* (1856), 1 C.B.N.S. 296; 26 L.J.C.P. 33; 3 Jur.N.S. 66; 5 W.R. 117; 140 E.R. 123; 1 Digest (Repl.) 585, *1872*.

Simpson v. *Lamb* (1856), 17 C.B. 603; 25 L.J.C.P. 113; 26 L.T.O.S. 203; 2 Jur.N.S. 91; 4 W.R. 323; 139 E.R. 1213; 1 Digest (Repl.) 564, *1801*.

Read v. *Rann* (1830), 10 B. & C. 438; L. & Welsb. 121; 8 L.J.O.S.K.B. 144; 104 E.R. 513; 1 Digest (Repl.) 602, *1948*.

Moffatt v. *Laurie* (1855), 15 C.B. 583; 24 L.J.C.P. 56; 24 L.T.O.S. 259; 1 Jur.N.S. 283; 3 W.R. 252; 139 E.R. 553; 1 Digest (Repl.) 599, *1931*.

Bull v. *Price* (1831), 7 Bing. 237; 5 Moo. & P. 2; 9 L.J.O.S.C.P. 78; 131 E.R. 91; 1 Digest (Repl.) 577, *1838*.

Appeal by the defendant from an order of the Exchequer Division on a rule nisi obtained by the defendant for the new trial of an action brought in Greenwich County Court by the plaintiff for commission due under a contract.

In September, 1877, the plaintiff, a mortgage broker, entered into an agreement with the defendant who wished to raise a loan on the security of some of his property. The terms of the agreement were contained in the following letter written by the defendant:

"Burnt Ash Hill, Sept. 21, 1876.

"Dear Sir,—In the event of your procuring me the sum of £2,000, or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received.—Yours truly, E. DREWETT.

Mr. Fisher, 52, Queen Victoria Street."

This agreement was duly stamped. The plaintiff went to various solicitors' offices attempting to procure the loan, and ultimately entered into an arrangement with the Temperance Building Society, who agreed to advance such a sum of money on the defendant's property as their surveyor should certify. The survey was made, and the sum certified was £1,625. The society thereupon offered to advance that sum to the defendant, subject to his title to the property being satisfactory, and he wrote to their secretary accepting the society's offer. Subsequently, when the title was being investigated by the society's solicitors, the defendant refused, on the ground of expense, to furnish a further abstract of title, and consequently the loan was never made.

In the county court the judge entered judgment for the defendant, but the plaintiff obtained a new trial and on the second hearing judgment was given for the plaintiff. The defendant obtained a rule nisi for a new trial, which was discharged, and the defendant appealed.

H. F. Dickens for the defendant.

Smalman Smith for the plaintiff.

BRAMWELL, L.J.—This case has been well argued by counsel for the defendant, but we must nevertheless give judgment against him. It is possible that the parties to this agreement may have had any one of several intentions. One is, that the defendant should pay commission to the plaintiff on such moneys only as he actually received, having the right, if he chose to exercise it capriciously, to refuse to receive; another is, that the plaintiff should not be paid his commission if the defendant refused to receive for good cause; a third, that defendant was to lose his commission if the plaintiff did not receive the money through the fault of the lenders; and a fourth, that the word "receive" is equivalent to the word "accept" which also appears in this document.

I think the whole thing really means this: "If you get for me a good contract for the loan of £2,000, I agree to pay you commission on that sum." There is the other possible meaning that the word "receive" may have been put into the contract in order to bind the defendant to pay commission only on sums actually received; but, if that is the meaning, I do not think it would help the defendant

here. My impression is that the tendency of decisions has been to hold that persons who for commission effect bargains are entitled to receive it when they have done all that they bargained to do, without reference to the agreement between the other parties. That seems to be the tendency of modern decisions, and I think it is reasonable, because such a person has done all that he contracted to do, and ought not to be dependent on what the other parties do outside their contract. The principle is: "There is nothing due to you until you have done all your work, but if the contract is not fulfilled because of the default of your principal, then your claim against him for commission is a good one." Supposing, however, that it would protect the defendants if he could show that it was through the fault of the lender that he did not receive the money, I do not think there is any evidence to show it. He did not receive the money because he did not choose to furnish an abstract of title. In my opinion, "on any money received" means on any sum of money in respect of which you shall have procured me a good contract to receive.

BAGGALLAY, L.J.—I am of the same opinion. The question turns entirely on the construction of the agreement, and I can hardly suppose the parties intended the commission to be payable only on the money actually received into the defendant's hands. I think the word "receive" is equivalent to "accept," and here the defendant offered to accept the loan.

THESIGER, L.J.—I am of the same opinion. The contract is divided into two parts: First, the consideration which the agent is asked to perform; and, secondly, the promise of the principal. The consideration is in these terms: "In the event of your procuring me the sum of £2,000 or such other as I shall accept." That is all the agent binds himself to do, and as soon as the Temperance Building Society agreed to advance the loan and the defendant accepted the offer, the whole consideration in point of fact was performed. I think that the subsequent part of the agreement, namely, the promise, "I agree to pay you a commission of 2½ per cent. on any money received," means no more than this, "If you will perform the consideration I will pay you commission, but as the sum you procure may be more or less than £2,000, I will only pay you pro rata." There was a point in the negotiations at which the Temperance Society would have advanced the money, and the position is the same as in *Green* v. *Lucas* (1). It was the defendant's fault that the loan was not completed, and he would have been liable to an action for not carrying out his agreement. I am of opinion that plaintiff is entitled to the commission.

Appeal dismissed.

Solicitors: *J. Donague*; *Scard & Sons.*

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

TYERS AND OTHERS *v.* ROSEDALE AND FERRYHILL IRON CO.

[COURT OF EXCHEQUER CHAMBER (Cockburn, C.J., Blackburn, Mellor, Lush, Brett and Lindley, JJ.), May 14, 1875]

[Reported L.R. 10 Exch. 195; 44 L.J.Ex. 130; 33 L.T. 56; 23 W.R. 871]

Sale of Goods—Delivery—Delivery by instalments—"Delivery in monthly quantities over 1871*"—Postponement by agreement from time to time of delivery of monthly instalments—Effect of postponement on contract.*

In October, 1870, the defendants agreed to sell to the plaintiffs 2,000 tons of iron, "delivery in monthly quantities over 1871, or sooner if required." No deliveries were required in 1870. In 1871 the plaintiffs proposed to the defendants to postpone from time to time the delivery of the monthly instalments and the defendants acquiesced in these proposals. By reason of the postponement of deliveries by December, 1871, 1,280 tons remained undelivered. In December, 1871, the plaintiffs wrote requesting the defendants to deliver all the iron remaining undelivered. The defendants delivered one further monthly quantity only and refused to make any further deliveries.

Held: the postponement of delivery had the effect of turning over the period of delivery to the year 1872, and, although the plaintiffs were not entitled to call for the delivery of the outstanding quantity other than by monthly quantities, nevertheless the defendants' refusal to make any further deliveries was a breach of contract for which they were liable in damages.

Notes. Considered: *Hartley* v. *Hymans*, [1920] All E.R.Rep. 328. Applied: *Sheik Mohammad Habib Ullah* v. *Bird* (1921), 37 T.L.R. 405; Considered: *Besseler, Waechter Glover & Co.* v. *South Derwent Coal Co.*, [1937] 4 All E.R. 552. Referred to: *Hickman* v. *Haynes* (1875), L.R. 10 C.P. 598.

As to instalment deliveries in general, see 34 HALSBURY'S LAWS (3rd Edn.) 101 et seq.; and for cases see 39 DIGEST 567.

Case referred to:

(1) *Roper* v. *Johnson* (1873), L.R. 8 C.P. 167; 42 L.J.C.P. 65; 28 L.T. 296; 21 W.R. 384; 39 Digest 676, *2618*.

Also referred to in argument:

Ogle v. *Earl Vane* (1867), L.R. 2 Q.B. 275; 7 B. & S. 855; 36 L.J. 157; affirmed (1868), L.R. 3 Q.B. 272, 9 B. & S. 182; 37 L.J.Q.B. 77; 16 W.R. 463, Ex. Ch.; 39 Digest 676, *2624*.

Brown v. *Muller* (1872), L.R. 7 Exch. 319; 41 L.J.Ex. 214; 27 L.T. 272; 21 W.R. 18; 39 Digest 676, *2620*.

Appeal from a decision of the Court of Exchequer (KELLY, C.B., and PIGOTT, B., MARTIN, B., dissentiente) making absolute a rule to enter a verdict for the defendants in an action brought by the plaintiffs for damages for breach of contract.

The action was tried before BLACKBURN, J., without a jury and he gave judgment for the plaintiffs for £649 assessing damages on the day of the breach of contract in 1871. A rule nisi was subsequently granted to the defendants to enter a verdict for them and the majority of the Court of Exchequer made this rule absolute.

L. Cave (with him *D. Seymour, Q.C.*) for the plaintiffs.

Herschell, Q.C. (with him *Waddy, Q.C.*, and *W. G. Harrison*), for the defendants.

COCKBURN, C.J.—I am of opinion that the judgment of the majority of the Court of Exchequer in this case must be reversed. The true view of the question was, I think, that taken by MARTIN, B., who dissented from the Chief Baron and PIGOTT, B., on the occasion.

The original contract between the parties was for the purchase by the plaintiffs of some 2,000 tons of iron, to be delivered in monthly instalments during the year 1871. It was not, however, convenient to the purchasers, the plaintiffs, to take the iron in the instalments originally contemplated by the parties, and accordingly they proposed to the sellers, the defendants, to postpone from time to time the delivery of the monthly instalments. It would have been perfectly competent to the defendants, on that proposal being made to them, to say to the plaintiffs, "We do not acquiesce in that proposal of yours. You are bound to take the iron in certain quantities month by month, and you must so take it, or consider the contract broken and at an end." But, instead of saying so, the defendants, as I read the correspondence, acquiesced in the postponement of the periods of delivery, and did not elect to treat the contract as at an end. The iron was to be delivered in the course of the year 1871, but by reason of this postponement of the several monthly deliveries, there was, at the end of the year in December, a very considerable quantity of iron in arrear and undelivered.

The plaintiffs then called on the defendants to deliver at once the whole of the iron so remaining undelivered. This was a demand which, I think, the plaintiffs were not entitled to make. The monthly delivery of instalments of iron had been postponed, and that, I think, had the effect of turning over the period of delivery to the year 1872, and the defendants could not, I think, be called upon to deliver the whole remaining quantity of some 1,289 tons of iron at once, at the end of the year 1871, but only to deliver it in such monthly quantities as was originally provided for by the contract. Yet, nevertheless, the effect of the plaintiffs making an unreasonable demand, and one which they were not entitled to make, was not to annul the contract; and the defendants were only bound to do that which they were able reasonably to perform. They might and should have said: "We will not deliver the whole that remains undelivered in one mass, nor otherwise than according to the terms of our original contract." They did not, however, say this; but, on the contrary, they said: "We will not deliver to you any more iron at all." In that I think they were clearly wrong, and consequently I think that they committed a breach of the contract for which they are liable in damages.

The question with regard to the measure of damages might have been a difficult one, raising matters of nice calculation as to the differences between the contract price and the market prices during the several months of 1872. Fortunately, however, that question does not arise here, because the assessment of damages at the market price of December is advantageous to the defendants. The true effect of the correspondence was, I think, simply to postpone the period of the delivery of the monthly instalments, leaving the contract still open. The judgment of the court below, therefore, must be reversed.

BLACKBURN, J.—I am of the same opinion. It is unnecessary for me to say more than that I agree entirely with the judgment of MARTIN, B., in the court below, and that I think the judgment of the majority of that court should be reversed, and for the reasons stated by that learned baron. I would, however, draw attention to two questions which do not arise, and which, therefore, need not be decided here. The first is, whether, when the postponement of the monthly delivery took place at the request of the plaintiffs, the effect was to make the undelivered residue of the iron deliverable by monthly instalments during the year 1872, or whether the plaintiffs had a right to require the delivery of the whole of it in December. It is not, I think, necessary to decide the point, inasmuch as in December the defendants gave distinct notice to the plaintiffs that they would not deliver any more, saying, in effect, "we will deliver you only a certain quantity and no more." Had they said, "We want a reasonable time," or "monthly periods," I should have been inclined to construe the agreement in accordance with that request. But they did not ask for time, but refused to deliver anything except one more monthly quantity. Then comes the other question—What, when the breach of contract was complete in December, was the measure of damages?

Was it such as would enable the plaintiffs to go into the market and buy iron at the then market price, or should the damages be computed by the different monthly prices, to be ascertained as a matter of fact, or calculated at the trial before the month arrived. This, however, is again a question not arising here, and one on which I shall not, therefore, express an opinion, as it seems that the assessing the damages on the December market price was more favourable to the defendants than if it had been calculated afterwards, and the plaintiffs do not seek for more.

MELLOR, J.—I also agree that the judgment of the majority of the court below should be reversed, and I adopt entirely the opinion and views of MARTIN, B., as expressed by him in his judgment. I say nothing with regard to the other points in the case.

LUSH, J.—I concur, and for the reasons given by my Lord and my brother BLACKBURN.

BRETT, J.—I agree entirely with the judgment of the Lord Chief Justice, but I desire to reserve my opinion as to what should be the measure of damages in this case, and whether *Roper* v. *Johnson* (1) is decisive of the point.

LINDLEY, J.—I agree with the other members of the court.

Appeal allowed.

Solicitors: *Torr, Janeway, Tagart & Co.*, for *Middleton & Sons*, Leeds; *John Scott, for Hodge & Harle*, Newcastle-upon-Tyne.

[*Reported by* H. LEIGH, ESQ., *Barrister-at-Law.*]

KOPITOFF *v.* WILSON

[QUEEN'S BENCH DIVISION (Blackburn, Quain and Field, JJ.), December 14, 1875, January 11, February 23, 1876]

[Reported 1 Q.B.D. 377; 45 L.J.Q.B. 436; 34 L.T. 677; 24 W.R. 706; 3 Asp.M.L.C. 163]

Shipping—Seaworthiness—Implied warranty—Stowage.

Where there is no agreement to the contrary a shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good and in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage. This obligation extends also to the shipowner making his ship seaworthy as regards stowage.

Notes. By the Carriage of Goods by Sea Act, 1924 (23 HALSBURY'S STATUTES (2nd Edn.) 884), an absolute warranty of seaworthiness is not to be implied in any contract for the carriage of goods by sea to which the rules in the schedule to that Act apply.

Considered: *Cohn* v. *Davidson* (1877), 2 Q.B.D. 455; *Steel* v. *Stateline Steamship Co.* (1877), 3 App. Cas. 72; *The Glenfruin*, [1881–5] All E.R.Rep. 461; *The Europa*, [1904–7] All E.R.Rep. 394; *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co., Ltd.*, [1924] All E.R.Rep. 135. Applied: *Re Fireman's Fund Insurance* v. *Western Australian Insurance and Atlantic Insurance*, [1927] All E.R.Rep. 514. Considered: *Smith, Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1939] 2 All E.R. 855. Referred to: *The Northumbria* (1906), 95 L.T. 618;

Ingram and Royle v. *Services Maritimes du Tréport* (1913), 109 L.T. 733; *The Thorsa*, [1916] P. 257; *The Christel Vinnen*, [1924] P. 61; *Reed* v. *Page and East*, [1927] 1 K.B. 743; *Elof Hannson Agency, Ltd.* v. *Victoria Motor Haulage Co.* (1938), 54 T.L.R. 666; *Smith, Hogg & Co.* v. *Black Sea and Baltic General Insurance Co.*, [1940] 3 All E.R. 405.

As to the seaworthiness of the ship during the voyage, see 35 HALSBURY'S LAWS (3rd Edn.) 401 et seq.; and for cases see 41 DIGEST 472 et seq.

Cases referred to:

(1) *Lyon* v. *Mells* (1804), 5 East, 428; 1 Smith, K.B. 478; 102 E.R. 1134; 41 Digest 472, *3039*.

(2) *Readhead* v. *Midland Rail. Co.* (1867), L.R. 2 Q.B. 412; 36 L.J.Q.B. 181; 15 W.R. 831; sub nom. *Redhead* v. *Midland Rail. Co.*, 8 B. & S. 371; 16 L.T. 485; on appeal sub nom. *Redhead* v. *Midland Rail. Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737; sub nom. *Redhead* v. *Midland Rail. Co.*, 9 B. & S. 519; 20 L.T. 628; 30 Digest (Repl.) 237, *857*.

(3) *Havelock* v. *Geddes* (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, *1834*.

(4) *Stanton* v. *Richardson*, *Richardson* v. *Stanton* (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; 21 W.R. 71; 1 Asp.M.L.C. 449; affirmed (1874) L.R. 9 C.P. 390; 30 L.T. 643; 22 W.R. 223, Ex. Ch.; (1875), 45 L.J.Q.B. 78; 33 L.T. 193; 24 W.R. 324; 3 Asp.M.L.C. 23, H.L.; 41 Digest 303, *1651*.

(5) *Gibson* v. *Small* (1853), 4 H.L.Cas. 353; 1 C.L.R. 363; 21 L.T.O.S. 240; 17 Jur. 1131; 10 E.R. 499, H.L.; 29 Digest (Repl.) 219, *1615*.

(6) *Liver Alkali Co.* v. *Johnson* (1872), L.R. 7 Ex. 267; 41 L.J.Ex. 110; 26 L.T. 805; on appeal (1874), L.R. 9 Exch. 338; 43 L.J.Ex. 216; 31 L.T. 95; 2 Asp.M.L.C. 332, Ex. Ch.; 8 Digest (Repl.) 10, *38*.

(7) *Nugent* v. *Smith* (1875), 1 C.P.D. 19; 45 L.J.Q.B. 19; 33 L.T. 731; 24 W.R. 237; 3 Asp.M.L.C. 87; reversed (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697; 34 L.T. 827; 41 J.P. 4; 25 W.R. 117; 3 Asp.M.L.C. 198, C.A.; 8 Digest (Repl.) 18, *95*.

(8) *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest (Repl.) 208, *1460*.

Also referred to in argument:

Worms v. *Storey* (1855), 11 Exch. 427; 25 L.J.Ex. 1; 26 L.T.O.S. 106; 4 W.R. 115; 156 E.R. 898; 41 Digest 493, *3222*.

Davis v. *Garrett* (1830), 6 Bing. 716; L. & Welsb. 276; 4 Moo. & P. 540; 8 L.J.O.S.C.P. 253; 130 E.R. 1456; 41 Digest 488, *3188*.

Thompson v. *Hopper* (1856), 6 E. & B. 172; 25 L.J.Q.B. 240; 26 L.T.O.S. 308; 2 Jur.N.S. 608; 4 W.R. 360; 119 E.R. 828; 29 Digest (Repl.) 225, *1675*.

Lloyd v. *General Iron Screw Collier Co.* (1864), 3 H. & C. 284; 4 New Rep. 298; 33 L.J.Ex. 269; 10 L.T. 586; 10 Jur.N.S. 661; 12 W.R. 882; 2 Mar.L.C. 32; 41 Digest 421, *2646*.

Dixon v. *Sadler* (1839), 5 M. & W. 405; 9 L.J.Ex. 48; 151 E.R. 172; affirmed sub nom. *Sadler* v. *Dixon* (1841), 8 M. & W. 895; 11 L.J.Ex. 435, Ex. Ch.; 29 Digest (Repl.) 221, *1638*.

The Freedom (1871), L.R. 3 P.C. 594; 8 Moo.P.C.C.N.S. 29; 24 L.T. 452; 1 Asp.M.L.C. 28; 17 E.R. 224, P.C.; 41 Digest 416, *2600*.

Notara v. *Henderson* (1872), L.R. 7 Q.B. 225; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Exch.; 41 Digest 292, *1519*.

Laurie v. *Douglas* (1846), 15 M. & W. 746; 4 L.T. 588; 41 Digest 421, *2642*.

Phillips v. *Clark* (1857), 2 C.B.N.S. 158; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, *2664*.

Montoya v. *London Assurance Co.* (1851), 6 Exch. 451; 20 L.J.Ex. 254; 17 L.T.O.S. 82; 155 E.R. 620; 41 Digest 238, *1793*.

Redman v. *Wilson*, *Redman* v. *Hay* (1845), 14 M. & W. 476; 14 L.J.Ex. 333; 9 Jur. 714; 153 E.R. 562; 41 Digest 240, *1803*.

Appeal from a decision of BLACKBURN, J., and a jury in an action brought by the plaintiff to recover damages for the loss of armour plates and bolts carried by the defendants on their ship.

The plaintiff as agent for the Russian government entered into a contract with the defendants who were shipowners at Hull, under the terms of which the defendants undertook to ship to Cronstadt from time to time large quantities of armour plates at agreed rates of freight varying according to the season of the year. The armour plates weighed between fifteen to eighteen tons each and were delivered to the defendants for shipment in the defendants steamship *Walamo* under a bill of lading containing many exceptions. The defendants stowed the ship by placing the plates on the top of a quantity of railway iron and then secured them by wooden shores. The plaintiff contended that this method of stowing the plates made her unseaworthy. At sea the ship encountered bad weather and she rolled heavily and after the ship had been out at sea for some hours one of the armour plates broke loose and went through the side of the ship which in consequence went down in deep water and was a total loss with all her cargo. The plaintiff contended that the breaking loose of the plate was because of improper stowage and the defendant contended that it was a direct consequence of the roughness of the sea which was a peril excepted in the bill of lading.

BLACKBURN, J., at the trial directed the jury as a matter of law that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bona fide endeavour to make her fit; and he left the following questions to the jury: (i) was the vessel at the time of her sailing in a state, as regards the stowing and securing of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt? (ii) if she was not in a fit state, was the loss that happened caused by that unfitness? The jury answered no to the first question and yes to the second and the judge directed a verdict to be entered for the plaintiff for the agreed amount of £6,550. Subsequently the defendants obtained a rule to show cause why a nonsuit should not be entered pursuant to leave reserved during the trial, or why there should not be a new trial on the ground that the learned judge had misdirected the jury in directing them there was an absolute obligation on the shipowner to make his ship seaworthy as regards the stowage, and that he would be liable if, in consequence of the non-performance of that obligation, the goods should be lost.

Cohen, Q.C. (with him *Butt, Q.C.*, and *Mathew*), for the plaintiff.
Thesiger, Q.C. (with him *Sir H. James* and *Webster*), for the defendants.

Cur. adv. vult.

Feb. 23, 1876. **FIELD, J.,** read the following judgment of the court. This is an action in which the plaintiff seeks to recover damages for the loss of a large number of iron armour plates and bolts which were lost on board the defendants' ship *Walamo*, on a voyage from Hull to Cronstadt. The cause was tried before BLACKBURN, J., at Guildhall at the Sittings after Hilary Term, 1875. The declaration contained several counts, and among them was a count alleging that the defendants had warranted that the ship should be seaworthy and reasonably fit to carry the goods in question, and alleged that by reason of a breach of such warranty the goods were lost. There was also a count upon the bill of lading, alleging a promise to deliver, with the exception of certain perils, &c., and a loss not within any of the exceptions. The defendants denied the warranty, and also alleged that the cause of loss was within some of the exceptions.

On the trial it appeared that the plaintiff, who was an agent of the Russian government, had entered into a contract with the defendants, who were shipowners at Hull, by which the defendants undertook to ship for Cronstadt from time to time large quantities of armour plates, which the plaintiff was having manu-

factured in this country, at agreed rates of freight, varying according to the season of the year. The other terms of the contract are not material to the points raised before us. These armour plates, of great weight, from eighteen to fifteen tons weight each, were delivered by the plaintiff to the defendants for shipment, and were by them shipped on Sept. 15 in the defendants' own steamship *Walamo*, under a bill of lading containing many exceptions. The defendants themselves, by their own servants, stowed the ship. The armour plates were by them placed on the top of a quantity of railway iron, and then secured there by wooden shores. There was a conflict of testimony whether this was or was not a proper mode of stowing them. It was not disputed that the steamship was in herself a good ship, but it was contended, on behalf of the plaintiff, that the mode of stowing these plates adopted by the defendants made her unseaworthy on this voyage.

On getting out to sea she encountered bad weather, the wind being high and the sea rough, and she rolled heavily. There was conflicting evidence as to the degree of this bad weather, and the cause of this rolling; the plaintiff contending that the wind and sea were no more than at that season was to be expected, and that the rolling was owing to the improper stowage of the vessel; the defendants contending that there was an unusual storm, which would have made any ship, however well stowed, roll. After the ship had been out at sea for some hours one of the armour plates broke loose, and went through the side of the ship, which in consequence went down in deep water, and was totally lost, with all her cargo on board. The plaintiff's contention was, that the breaking loose of the plate was because it was improperly stowed and secured; the defendants' that it was a direct consequence of the roughness of the sea, which was a peril excepted in the bill of lading. These contentions raised questions of fact for the jury. Leave was reserved at the close of the case to enter a nonsuit, if the exceptions in the bill of lading protected the defendants under the circumstances. The case thus was left to the jury.

The learned judge told the jury as a matter of law, and not as a question for them, that a shipowner warrants the fitness of his ship when she sails, and not merely that he will honestly and bona fide endeavour to make her fit; and after explaining to the jury what reasonably fit meant with reference to a North Sea voyage, and the other facts in the case, left the following questions to the jury: First, was the vessel at the time of her sailing in a state, as regards the stowing and securing of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt? secondly, if she was not in a fit state, was the loss that happened caused by that unfitness? These questions were put in writing, and handed to the jury, and on that paper the judge put in writing what he had previously stated in his summing-up, that they were

> "to understand (in answering this second question) that though the disaster would not have happened had there not been considerable sea, yet it is to be considered as caused by the unfitness, if they (the jury) think that the plates would not have got adrift when they did, had the stowage been such as to put the ship in a fit state."

The jury answered the first question in the negative, and the second in the affirmative. No complaint has been made as to these findings not being justified by the evidence. Upon these findings the learned judge directed a verdict to be entered for the plaintiff for the agreed amount, £6,550; and in Easter Term, 1875, the defendants obtained a rule to show cause why a nonsuit should not be entered pursuant to the leave reserved, or why there should not be a new trial on the ground that the learned judge misdirected the jury, in directing them there was an absolute obligation on the shipowner to make his ship seaworthy as regards the stowage, and that he would be liable if, in consequence of the non-performance of that obligation, the goods should be lost. That part of the rule which prayed for a nonsuit, although not expressly abandoned for any future purpose, was not

attempted to be supported before us; and with regard to the remaining portion of the rule, we took time to consider our judgment; not because we entertained any doubt as to the correctness of the direction of the learned judge, but because the case involved considerations which rendered it desirable that our reasons should be fully and explicitly stated.

We think that the rule must be discharged. We hold, then, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage. For this proposition we have the high authority of LORD TENTERDEN, who lays it down in the first edition of his book, published in 1802, and for the correctness of which he vouches EMERIGON and other eminent writers or commentators upon the subject: ABBOT ON SHIPPING (1st Edn.), p. 146. The accuracy of the proposition thus stated in 1802 has not, that we are aware of, ever been brought into question in any of the subsequent editions, or of the numerous textbooks since published on the subject.

In further support of the implication of such a warranty, we have the authority of LORD ELLENBOROUGH, who, in *Lyon* v. *Mells* (1), lays it down that it is a part of the contract on the part of a carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers it; and although it is true, as was pointed out by counsel for the defendants in his argument before us, that the warranty thus expressed by LORD ELLENBOROUGH is expressed in terms limiting it to a contract for the carriage of goods by a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, the measure of liability thus laid down by him has been considered generally applicable to any contract for carriage per BLACKBURN, J., in *Readhead* v. *Midland Rail. Co.* (2), and in *Havelock* v. *Geddes* (3), *Stanton* v. *Richardson* (4); was actually applied to contracts for carriage by charterparty. In further support of this proposition, the existence of such a warranty as a general implication arising in all contracts of shipment was universally recognised or assumed in the opinions expressed in *Gibson* v. *Small* (5). We further find that the same doctrine obtains in the American courts (1 PARSONS ON SHIPPING, 171). It appears to us, also, that there are good grounds in reason and common sense for holding such to be the law. It is well and firmly established that in every marine voyage policy the assured comes under an implied warranty of seaworthiness to his assurer. If we were to hold that he has not the benefit of a similar implication in the contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss which it is the object and purpose to give him by the two contracts taken together.

Holding as we now do, the result is that the merchant by his contract with the shipowner having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is by his contract of assurance protected against the damage arising from such perils acting upon a seaworthy ship. The main argument addressed to us on the part of the defendants, however, was that it was not intended, by the propositions and authorities which we have above referred to, to assert the existence of an independent implication of warranty applicable to every contract of carriage by water, but that the doctrine thus asserted was a subordinate part of the more extensive liability attaching to carriers, and that inasmuch as the latter were bound to carry safely and securely, the act of God and the Queen's enemies only excepted, it was by virtue of that obligation, and not by any specific contract to be implied, that the duty arose. It was, therefore, said that the defendants not being common carriers, there was no room for any such implication in the present case. But we have already pointed out that, although it is strictly true that

LORD ELLENBOROUGH'S proposition in *Lyon* v. *Mells* (1) is in its terms confined to carriers or persons holding themselves forth as ready to carry, the principle itself has always received a wider application; and in *Liver Alkali Co.* v. *Johnson* (6) and *Nugent* v. *Smith* (7), in the observations of the courts the existence of the warranty in question on the part of a shipowner is asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a public carrier.

Counsel for the defendants, however, in his able argument, mainly and very properly relied on the judgment in the Exchequer Chamber in *Readhead* v. *Midland Rail. Co.* (2). The point decided in that case was, that the obligation of the carrier of passengers by land did not extend so far as to warrant the roadworthiness of the carriage supplied by him against latent defects, and did not, therefore, directly decide anything as to the obligation of a carrier by sea of goods to warrant the seaworthiness of his ship even against latent defects; but we think counsel for the defendants was justified in saying that the reasoning of the judgment threw doubt upon that position. The more recent case of *Francis* v. *Cockerill* (8) in the Exchequer Chamber, we think, establishes that the obligation or warranty even on land extends to everything except latent defects which could not by any reasonable diligence or skill be discovered. In the case now before us there was no necessity to consider the law as to latent defects, or to direct the jury on that point, for nothing of the sort was suggested. We think that it is not a misdirection entitling the party against whom the verdict passes to a new trial, if the judges make an inaccurate statement of the law on some point not involved in the issue, and on which the jury required no direction, and consequently we need not express any opinion on this point. We are not, however, to be understood as intimating that the ruling in this respect was wrong.

Rule discharged.

Solicitors: *Hollams, Son & Coward*; *Lowless & Co.*

JEBSEN AND OTHERS *v.* EAST AND WEST INDIA DOCK CO.

[Common Pleas Division (Lord Coleridge, C.J., Denman and Grove, JJ.), January 16, February 25, 1875]

[Reported L.R. 10 C.P. 300; 44 L.J.C.P. 181; 32 L.T. 321; 23 W.R. 624; 2 Asp.M.L.C. 505]

Partnership—Contract—Breach—Damages—Mitigation—Benefit to partnership. Ship—Part owners—Contract—Breach—Damages—Mitigation—Benefit to partnership.

For the purposes of actions for breach of contract, part-owners of ships who are working the ship together for profit are in the same position as partners. Where partners sue for breach of contract, the damages must be confined to those sustained by the partnership; the joint damage only can be considered. It follows that any benefit arising out of the breach, assuming that it can be taken into account in reduction of damages, must be a joint benefit or one accruing to the partnership.

The steamer *Peter Jebsen* was owned by the twelve plaintiffs. The defendant dockowners, in breach of their contract with the plaintiffs, caused the *Peter Jebsen* to be delayed in the dock and she was prevented from carrying her cargo of emigrants and merchandise to their destination in America. Most of the emigrants went to America in two other ships, the *Harold Harfager*, and the *S. Olaf*. The 33 owners of the *Harold Harfager* included five of the plaintiffs and the *S. Olaf* was owned by 26 persons including five other of the plaintiffs. The defendants claimed that since some of the plaintiffs had gained a profit by the defendants' default this sum should be taken into account in reduction of the damages.

Held: since the benefit enjoyed by some of the plaintiffs was not a joint benefit or one accruing to the partnership it should not be taken into account in reduction of the damages.

Notes. Considered: *Shearman* v. *Folland*, [1950] 1 All E.R. 976. Referred to: *The Marpessa*, [1891–6] All E.R.Rep. 187; *British Westinghouse Electric Manufacturing Co.* v. *Underground Electric Rail. Co. of London*, [1911–13] All E.R.Rep. 63; *Jamal* v. *Moolla Dawood*, [1916] A.C. 175; *Hill* v. *Showell* (1918), 87 L.J.K.B. 1106; *City Tailors* v. *Evans*, [1921] All E.R.Rep. 399; *Square* v. *Model Farm Dairies (Bournemouth), Ltd.*, [1939] 1 All E.R. 259.

As to mitigation of damages in general, see 11 Halsbury's Laws (3rd Edn.) 289 et seq.; and for cases see 17 Digest (Repl.) 106 et seq.

Cases referred to:

(1) *Yates* v. *Whyte* (1838), 4 Bing.N.C. 272; 1 Arn. 85; 5 Scott, 640; 7 L.J.C.P. 116; 132 E.R. 793; 17 Digest (Repl.) 108, *221.*

(2) *Mason* v. *Sainsbury* (1782), 3 Doug.K.B. 61; 99 E.R. 538; 29 Digest (Repl.) 451, *3293.*

(3) *Bradburn* v. *Great Western Rail. Co.* (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 23 W.R. 48; 17 Digest (Repl.) 108, *222.*

(4) *Weller* v. *Baker* (1769), 2 Wils. 414.

Also referred to in argument:

Agacio v. *Forbes* (1861), 14 Moo.P.C.C. 160; 4 L.T. 155; 9 W.R. 503; 15 E.R. 267, P.C.; 36 Digest (Repl.) 510, *750.*

Bauerman v. *Radenius* (1798), 7 Term Rep. 633; 101 E.R. 1186; 20 Digest (Repl.) 252, *11.*

Franklin v. *South Eastern Rail. Co.* (1858), 3 H. & N. 211; 31 L.T.O.S. 154; 4 Jur.N.S. 565; 6 W.R. 573; 157 E.R. 448; 36 Digest (Repl.) 213, *1128.*

Rule Nisi obtained by the defendants calling upon the plaintiffs to show cause why the amount of damages awarded to them in an action brought by them against

the defendants for damages for breach of contract, should not be reduced pursuant to leave reserved, or why it should not be referred to an arbitrator to determine the amount on the principle to be laid down by the court, on the ground that the plaintiffs could not recover more damages than the least amount which any one of the plaintiffs would be entitled to recover, and that some of the plaintiffs suffered no loss which they were entitled to recover.

Thesiger, Q.C., and *R. E. Webster* showed cause.

W. Williams, Q.C., and *C. S. C. Bowen* in support of the rule.

Cur. adv. vult.

Feb. 25, 1875. **DENMAN, J.,** read the following judgment of the court.—This was an action tried before Lord Coleridge, C.J., at the sittings at Guildhall after Hilary Term, 1874, to recover damages for the detention of a steamer of the plaintiffs, called the *Peter Jebsen*, by the default of the defendants. The verdict was for the plaintiffs, and it is not disputed that for some amount the verdict must stand. By the limitation placed by the court upon the rule on which we are now to give judgment, the questions became reduced to the single one whether the plaintiffs were entitled to retain a sum of £1,444 14s. 6d. which was assessed by the jury, or such portion of that sum as an arbitrator might award if the court should be of opinion that they were entitled in point of law to retain any of it. This point was elaborately argued before us last term; and we are now to give judgment upon it.

The question arose thus: There were two lines of steamers from Norway to America called respectively the Nordske Lloyds and the Nordske American lines. The *Peter Jebsen* belonged to the Nordske Lloyds. She was under contract to carry a cargo of emigrants and merchandise from Bergen to New York at the time when she was detained in the defendants' dock, and in order to fulfil her contract she ought to have been at Bergen at the end of June or the beginning of July, 1872, so as to start from Bergen, as she had been advertised to do, on July 4. Sufficient notice of this contract had been given to the defendants to make them liable for the loss occasioned to the plaintiffs by the breach of it, if, as was the fact, the defendants' conduct caused that breach: and this loss is to be taken, for the purpose of our judgment, at £1,444 14s. 6d. It is said, however, that the plaintiffs have not sustained these damages in fact, and that, therefore, in law they are not entitled to retain them. The *Peter Jebsen*, as has been said, belonged to the Nordske Lloyd's line. There were two other steamers, the *Harold Harfager* and the *S. Olaf*, which belonged to the Nordske American line. The 240 emigrants who were booked for America by the *Peter Jebsen*, were indeed lost to her. But 202 of them went to America on July 10 by the *Harold Harfager*; and twenty-five more of them went to America on Aug. 16 by the *S. Olaf*.

It is as to these that the substantial question arises. The two lines of ships which have been mentioned are associations of ships and not of owners. There is one body of directors and one set of laws for each of the lines respectively. But the owners of each ship in each line are not the same. Each ship has its own set of owners; and the same man may be and in fact is part owner in various proportions of different ships in different lines. In the instances of these particular ships, the facts were thus: The *Peter Jebsen* was divided into 192 shares, and the twelve plaintiffs owned them. The *Harold Harfager* was divided into 360 shares, which were owned by thirty-three owners; and five of these thirty-three were five of the plaintiffs. The *S. Olaf* was divided into 300 shares, which were owned by twenty-six owners, and five of these twenty-six were five of the plaintiffs, but not all the same five as were part-owners in the *Harold Harfager*. It is said, the *Harold Harfager* and the *S. Olaf* profited by the loss of the *Peter Jebsen*; they carried emigrants whom they would not have carried but for the detention of the *Peter Jebsen*; some of the plaintiffs, therefore, gained by the default of the defendants; and such gain to individual plaintiffs, which, though with difficulty, is yet capable of being ascertained, must therefore be taken in reduction of the damages which the whole body of plaintiffs is entitled to.

The statement of such a proposition in its bare simplicity is perhaps a sufficient answer to it. We need not insist upon the difficult and complicated inquiries which in a multitude of easily suggested cases (some were suggested in the ingenious argument before us) would render any result being arrived at by a jury practically impossible. The absence of authority for a claim by defendants like this, which yet if well founded must have arisen in many cases, affords a strong presumption against its having any legal foundation. It is true that there must be a first instance in every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet, when brought to the test of argument, is found to be a sound one. But this is a point which must have arisen so frequently that it is to us incredible that, if sound, it never should have been taken.

The contention of the defendants, however, is not only without authority; it is against the principle of cases decided under analogous circumstances. It should seem that, if there had been but one owner of the *Peter Jebsen*, and the same person had been sole owner of the *Harold Harfager* and of the *S. Olaf*, the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former. *Yates* v. *Whyte* (1), decided that a defendant in a collision case could not deduct from the amount of damages to be paid by him a sum of money paid to the plaintiff by insurers in respect of such damage. It may be said that the authority of this case is not direct, because the insurance was a contract of indemnity, and the insurers might have recovered over from the plaintiff. The decision in the case, however, and in that of *Mason* v. *Sainsbury* (2), itself cited with approbation in *Yates* v. *Whyte* (1) both stand on grounds independent of this consideration.

But, whatever weight may be due to this consideration, *Bradburn* v. *Great Western Rail. Co.* (3), cannot be so qualified. That was an action for injuries in a railway accident: it was held that, in estimating the damages, the defendants could not take into account the amount which the plaintiff received from an accidental insurance policy. There, the contract was not one of indemnity. The judges held that the contract into which the plaintiff had entered was that, in consideration of the payment of premiums, he (the plaintiff) should, on the happening of a certain event, receive a sum of money. The event happened, and the benefit of the contract accrued to the plaintiff through the defendants' default. But the benefit could not be deducted from the damages for which the defendants were liable. This case appears to us to be perfectly well decided, and to be in point against the defendants in the case before us. Furthermore, although not in form, it is in substance an attempt to set-off against joint damage a several benefit. We were told by junior counsel for the defendants, in a very able argument, that he relied upon a distinction, which no doubt exists, but which we think will not avail the defendants, between partnerships and corporations.

For the purposes of actions for breach of contract, part-owners of ships who are working the ship together for profit, are in the same position as partners; and, where partnerships sue for breach of contract, the damages must be confined to those sustained by the partnership; the joint damage only can be considered. It seems to follow that any benefit arising out of the breach of contract, assuming that it can be taken at all into account in reduction of damages, must be a joint benefit, or one accruing to the partnership. In such a case as that put in argument, of a gang with whom a joint contract had been made being dismissed in breach of it, it is clear enough that the gang can sue. It was held in the case of the Tunbridge Wells dippers (*Weller* v. *Baker* (4)), by WILMOT, C.J., and the Court of Common Pleas that, if a stranger disturbed them in their employment, they were all jointly concerned in point of interest, and could all jointly sue in an action on the case. It follows that only something in which the benefit was joint could, if anything could, be considered in reduction of damage. If the matter now attempted to be set-off in substance were a set-off in form, there would be no room for the defendants' contention; for a joint debt cannot be set-off against a separate demand,

nor a separate debt against a joint one. The benefit here, as it is a gain from third parties, is not a set-off; but the same rules of sense and convenience apply as if it were. On no ground, therefore, do we think the defendants entitled to succeed; and the rule must be discharged.

Rule discharged.

Solicitors: *Lowless & Co.*; *Freshfields & Williams.*

RODOCONACHI AND OTHERS *v.* ELLIOTT

[Court of Exchequer Chamber (Bramwell, Pigott and Amphlett, BB., Quain and Archibald, JJ.), February 6, June 16, 1874]

[Reported L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp.M.L.C. 399]

Insurance—Marine insurance—Cargo—Loss—Right of assured to recover under policy—Insurance against restraint of princes—Terrene risk—Goods in besieged town.

The plaintiffs took out a Lloyd's insurance policy on a quantity of silk in the ordinary form, "lost or not lost, at and from Japan and/or Shanghai to Marseilles and/or Leghorn and/or London, via Marseilles and/or Southampton, and while remaining there for transit," against the usual perils including "arrests, restraints, and detainment of princes." It was agreed that the silk should be shipped by any of three named lines of steamers, including the Messageries Imperiales. This company, as the underwriter well knew, always sent such goods overland through France by the Lyons Railway from Marseilles to Paris, thence by the Northern Railway to Boulogne and then to London. The silks were shipped at Shanghai for London on a steamer of the Messageries Imperiales. War between France and Germany had started on July 15, 1870. The silk reached Marseilles on Aug. 27, and was despatched by the Lyons Railway, arriving at Paris on Sept. 13. At this time the German army was advancing on Paris and on Sept. 19 Paris was completely surrounded and all communications with the outside world were cut off so that it was impossible to remove the silk from the city. On Sept. 29, while the seige continued, the plaintiffs gave notice of abandonment to the underwriter.

Held: the policy covered the terrene risk of the land transit and the goods were lost by the perils insured against, viz., restraint of princes; notice of abandonment had been given within a reasonable time; and, accordingly, the plaintiffs were entitled to recover as for a total loss.

Notes. Considered: *Johnston* v. *Hogg* (1883), 10 Q.B.D. 432; *Ruys* v. *Royal Exchange Assurance Corpn.*, [1897] 2 Q.B. 135; *Miller* v. *Law Accident Insurance Co.*, [1900–3] All E.R.Rep. 588; *British and Foreign Marine Insurance* v. *Sanday*, [1916] 1 A.C. 650. Followed: *Furness, Withy & Co., Ltd.* v. *Rederia kiticbolaget Banco*, [1916–17] All E.R.Rep. 873. Considered: *Rickards* v. *Forestal Land, Timbers and Railways Co.*, *Robertson* v. *Middows Ltd.*, *Kahn* v. *Howard Brothers & Co.*, [1941] 3 All E.R. 62. Referred to: *Robinson Gold Mining Co.* v. *Alliance Insurance*, [1901] 2 K.B. 919; *Mitsui* v. *Mumford*, [1915] 2 K.B. 27; *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1916–17] All E.R.Rep. 146; *Russian Bank for Foreign Trade* v. *Excess Insurance*, [1918] 2 K.B. 123; *Atlantic Maritime Co. Inc.* v. *Gibbon*, [1953] 1 All E.R. 893.

As to when insured voyage is interrupted by act of a government, see 22 Halsbury's Laws (3rd Edn.) 93 et seq.; and for cases see 29 Digest (Repl.) 253 et seq.

Cases referred to:

(1) *Anderson* v. *Wallis* (1813), 2 M. & S. 240; 3 Camp. 440; 105 E.R. 372; 29 Digest (Repl.) 321, *2435.*

(2) *Barker* v. *Blakes* (1808), 9 East, 283; 103 E.R. 581; 29 Digest (Repl.) 331, *2521.*

(3) *Olivera* v. *Union Insurance Co.*, 3 Wheaton, 183.

(4) *The Vrouw Judith* (1799), 1 Ch. Rob. 150; 1 Eng. Pr. Cas. 86; 165 E.R. 130; 41 Digest 260, *1021.*

Also referred to in argument:

Jardine v. *Leathley* (1863), 3 B. & S. 700; 1 New Rep. 394; 32 L.J.Q.B. 132; 7 L.T. 783; 9 Jur.N.S. 1035; 11 W.R. 432; 1 Mar.L.C. 288; 122 E.R. 262; 29 Digest (Repl.) 329, *2504.*

Harrison v. *Ellis* (1857), 7 E. & B. 465; 26 L.J.Q.B. 239; 29 L.T.O.S. 76; 3 Jur.N.S. 908; 5 W.R. 494; 119 E.R. 1319; 29 Digest (Repl.) 152, *900.*

Pelly v. *Royal Exchange Assurance Co.* (1757), 1 Burr. 341; 97 E.R. 343; 29 Digest (Repl.) 91, *373.*

Geipel v. *Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 29 Digest (Repl.) 411, *2558.*

Hadkinson v. *Robinson* (1803), 3 Bos. & P. 388; 127 E.R. 212; 29 Digest (Repl.) 241, *1820.*

Aubert v. *Gray* (1862), 3 B. & S. 169; 32 L.J.Q.B. 50; 7 L.T. 469; 9 Jur.N.S. 714; 11 W.R. 27; 1 Mar.L.C. 264; 122 E.R. 65; sub nom. *Grey* v. *Auber*, 1 New Rep. 33, Ex. Ch.; 29 Digest (Repl.) 253, *1901.*

Schmidt v. *United Insurance Co.*, 1 Johns. 249, § 896.

Saltus v. *United Insurance Co.*, 15 Johns. 523.

Roux v. *Salvador* (1836), 3 Bing.N.C. 266; 2 Hodg. 209; 4 Scott, 1; 7 L.J.Ex. 328; 132 E.R. 413, Ex. Ch.; 29 Digest (Repl.) 307, *2322.*

Bird v. *Jones* (1845), 7 Q.B. 742; 15 L.J.Q.B. 82; 5 L.T.O.S. 406; 10 J.P. 4; 9 Jur. 870; 115 E.R. 668; 43 Digest 444, *721.*

The Express (1872), L.R. 3 A. & E. 597; 41 L.J.Adm. 79; 26 L.T. 956; 1 Asp.M.L.C. 355; 41 Digest 491, *3201.*

The San Roman (1872), L.R. 3 A. & E. 583; 41 L.J.Adm. 72; 26 L.T. 948; 1 Asp.M.L.C. 347; affirmed sub. nom. *Anderson* v. *San Roman* (Owners) (1873), L.R. 5 P.C. 301; 42 L.J.Adm. 46; 28 L.T. 381; 21 W.R. 393; 1 Asp.M.L.C. 603, P.C.; 41 Digest 406, *2523.*

Appeal by the defendant, the underwriter of a marine policy, from a decision of the Court of Common Pleas in favour of the plaintiffs, the insurer, on a Special Case.

Day, Q.C., and *J. C. Mathew* for the defendant.
Field, Q.C., and *Thesiger, Q.C.*, for the plaintiffs.

Cur. adv. vult.

June 16, 1874. **BRAMWELL, B.**, read the following judgment of the court.—The first point made by the defendant was that, supposing there was a loss within the policy, there was no right of abandonment, the plaintiffs having sold the goods insured, and the vendees having claimed them on their arrival. The answer is, that if the plaintiffs had the right of abandonment they did abandon, and the abandonees, the underwriters, thereby acquired all the rights of the assured, including their right to the price of the goods from the vendees.

The second point made by the defendant was, that the policy was limited to marine risks. What was in contemplation of the parties does not matter, though we do not doubt that the assured must have had the whole journey in view. We must see what the policy says. It seems to us that it very clearly, in words, includes the whole transit by land as well as by sea. The words are: "At and from Shanghai to Marseilles and London, via Marseilles." The slovenly mode of saying, "and or," if the words were critically examined, might make a difficulty, though

not on this question; but bearing in mind the course of carriage and transit found in the case, there can be no doubt that the voyage or journey described includes a land passage through France. No doubt many of the perils are sea perils exclusively; "perils of the seas" are named, but many are common to land and sea, as "fire" and "thieves." With respect to the argument that, as all risks of craft are mentioned, it follows that while inland there is no insurance, the answer is, that those words are necessary to cover the risk of the original embarkation and final landing, which would not be included in the words "at and from," and "shall be arrived at." We see nothing to make us limit the plain words of the policy to the sea part of the transit.

There remains the question whether there has been a loss from a peril within the policy. For, if so, it seems to us there was a right to abandon, there being a loss of the goods, the assured having lost all control over them for an indefinite time, which might extend to such a period as to cause at least a loss or failure of the particular adventure, and possibly a total loss of the goods, or more or less damage to them. In such a case the assured has a right to throw the risk on the underwriter: PHILLIPS ON INSURANCE, p. 1624.

The facts found are, that the goods safely arrived at Paris; that on Sept. 10 carriage by railway from Paris to Boulogne became, and till after the commencement of this suit continued, impossible, in consequence of the German armies having taken possession of parts of the railway and intercepted all communications thereby between Paris and Boulogne. This was the usual way in which such goods were sent from Marseilles, en route to London. It was not said that they could not have been sent to Havre or other ports, but we think this immaterial. For, supposing they could and ought to have been, but were not, supposing that in this the carriers were guilty of a breach of duty, that would not make the loss the less a loss to the assured. It is afterwards found that while the silks remained at Paris, on Sept. 19, the German armies completely invested Paris, and that from that day until the commencement of the action they completely surrounded and besieged Paris, and held military possession of all roads leading out of Paris, and prevented communication between Paris and all other places, by reason whereof it was impossible to remove the silks from Paris. The result of this state of things undoubtedly was, that the goods were prevented from leaving Paris, and the whole adventure broken up, and so continued at the time when the notice of abandonment was given, and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods by restraint of kings and princes, within the terms of the policy. This is not a mere temporary retardation of the voyage, but a breaking up of the whole adventure.

It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of LORD ELLENBOROUGH in *Anderson* v. *Wallis* (1) (2 M. & S. at p. 248), "to a destruction of the contemplated adventure:" see also *Barker* v. *Blakes* (2). But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or public order prohibiting the transport of goods from the besieged city; but the city in which the goods were was besieged and completely invested, all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army. What we have to look at is whether, by the immediate and direct pressure of the German army, the goods were prevented from reaching their destination. A siege like the present, which was intended to reduce the besieged place by famine, is a prohibition of all commerce and intercourse with the besieged place. Neutrals would have no right to cross the German lines in order to bring out their goods, or for any other purpose that would or might in the least interfere with the military operations. In the case of a maritime blockade, neither the ships nor the goods on board of them within the port, and which are prevented from coming out, are seized or arrested, or in the actual

possession of the blockading force; there is no specific action on the ships or goods beyond the prohibition against leaving the port. But surely they are "restrained" from coming out, and the prosecution of the adventure is thereby effectually impeded.

We quite agree with the opinion expressed on this subject by the Supreme Court of the United States, in *Olivera* v. *Union Insurance Co.* (3), and which was quoted before us, that the inhabitants of a besieged town, or the ships in a blockaded port, may be properly said to be "restrained" from coming out by the action of the besieged army or blockading force. A siege, where the place is completely surrounded and invested, is a stronger case than a mere maritime blockade. In the latter case, the land communications are unaffected, and the commerce by sea only is interdicted. But we are unable to draw any material or substantial distinction between the two, so far as they operate to prevent or restrain all intercourse or commerce, or the entry into or exit of any goods from the besieged or blockaded places. GROTIUS, book 3, I. 5, places oppidum obsessum vel portus clausus, exactly on the same footing as regards the right of neutrals to hold commerce with the belligerents; and LORD STOWELL'S definition of a blockade is still more applicable to a siege like the siege of Paris than to a blockade merely maritime. He says (*The Vrouw Judith* (4), 1 Ch. Rob. at p. 152):

> "A blockade is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than importation."

If, therefore, the effect of the siege of Paris was to cut off entirely all foreign connection and correspondence, we think that the goods in this case were restrained or prevented from leaving Paris by the operation of that siege. It appears to us that the words, "restraint and detainments of all kings, princes, and people of what nation, condition, or quality soever," are wider and more comprehensive words than those which precede them, and that they include and cover the case now under consideration. As a verbal matter, we may observe that "restraint" is a word more properly applicable to persons than to goods, so that a restraint of goods means a restraint of those having the custody of goods. We cannot help thinking that the doubt arises through the speedy arrival of these goods uninjured. Had they been perishable goods destroyed by the delay, it would be difficult to say their loss was not caused by restraint of princes. For these reasons we are of opinion that the goods insured by the present policy were either restrained from leaving Paris, or were detained within Paris by the immediate and direct action of the German army, and were, therefore, so lost by one of the perils insured against, as to entitle the assured to abandon them to the underwriters and claim for a total loss. We think, therefore, that the judgment of the court below ought to be affirmed.

Appeal dismissed.

Solicitors: *Markby & Terry*; *Waltons, Bubb & Walton.*

[*Reported by* JOHN ROSS, ESQ., *Barrister-at-Law.*]

FISHER AND ANOTHER *v.* VAL DE TRAVERS ASPHALTE CO.

[COMMON PLEAS DIVISION (Lord Coleridge, C.J., Brett and Lindley, JJ.), April 25, 1876]

[Reported 1 C.P.D. 511; 45 L.J.Q.B. 479; 35 L.T. 366]

Damages—Remoteness of damage—Costs and expenses reasonably incurred in negotiations and settlement of claim by third party—Contractor claiming recovery from sub-contractor for breach of contract.

The plaintiffs were contractors for the construction and maintenance of a tramway and sub-contracted with the defendants for the construction and maintenance of the asphalte paving of the tramway. After completion of the tramway, H. was lawfully driving his cart along the public highway on which the tramway was laid and was thrown out and injured because of a hole in the asphalte paving of the tramway due to the negligence of the defendants in failing to maintain the asphalte paving under their contract with the plaintiffs. H. commenced an action for damages for negligence against the tramway company which immediately served notice on the plaintiffs who in turn served notice on the defendants and claimed to be indemnified by them. The defendants repudiated any responsibility or liability and refused to take any steps in defence of the action. After negotiations, the plaintiffs eventually compromised the action with H. and paid him £110, including £40 for his costs, in settlement and incurred £18 themselves for their costs and expenses up to and including the settlement of the action. The plaintiffs claimed the full £128 expended as damages for the defendants' breach of contract. It was found that the plaintiffs had adopted a reasonable course in negotiating and settling the action with H.

Held: there was a distinction between the sum paid in damages which was the natural result of the defendants' breach of contract and the reasonable costs in ascertaining those damages, and the plaintiffs could not recover the costs paid to H. or their own costs, which were incurred in the negotiations, even though such costs were reasonably incurred and benefited the defendants by reducing H.'s claim; accordingly, the sum recoverable by the plaintiffs must be reduced by £58.

Notes. Considered: *Biggin & Co.* v. *Permanite, Ltd.*, [1951] 2 All E.R. 191. Referred to: *Hammond* v. *Bussey* (1887), 20 Q.B.D. 79; *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q.B. 413.

As to the consequences of reasonable conduct and the standard to be applied in recovering, as damages, costs in other proceedings by or against third parties, see 11 HALSBURY'S LAWS (3rd Edn.) 296; and for cases see 17 DIGEST (Repl.) 136 et seq.

Case referred to:

(1) *Baxendale* v. *London, Chatham and Dover Rail. Co.* (1874), L.R. 10 Exch. 35; 44 L.J.Ex. 20; 32 L.T. 330; 23 W.R. 167, Ex. Ch.; 8 Digest (Repl.) 156, *989*.

Also referred to in argument:

Ronneberg v. *Falkland Islands Co.* (1864), 17 C.B.N.S. 1; 4 New Rep. 243; 34 L.J.C.P. 34; 10 L.T. 530; 10 Jur.N.S. 940; 12 W.R. 914; 2 Mar.L.C. 30; 144 E.R. 1; 17 Digest (Repl.) 138, *419*.

Short v. *Kalloway* (1839), 11 Ad. & El. 28; 113 E.R. 322; 31 Digest (Repl.) 465, *5915*.

Tindall v. *Bell* (1843), 11 M. & W. 228; 12 L.J.Ex. 160; 152 E.R. 786; 17 Digest (Repl.) 136, *407*.

Mors-Le-Blanch v. *Wilson* (1873), L.R. 8 C.P. 227; 42 L.J.C.P. 70; sub nom. *Le Blanch* v. *Wilson*, 28 L.T. 415; 21 W.R. 109; 1 Asp.M.L.C. 605, H.L.; 17 Digest (Repl.) 137, *410*.

Rule Nisi obtained by the defendants calling on the plaintiffs to show cause why damages in the action should not be reduced by £58, i.e., the amount of costs and expenses incurred by the plaintiffs including those of the claimant, in settling a previous action in which the defendants were ultimately liable.

The plaintiffs were contractors for the construction and maintenance of a tramway belonging to the North Metropolitan Tramways Co., and the plaintiffs had as such contractors agreed with the defendants the sub-contractors to lay with asphalte in a workmanlike and efficient manner the tramway, and to keep and maintain it in good order and condition and to have the asphalte so laid and kept, and maintained. The asphalte paving at some junction points in Mare Street, Hackney, became worn down so as to create a dangerous hole. and Hicks who was lawfully driving along that public road in which the tramway was laid was thrown from his cart and severely injured. Hicks then claimed compensation from the North Metropolitan Tramways Co., who passed on the claim to the plaintiffs, who then passed on the claim to the defendants, who repudiated all responsibility or liability. Hicks then issued a writ against the North Metropolitan Tramways Co., notice of which was passed on by the company to the plaintiffs, and by the plaintiffs to the defendants. Later the plaintiffs wrote to the defendants explaining that the action by Hicks could be settled and advising the defendants that they were liable. Receiving no reply they wrote to the defendants stating that they intended to settle with Hicks and that they held the defendants responsible for any settlement. To this arrangement the defendants did not accede or consent and in the result the plaintiffs settled the action by paying £110 to Hicks for damages including £40 costs. The charges of their own solicitors amounted to £18, which they also paid, taking on themselves the action to which the Tramway Company were the nominal defendants.

The plaintiffs alleged that the defendants as sub-contractors had broken their contract by failing to lay the asphalte in a workmanlike and efficient manner and had failed to keep or maintain it in good order or repair but had allowed it to become worn down so as to be dangerous and that the defendants were liable for the injury caused to Hicks and the plaintiffs claimed £128 which included the costs and expenses incurred in settling the action with Hicks.

The action was tried before LORD COLERIDGE, C.J., and a common jury on Nov. 27, 1875, and on the question whether the plaintiffs adopted a reasonable course in negotiating and settling the action brought by Hicks, the jury found in the affirmative, verdict was accordingly entered for the plaintiffs for the whole sum claimed.

Afterwards the defendants, moved for a rule calling on the plaintiffs to show cause why a new trial should not be granted on the ground that the defendants were not liable to pay the plaintiffs any part of the sums claimed. The court, however, granted the rule only on the ground that the defendants were not liable to the plaintiffs for £40, the costs of Hicks, or for £18, the plaintiffs' own costs in the action brought by Hicks.

The defendants appealed to the Court of Appeal upon the refusal of this court to grant the rule as to all the grounds but the Court of Appeal held that this court had rightly so refused.

Murphy, Q.C., and *Lanyon* for the plaintiffs showed cause.

Philbrick, Q.C., and *W. G. Harrison* for the defendants were not called upon to support the rule.

BRETT, J.—We are bound by authority to say that this rule should be made absolute. The defendants were guilty of a breach of their contract to lay down and keep in order for a certain time the asphalte of a tramway. The question is: What damages they are liable to pay to the plaintiffs for that breach of their contract? The first and immediate damages arising therefrom are the expenses of putting the asphalte of the tramway into proper order, and had there been no accident to Hicks through the want of repair of the asphalte, these damages, in this case, would have been all that the defendants could have been called upon to pay;

but an accident did happen to Hicks through the breach of contract committed by the defendants. Hicks sued the tramway company for negligence, and to this action the company had no defence. Then arises the question of the amount of the claim for negligence. The tramway company give notice to the plaintiffs, their contractors, and the plaintiffs forward the notice to the defendants, with whom they sub-contracted. The defendants decline to have anything to do with the matter, and leave the plaintiffs to act as they may think proper with reference to the claim. The plaintiffs then take up the case and effect a proper and reasonable settlement, and in so doing incur costs, which were, and which are found to have been reasonably and properly incurred, and the person injured, Hicks, also incurred costs, and these as well as their own costs the plaintiffs pay.

The plaintiffs' case is that they are entitled to recover these costs. They say that the claim made was an unliquidated one, and that it was reasonable to have the proper amount ascertained. They say: We gave the defendants notice, and made the best possible terms; we had no right to shut our eyes, fold our hands, and pay whatever was asked; the jury find we acted reasonably, and are entitled to be held harmless. It is answered that there was no contract to pay the damages which the defendants actually paid; and further, none to pay the costs of ascertaining these damages or arriving at a settlement. As to the damages themselves, we refused to grant a rule to the defendants to enable them to raise the question as to their liability to repay them to the plaintiffs, and the Court of Appeal have held that we were right in so refusing, and that the payment of the damages was a natural consequence of the defendants' breach of contract. The question is, given that the payment of the damages is a natural result of the breach of contract by the defendants, is the cost of ascertaining, and, mayhap diminishing, those damages to be allowed as a natural result?

It is said the defendants never contracted to pay these costs; that argument applies equally to the damages themselves. But for *Baxendale* v. *London, Chatham and Dover Rail. Co.* (1) I should have seen no distinction between damages and the reasonable costs of ascertaining them. It is somewhat hard to say to the plaintiffs, you were not entitled to pay any unreasonable claim made by Hicks, and yet to say if you reasonably diminish that claim, or sift it, or inquire into it, you do it at your own expense. The question in the Exchequer Chamber in *Baxendale* v. *London, Chatham and Dover Rail. Co.* (1), I think stood thus, assuming the damages to be recoverable, are the costs of ascertaining them recoverable? And the answer there given is no. This was so held by that court for reasons which we here cannot discuss, but to which it is our duty to bow. There is no fair distinction in principle between this case and Baxendale's as regarded the majority of that court. That case decides the present, both as to the plaintiffs' own costs and as to those incurred by Hicks; and therefore, although apart from that case, I should have otherwise decided, I think the rule must be made absolute.

LINDLEY, J.—I am of the same opinion, and for the same reason. I cannot distinguish this case from *Baxendale* v. *London, Chatham and Dover Rail. Co.* (1).

LORD COLERIDGE, C.J.—This case is concluded by authority, but at the same time it is not quite so clear to me as it is to my learned brothers that I was not wrong, apart from authority, in leaving to the jury the question of reasonableness. It is not quite clear to me that there may not be a distinction between the damages and the costs. It would be difficult to lay down any principle; there might be, instead of three contracts as here, half a dozen, and very complicated questions as to liability might arise under such circumstances. However, it is enough to say that the case is decided for us by *Baxendale* v. *London, Chatham and Dover Rail. Co.* (1).

Rule absolute.

Solicitors: *Stevens, Wilkinson & Harries*; *Drake & Son.*

[*Reported by* Cyril Dodd, Esq., *Barrister-at-Law.*]

LEGGOTT *v.* GREAT NORTHERN RAIL. CO.

[Queen's Bench Division (Mellor and Quain, JJ.), May 20, 23, 1876]

[Reported 1 Q.B.D. 599; 45 L.J.Q.B. 557; 35 L.T. 334; 24 E.R. 784]

Estoppel—Estoppel by record—Administration action—Previous action by administratrix under Fatal Accidents Act, 1846—*Subsequent action for damage to estate of deceased husband.*

The plaintiff, administratrix of her deceased husband, brought an action on behalf of herself and her children under the Fatal Accidents Act, 1846, and received a sum for damages and costs against the defendants, a railway company. Subsequently the plaintiff, as administratrix, sued the defendants, on behalf of the personal estate of the deceased, for damage to the estate caused by the loss of business profits, the expense of employing a manager, and medical expenses which occurred during her husband's life as a result of the personal injuries caused by the negligence of the defendants. The defendants denied the personal injuries and negligence and also pleaded that the plaintiff had previously recovered judgment against them in the action under the Fatal Accidents Act, 1846. The plaintiff replied that the defendants were estopped from denying the personal injuries and negligence as these issues had been determined in the action under the Fatal Accidents Act, 1846. On cross-demurrers to the defence and reply,

Held: the action under the Fatal Accidents Act, 1846, was no answer to the present action as the plaintiff sued in different rights in the two actions and no estoppel by record arose between the parties.

Notes. The Fatal Accidents Act, 1846, has been amended by the Fatal Accidents Act, 1959; see 39 Halsbury's Statutes (2nd Edn.) 941.

Considered: *Pulling* v. *Great Eastern Rail. Co.* (1882), 9 Q.B.D. 110. Referred to: *Quirk* v. *Thomas*, [1916] 1 K.B. 516; *Marginson* v. *Blackburn Borough Council*, [1939] 1 All E.R. 273.

As to estoppel by record, party must sue or defend in the same right, see 15 Halsbury's Laws (3rd Edn.) 199; and for cases see 21 Digest (Repl.) 292 et seq. As to accrual of causes of action after death, see 16 Halsbury's Laws (3rd Edn.) 480 et seq.; and as to liability under the Fatal Accidents Acts for negligence causing death, see 28 Halsbury's Laws (3rd Edn.) 35 et seq.; and for cases see 24 Digest (Repl.) 765 et seq. For the Fatal Accidents Acts, 1846 and 1864, see 17 Halsbury's Statutes (2nd Edn.) 4 et seq.

Case referred to:

(1) *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L.R. 10 C.P. 189; 44 L.J.C.P. 148; 31 L.T. 847; 23 W.R. 310; 24 Digest (Repl.) 766, *7555*.

Also referred to in argument:

Duchess of Kingston's Case (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C., 12th edn., 754; 21 Digest (Repl.) 225, *225*.

Metters v. *Brown* (1863), 1 H. & C. 686; 1 New Rep. 367; 32 L.J.Ex. 138; 7 L.T. 795; 9 Jur.N.S. 416; 11 W.R. 429; 158 E.R. 1060; 21 Digest (Repl.) 355, *996*.

Doe d. Hornby v. *Glenn* (1834), 1 Ad. & El. 49; 3 Nev. & M.K.B. 837; 3 L.J.K.B. 161; 110 E.R. 1126; 23 Digest (Repl.) 62, *536*.

Middleton's Case (1603), 5 Co. Rep. 28 b; 77 E.R. 93; 23 Digest (Repl.) 56, *442*.

Robinson's Case (1603), 5 Co. Rep. 32 b; 77 E.R. 103; sub nom. *Robinson* v. *Robinson*, Cro. Jac. 14; 24 Digest (Repl.) 784, *7732*.

Potter v. *Metropolitan Rail. Co.* (1875), 32 L.T. 36, Ex. Ch.; 24 Digest (Repl.) 766, *7556*.

Action by the administratrix of her deceased husband against a railway company claiming on behalf of the personal estate £1,000 damages for loss of business profits, expenses of employing a manager and medical expenses as a result of the injury caused to the deceased during his lifetime by the negligence of a railway company.

The plaintiff was the administratrix of the personal estate and effects of her deceased husband, Richard Thomas Leggott, who died intestate on Aug. 3, 1874.

The defendants, a railway company, carried passengers between King's Cross and Finchley. King's Cross station was occupied and managed by the defendants. At the time of the accident the deceased carried on the business of a potato salesman at the Great Northern Railway potato market, and he had taken a season ticket from the defendants, entitling him to travel as a passenger on their line between the above mentioned stations. On Mar. 20, 1874, in the afternoon, the deceased was received by the defendants at King's Cross, as a passenger, to be safely and securely conveyed by them to Finchley, in a train that was shortly expected to start. While lawfully waiting on the platform intended for passengers who wished to travel by that train, a barrow or trolley loaded with newspapers was by the alleged negligence of the defendants violently pushed against him. He was knocked down and seriously injured in the head and leg and otherwise. In consequence of these injuries it was alleged that the deceased was entirely unable to attend to his business from that day till the day of his death; incurred great expense in providing other persons to manage his business; lost a large portion of the profits that he would otherwise have made, and the goodwill of the business, owing to his having been unable to attend to it, was rendered much less valuable. It was also alleged that large expenses were incurred in obtaining the necessary medical attendance, and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid. The plaintiff claimed £1,000 damages for injury to the personal estate and effects of the deceased.

The defendants denied specifically all the allegations relating to this injury and the damage arising therefrom. They further stated that after the death of the deceased the plaintiff as administratrix of his personal estate and effects for the benefit of herself, as the wife, and of Annie Leggott, Alice Leggott and Ada Leggott, the children of the deceased, sued the defendants in the Queen's Bench Division under the Fatal Accidents Act, 1846, in respect of the accident at King's Cross that by reason of the injuries thereby occasioned, the deceased afterwards, and within twelve calendar months next before the commencement of such action, died. And upon such action a verdict was taken by consent, and on Nov. 25, 1875, judgment of the court was signed against the defendants for the cause of action for £500, and the plaintiff's costs; and the defendants had paid the plaintiff as administratrix £500, together with her costs; which the plaintiff as administratrix had received in full satisfaction and discharge of the judgment and causes of action.

The defendants also said that before bringing this present action for £1,000 damages for loss to the personal estate of the deceased the plaintiff as administratrix had already sued the defendants in respect of the several matters, claims, and causes of action alleged and the defendants had paid to the plaintiff as such administratrix £500 and the costs of such action, which the plaintiff as such administratrix had accepted in full satisfaction and discharge of all such claims and causes of action.

The plaintiff replied and joined issue and said that the defendants ought not to be admitted to deny the facts relating to the injury and damage arising therefrom because at the trial such issues were found by the jury in the plaintiff's favour, and that judgment was signed thereon accordingly, and such judgment still stood, and the plaintiff said that such issues were the same issues as those raised by the defendants' denials; and the plaintiff demurred on the ground that an action under the Fatal Accidents Act, 1846, was no bar to an action for damages for

injury to the personal estate of the deceased during the lifetime of the deceased, and on other grounds sufficient in law to sustain the demurrer.

The defendants rejoined and joined issue and demurred to the question of admisssion of the facts on the ground that the action under the Fatal Accidents Act, 1846, was brought by the plaintiff in another capacity, and was not an action between the same parties in the same rights, and was not an action for or in respect of the same subject-matter of complaint or ground or causes of action as the present action, and for and on other grounds sufficient in law to support the demurrer.

The plaintiff contended in argument; that the issue being the same, the estoppel was good if the parties were the same, and were suing or being sued in the same capacity; that the plaintiff was the same, and was suing in the same capacity; and that the persons to be benefited, if damages were awarded in this action, were the same, viz., the widow and the children.

The defendants contended in argument that the action under the Fatal Accidents Act, 1846, was not an action between the same parties in the same capacity and right, and was not an action for and in respect of the same subject-matter of complaint, or ground or causes of action on the present action; that, therefore, the defendants were not estopped from raising in this action the facts of the issue; that the present action did not lie; and that the issues objected to as raised in this action were not the subject of estoppel.

Mellor, Q.C., and *Harmsworth* for the defendants.
Bray for the plaintiff.

MELLOR, J.—The case has been well put on behalf of the plaintiff, but we think no estoppel can arise against the defendants. The previous action, in which the same issues had been decided, was an action expressly created by statute, and subject to the limit imposed thereby. Lord Campbell's Act [Fatal Accidents Act, 1846], for the first time, made a person liable for damages occasioned by his act, neglect, or default, even although the person injured met with his death in consequence. Section 2 expressly enacted that the action is to be brought in the name of the executor or administratrix, not for the benefit of the estate, but only as trustee for certain persons particularised in the section. By the Fatal Accidents Act, 1864, the machinery is somewhat altered, but not to change the interest or capacity in which the executor or administrator must sue. Under these provisions the executor or administrator is made a mere machine for bringing the action, and he cannot act in any way for the advantage or otherwise of the general estate which he has to administer.

Here, on the contrary, the administratrix sues as representative of the intestate's estate, and her first duty will be to settle his debts and other claims against it. It may be that the beneficiaries of the first action will take something under the present, but that is not certain, and the plaintiff does not sue now for them alone as she did before. I think that, for the purpose of an estoppel by record, the plaintiff is now in a position of a stranger with respect to that which she filled in the previous action. With the single exception of *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1), it seems that such an action as this has never before been brought. We yield, however, to that authority, although we consider that its effect is not to create an estoppel here. That authority can only be questioned on appeal, and whether the action is maintainable or not, we are prepared to say that the defendants cannot be prevented from disputing again the issues which were determined before. Our judgment must be for the plaintiff on the defence, and for the defendants on the reply.

QUAIN, J.—I am of the same opinion. I think the defendants are entitled to our judgment on their demurrer to the estoppel pleaded by way of reply. Parties to an action must be suing and sued in the same right as in a previous action, in order that the verdict shall be an estoppel. Although in the action mentioned in

the 5th paragraph of the defence the plaintiff was suing nominally as administratrix, she was merely a trustee for the persons named in the declaration, and was not as in this action suing for the benefit of the deceased's estate. The two actions are brought in entirely different rights, and on that account no estoppel can exist. The exact question was not raised in *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1), but the distinction between the rights in which the plaintiff sued was clearly drawn by the court, and indeed the judgment was based to a great extent upon that distinction. I yield without assenting to the authority of that case in respect to the maintenance of this action, but whatever might be the conclusion of the Appeal Court on the subject, I think there was clearly no estoppel by record to bind the parties in this second action.

Judgment for plaintiff on demurrer to defence; for defendant, on demurrer to reply.

Solicitors: *May, Sykes & Batten*; *Johnston, Farquhar & Leech.*

[*Reported by* M. W. McKellar, Esq., *Barrister-at-Law.*]

GOODWIN *v.* ROBARTS

[House of Lords (Lord Cairns, L.C., Lord Hatherley and Lord Selborne), May 11, 12, 18, 19, June 1, 1876]

[Reported 1 App. Cas. 476; 45 L.J.Q.B. 748; 35 L.T. 179; 24 W.R. 987]

Bill of Exchange—Scrip of foreign government entitling bearer to a bond when instalments paid—Transferable by delivery to bona fide holder for value—Fraudulent deposit by broker with third party taking bona fide and for value as security for loan—Liability of third party to owner of scrip.

A foreign government, about to raise a loan in England, issued through their agents scrip which on the face of it stated that when all instalments had been paid the bearer was entitled to receive a bond. By the usage of merchants such scrip was treated as negotiable and transferable by mere delivery to a bona fide holder for value. The plaintiff purchased through his broker on the Stock Exchange some scrip and left it in the hands of his broker who deposited it with the defendants as security for a loan to himself and thereafter absconded. The defendants did not know that the broker held the scrip as the plaintiff's broker and took it bona fide and for value. The plaintiff claimed to recover the value of the scrip from the defendants who had sold it to reimburse themselves.

Held: the scrip could not be distinguished from the bonds and was a negotiable instrument, transferable by mere delivery to a bona fide holder for value, and the defendants, being bona fide holders for value, were not liable to the plaintiff.

Notes. Followed: *Rumball* v. *Metropolitan Bank* (1877), 2 Q.B.D. 194. Distinguished: *France* v. *Clarke* (1884), 26 Ch.D. 257; *Fine Art Society* v. *Union Bank of London* (1886), 17 Q.B.D. 95. Applied: *Easton* v. *London Joint Stock Bank* (1886), 34 Ch.D. 95. Distinguished: *Colonial Bank* v. *Hepworth* (1887), 36 Ch.D. 36. Considered: *London and County Banking Co.* v. *London and River Plate Bank* (1887), 20 Q.B.D. 232. Applied: *Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333. Followed: *London Joint Stock Bank* v. *Simmons*, [1891-4] All E.R.Rep. 415; *Bechuanaland Exploration Co.* v. *London Trading*

Bank, [1898] 2 Q.B. 658. Considered: *Webb*, *Hale* v. *Alexandria Water Co.* (1905), 93 L.T. 339. Referred to: *Johnson* v. *Credit Lyonnais Co.*, *Johnson* v. *Blumenthal* (1877), 3 C.P.D. 32; *Williams* v. *Ayers* (1877), 3 App. Cas. 133; *Bickerton* v. *Walker* (1885), 31 Ch.D. 151; *Picker* v. *London and County Banking Co.* (1887), 18 Q.B.D. 815; *Williams* v. *Colonial Bank*, *Williams* v. *London Chartered Bank of Australia* (1888), 38 Ch.D. 388; *Colonial Bank* v. *Cady*, *London Chartered Bank of Aust.* v. *Cady* (1890), 15 App. Cas. 267; *Dashwood* v. *Magniac*, [1891] 2 Ch. 306; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Clayton* v. *Le Roy* (1911), 104 L.T. 419; *St. Pierre* v. *South American Stores* (*Gath & Chaves*), *Ltd. and Chilean Stores* (*Gath & Chaves*), *Ltd.*, [1937] 3 All E.R. 349; *Bank of Baroda*, *Ltd.* v. *Punjab National Bank*, *Ltd.*, [1944] 2 All E.R. 83; *Marquess of Bute* v. *Barclays Bank*, *Ltd.*, [1954] 3 All E.R. 365.

As to the rules determining negotiability, see 3 HALSBURY'S LAWS (3rd Edn.) 238 et seq.; and for cases see 3 DIGEST (Repl.) 423 et seq.

Cases referred to:

(1) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 35 Digest (Repl.) 537, *2169*.

(2) *Gorgier* v. *Mieville* (1824), 3 B. & C. 45; 4 Dow & Ry.K.B. 641; 2 L.J.O.S.K.B. 206; 107 E.R. 651; 6 Digest (Repl.) 419, *2959*.

(3) *Dixon* v. *Bovill* (1856), 3 Macq. 1; 28 L.T.O.S 130; 2 Jur.N.S. 933; 4 W.R. 813, H.L.; 6 Digest (Repl.) 427, *3001*.

(4) *Crouch* v. *Credit Foncier of England* (1873), L.R. 8 Q.B. 374; 42 L.J.Q.B. 183; 29 L.T. 529; 21 W.R. 946; 6 Digest (Repl.) 417, *2948*.

(5) *Smith* v. *Weguelin* (1869), L.R. 8 Eq. 198; 38 L.J.Ch. 465; 20 L.T. 724; 17 W.R. 904; 43 Digest 628, *632*.

(6) *King of Spain* v. *Machado* (1827), 4 Russ. 225; 6 L.J.O.S.Ch. 61; 38 E.R. 790; 1 Digest (Repl.) 717, *2648*.

(7) *Lang* v. *Smyth* (1831), 7 Bing. 284, 5 Moo. & P. 78; 9 L.J.O.S.C.P. 91; 131 E.R. 109; 1 Digest (Repl.) 399, *595*.

Also referred to in argument:

Partridge v. *Bank of England* (1846), 9 Q.B. 396; 15 L.J.Q.B. 395; 8 L.T.O.S. 195; 10 Jur. 1031; 115 E.R. 1324, Ex. Ch.; 1 Digest (Repl.) 350, *299*.

Re Agra and Masterman's Bank, *Ex parte Asiatic Banking Corpn.* (1867), 2 Ch. App. 391; 36 L.J.Ch. 222; 16 L.T. 162; 15 W.R. 414, L.JJ.; 6 Digest (Repl.) 62, *560*.

Re Imperial Land Co. of Marseilles, *Ex parte Colborne and Strawbridge* (1870), L.R. 11 Eq. 478; 40 L.J.Ch. 93; 23 L.T. 515; 19 W.R. 223; 6 Digest (Repl.) 35, *274*.

Miller v. *Race* (1758), 1 Burr. 452; 2 Keny. 189; 97 E.R. 398; 6 Digest (Repl.) 418, *2954*.

Lickbarrow v. *Mason* (1787), 2 Term Rep. 63; 6 East, 20, n. 100 E.R. 35; reversed sub nom. *Mason* v. *Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; reversed and venire de novo awarded sub nom. *Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57, H.L.; 6 Digest (Repl.) 428, *3007*.

Re General Estates Co., *Ex parte City Bank* (1868), 3 Ch. App. 758; 18 L.T. 894; 16 W.R. 919, L.JJ. 6 Digest (Repl.) 421, *2970*.

Heseltine v. *Siggers* (1848), 1 Exch. 856; 18 L.J.Ex. 166; 154 E.R. 365; 6 Digest (Repl.) 419, *2961*.

Rodger v. *Comptoir D'Escompte de Paris* (1869), L.R. 2 P.C. 393; 5 Moo.P.C.C.N.S. 538; 38 L.J.P.C. 30; 21 L.T. 33; 17 W.R. 468; 3 Mar.L.C. 271; 16 E.R. 618, P.C.; 12 Digest (Repl.) 208, *1477*.

Breverton's Case (1537), Dyer, 30 b.; 73 E.R. 67; 8 Digest (Repl.) 613, *537*.

A.-G. v. *Bouwens* (1838), 4 M. & W. 171; 1 Horn. & H. 319; 7 L.J.Ex. 297; 150 E.R. 1390; 6 Digest (Repl.) 419, *2959*.

Tassell and Lee v. *Lewis* (1695), 1 Ld. Raym. 743; 91 E.R. 1397; 6 Digest (Repl.) 334, *2416*.

Lambert v. *Oakes* (1699), 1 Ld. Raym. 443; 12 Mod. Rep. 244; Holt K.B. 117; 91 E.R. 1194; sub nom. *Lambert* v. *Pack*, 1 Salk. 127; sub nom. *Anon.*, 1 Salk. 126; 6 Digest (Repl.) 291, *2139*.

Walmsley v. *Child* (1749), 1 Ves. Sen. 341; 27 E.R. 1070, L.C.; 6 Digest (Repl.) 393, *2812*

Appeal by the plaintiff from a decision of the Exchequer Chamber (COCKBURN, C.J., MELLOR, LUSH, BRETT and LINDLEY, JJ.), reported L.R. 10 Exch. 337, affirming a decision of the Court of Exchequer (BRAMWELL and CLEASBY, BB.), reported L.R. 10 Exch. 76, in favour of the defendants on a Special Case in an action by the plaintiff to recover the value of a scrip from the defendants, who had sold it to reimburse themselves for their advance made on its deposit as security.

The plaintiff had purchased some Austrian and Russian scrip on the Stock Exchange, in the usual manner, through his broker, Clayton, and had left it in Clayton's possession. Clayton deposited it with the defendants as security for an advance made to himself, and afterwards absconded. The defendants were not aware that Clayton only held the scrip, as the plaintiff's broker, but took it bona fide for value. All instalments on the scrip were fully paid up.

Benjamin Q.C., and *Anstie* for the appellant.

J. Brown, Q.C., and *C. H. Robarts* for the respondents.

June 1, 1876. **LORD CAIRNS, L.C.**, stated the facts, and continued: The question argued in the courts below was the negotiability of a scrip for a foreign loan; but there appears to me to be a prior consideration as to the appellant's title, which would alone be sufficient to dispose of his claim. He bought in the market certain scrip, which, from the form in which it was prepared, virtually represented that the paper would pass from hand to hand by delivery only, so that anyone who became bona fide the holder might claim for his own benefit the fulfilment of the terms from the foreign government. The plaintiff might have kept this scrip in his own possession, and if he had done so no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker or agent, and although it is stated that it remained in the broker's hands for disposal, or to be exchanged for the bonds when issued, as the plaintiff might direct, those into whose hands the scrip might come would know nothing of his title nor of any private instructions which he might have given to his agent. The scrip itself would be a representation to anyone taking it—a representation to which the appellant must be taken to have been a party—that if it were taken in good faith and for value the person taking it would stand to all intents and purposes in the place of the previous holder.

Let us assume for a moment that the instrument was not negotiable, that no right of action was transferred by delivery, and that no claim could be made by the holder in his own name against the foreign government; still the appellant is in the position of a person who has made a representation on the face of the scrip that it would pass with a good title to anyone at least who takes it in good faith and for value; and of one who has put it in the power of his agent to hand over the scrip to persons who have been induced to alter their position on the faith of the representations so made. I am of opinion that on doctrines well established by many authorities, of which *Pickard* v. *Sears* (1) may be taken as an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired. I must, however, add that I have no hesitation in expressing my concurrence in what I understand to have been the ratio decidendi in the courts below. It was well established by *Gorgier* v. *Mieville* (2), an authority which has never been impugned, and which was not disputed at the Bar, that if this action had been brought for the bonds of this foreign debt payable to bearer, and if there had been evidence of the usage of trade as to the negotiability of such bonds, similar to the evidence in *Gorgier* v. *Mieville* (2) or similar to the statements in the Special Case now before your Lordships, the negotiability of the instruments would have been established.

It was contended that this scrip was at most an undertaking to give a bond, and not a security for money; but, in my opinion, it is impossible to maintain such a distinction. The whole sum of £100 had been actually advanced, the loan carried interest from the previous Dec. 1, nothing remained to be done by the holder of the scrip, and if any such holder had been asked what security he had for the advance which he had made, he would unhesitatingly have pointed to the scrip. Under these circumstances I cannot regard the scrip as in any way different from a bond, and as the statement in the Case carries the custom as to negotiability of scrip quite as high as the evidence in support of the negotiability of bonds in *Gorgier* v. *Mieville* (2), I am clearly of opinion that your Lordships ought to hold that this scrip is negotiable, and that any person taking it in good faith obtained a title to it, independent of that of the person from whom he took it. I need go no further into a consideration of the authorities referred to in the Court of Exchequer Chamber, and in the arguments before your Lordships, and I, therefore move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY.—I concur in recommending your Lordships to come to the conclusion which has been pointed out by the noble and learned Lord on the Woolsack. The question is really determined by the consideration of three paragraphs in the Special Case, and a consideration of what has been already held by the courts of law for more than fifty years—since the decision in *Gorgier* v. *Mieville* (2)—there having been no decision to the contrary, I believe, from that time to the present.

The Special Case first describes what the scrip is, and then states that it is paid up, and is thereupon scrip which, upon its mere production to the Russian government, entitles the holder, without more, to obtain a bond for the specified sum, as well as entitling him to interest upon that money which has already been paid in respect of the scrip. It says, in para. 7, that

> "in the month of February, 1874, the plaintiff purchased and paid for £200 of the Russian scrip, on which the instalments were fully paid-up in advance, representing the right to receive bonds of the Russian government to the like amount, and also £300 of the Hungarian scrip, on which the instalments were fully paid-up in advance, representing the right to receive Hungarian bonds to the like amount."

Paragraph 8 says,

> "The plaintiff had employed Herbert Clayton, a stockbroker of the London Stock Exchange, to purchase the scrip in question in the Stock Exchange, which he did in the ordinary way. It remained in the hands of Clayton, as the plaintiff's broker, for disposal, or to be exchanged for the bonds when issued, as the plaintiff should direct, at the time Clayton parted with it as hereinafter mentioned."

And then para. 9 says:

> "The scrip of loans to foreign governments, entitling the bearers thereof to a bond for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and foreign Stock Exchanges, and through them by members of the public for over fifty years [—that represents the date of the decision in *Gorgier* v. *Mieville* (2)]. It is and always has been the usage of such bankers, money dealers, and stock exchanges during all that time to buy and sell such scrip, and to advance loans of money upon the security of it, before the bonds were issued, and to pass the scrip upon such dealings by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognised by the foreign governments or their agents delivering the bonds when issued to the bearers of the scrip."

In that state of circumstances, the Special Case having told us how these documents pass, we find that the plaintiff himself is a person who acquired his title to the scrip in question in that way. He acquired his title by instructing a broker named Clayton to go into the market and deal with the scrip in the manner in which the respondents in the case before us have themselves dealt with it, that is to say, that Clayton discharged his duty towards the appellant by the delivery to him (and with this the appellant was satisfied) of certain Russian and Hungarian scrip fully paid-up, without any inquiry whatever as to the preceding title, without taking into consideration whether or not the Russian government, or Messrs. Rothschild as their agents, could be considered as the persons primarily liable. He was content to receive in the market this document which would entitle him to receive a bond upon its mere production, and in like manner upon his parting with it would entitle any holder to receive a bond in the same way that he himself had become entitled to receive one. He left that document with his broker for disposal, or to be exchanged for bonds as he might think fit to direct. The broker unhappily pawned it for a debt of his own.

It is also found in the Case that these instruments are taken as securities, and pass from hand to hand as such. Here is a gentleman in possession of a document, which on the face of it entitles the holder to receive another document of a different character, a bond instead of scrip, upon the mere presentation of it by him as holder. He knows that if he places this document in the hands of a broker, that broker, if he should be told to dispose of it, would do so by simply handing over the scrip, as it had been handed to him for his client, the appellant, when the latter became entitled to it. The person buying of his broker would not be expected to ask, and, according to the course of business and dealing in the market, would not necessarily ask any question as to how the scrip had been acquired, and what the title of the previous owner of it had been. The appellant, therefore, gives the broker scrip which is disposed of every day in the market, and has for the last fifty years been disposed of every day in the market, upon the sole presentation of it by the holder, the seller, or the pledgor, to the person to whom he wishes to sell or to pledge it, and that without any suspicion being aroused to suggest the necessity, or even the propriety, of asking a single question further. Can a person who himself acquired the instrument in that manner, who knows that as long as he has it safe in his pocket, in his box, or in his desk, he can rely upon that instrument, but that as soon as he parts with it the holder will, as he did, become in a position to claim those bonds which he might himself have claimed if he had retained possession of the scrip, and he, placing it in the hands of a broker with no instructions whatever, except to dispose of it as he may direct, can he, according to the principle of the cases which were referred to in the course of the argument with regard to limited agency, recover the value of the scrip against a bona fide holder for value, when on the face of it that which constitutes, you may say, the authority of the agent, namely the possession of the documents, appears to be sufficient alone for obtaining the bonds in question?

I agree with my noble and learned friend on the Woolsack in thinking that this case might be disposed of upon that ground alone. But we are brought to the same conclusion if we refer to the decision in *Gorgier* v. *Mieville* (2), and consider how that case has been acted upon for the last fifty years, according to the statement contained in the Special Case itself. In the very able argument of counsel for the appellant it was pointed out that there was a distinction between that case and the present; but the only difference is this: in that case the court had to deal with the bonds themselves on which the Russian government was bound to make the payments; in this case we have to deal with an instrument which entitles the bearer to receive those bonds, all the payments on the scrip having been made at the time when it was handed over. Can there be any rational distinction between these two documents? Or, as BRAMWELL, B., put the question, if a broker was able to go into the market with a portion of the scrip in one hand and a bond in the other, and sell them both, could you hold that there was a substantial or

A rational distinction to be drawn between the right of a person who so acquired according to the practice of the Stock Exchange the one document, and the right of a person who in the same way acquired the other?

I do not think we need go into the nice distinction which counsel for the appellant so ingeniously laid before us by tracing the gradual extension of the doctrine of the negotiability of instruments. I think it would be sufficient to rest upon B the decision in *Gorgier* v. *Mieville* (2), and to say that there is no substantial distinction in fact between the instrument in that case and this instrument, which was immediately exchangeable for money, and intended to be so, and, further, that no sufficient authority is given by the doctrine of principal and agent which would authorise your Lordships to say that a man who gives his agent full power, according to the custom of the market in which he employs him, to dispose of an C instrument of that kind, by giving him an instrument which, according to the custom of that market, is passed from bearer to bearer, can be heard at the same time to say: "These are secret instructions, known to me and my agent only, which limit his right to that right which alone I say I have conferred on him as my agent." The appellant having entrusted this document to the agent, and the agent having parted with it according to the custom of the market, and there being a D bona fide title on the face of it, it seems to me that that title is perfectly good against the appellant.

LORD SELBORNE.—The scrip in this case is not one of those contracts in writing which have their nature, incidents, and effects defined and regulated by English law, so that a judge in an English court is bound, without evidence, to know E whether and how (if at all) they are legally transferable, and to reject any evidence of a customary mode of transfer if at variance with the law. It is not like the iron scrip which was the subject of LORD CRANWORTH'S remarks in *Dixon* v. *Bovill* (3), nor like the bond in *Crouch* v. *Credit Foncier of England* (4). The Court of Queen's Bench, in deciding that case, relied upon the distinction between English instruments made by an English company in England and a public debt created by a F foreign or colonial government, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder, on which there cannot properly be said to be any right of action at all, though the holder has a claim on a foreign government.

The Russian and Austrian scrip now before your Lordships belongs, in my judgment, to the latter, and not to the former category, and I know of no rule or prin- G ciple of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country according to any custom or usage which may be shown to prevail, if consistent with what appears on the face of the instrument. Considering it to be clear that the engagement, whatever may be its effect, which appears on the face of this scrip, is that of the foreign government, and not of Messrs. Rothschild, I desire to express my entire agreement with H what was said by LORD ROMILLY, M.R., in *Smith* v. *Weguelin* (5) (L.R. 8 Eq. at p. 212):

> "It is in my opinion a complete misapprehension to suppose that because a foreign government negotiates a loan in a foreign country it thereby introduces into that transaction all the peculiarities of the law of the country in which the negotiation is made. The place where the loan is negotiated does I not in my opinion, in the least degree affect the question of law. The contract is the same, and the obligations are the same, whoever be the bondholders. Suppose a French or Belgian company, residing in Paris or Brussels, instruct their agents in London to subscribe for some of these bonds, is the contract between the Peruvian government and a Belgian company to be regulated by English law because the contract is made by their agents in London, or are the contracts to vary according to the domicil of the subscribers to the loan? If the French government should negotiate a loan on certain specified terms, whether negotiated in London, in Brussels, or in Paris, the

same law must regulate the whole, and that law is the law of France, as much as if it had been expressly notified in the articles that the French law would be that by which the contract must be construed and governed. So if the English government were to negotiate a loan in Paris, or in New York, the English law must be applied to construe and regulate the contract."

The Special Case upon which your Lordships have to decide is silent as to the laws of Russia and of Austria with respect to the character and negotiability of these instruments. They must be construed, as was laid down by LORD LYNDHURST in *King of Spain* v. *Machado* (6), according to the obvious import of their terms; and the Special Case states that they have been largely dealt in, according to the usage which, for more than fifty years, has generally prevailed among bankers, money dealers, and the members of the English and foreign stock exchanges with respect to the scrip of loans of foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the government. This usage, which is expressly said to have extended to the scrip now in question, and to have been always recognised by the foreign governments delivering the bonds, when issued, to the bearer of the scrip, has been to deal with the scrip, for the purposes of purchase, sale, and loans of money on security, as a negotiable instrument transferable by delivery only. According to the opinion of LORD TENTERDEN in *Lang* v. *Smyth* (7), the proof of such usage is sufficient to justify the inference that such instruments are negotiable in the states by which they are issued, so as to render evidence of the law of those states unnecessary. TINDAL, C.J., added in the same case that the question, when the effect, not of the instrument transferred, but of the transfer of that instrument in England, is in dispute, is not so much what is the usage in the country from which the instrument comes, as that in the country where it was passed.

The usage so stated in the present case appears to be the legitimate, natural, and intended consequence, unless there be any law to prohibit it, of that representation and assignment which appears on the face of the scrip itself when construed according to the obvious import of its terms. It is, in its proper nature, a receipt or voucher for the several instalments, the payment of which in full is to entitle the bearer to bonds for the amount therein mentioned. Between the persons to whom it was first issued on the payment of the first instalment, and the Russian or Austrian governments, there was no other contract than this, that in exchange for his money he should receive this document as an instrument intended to give title, not to himself as an original creditor of that government, nor to any other person as claiming title under him by assignment, but directly and immediately to any one who might happen to be the bearer when the time for the delivery of the bond should arrive. The saleable and marketable quality of the scrip depended upon its having this particular nature and character, and to have this nature and character it was necessary that it should be capable of passing from hand to hand as a negotiable instrument. That that was the intention of the government which issued it cannot admit of doubt, and the appellant, whose title was so acquired, and every other holder, must be taken to have acceded to the representation upon the face of the document by virtue of which it did obtain general currency, in fact, in the English market, and also in the markets of Europe.

I should have no difficulty in coming to a conclusion favourable to the respondents on these grounds; but when the fact is added that upon the delivery of the scrip all the instalments necessary to give a complete right to the £100 stock mentioned on the face of the instrument had been actually paid, the case becomes more clear. After these payments had been made, and receipts for them signed, the scrip was as much a symbol of money due, and as capable of passing current upon the principle explained in the authorities with respect to bank notes, exchequer bills, and bonds, as it would have been if a bond had been actually delivered in exchange for it. It represented, though in a different form, precisely the same amount of indebtedness of the foreign government, which the bond would have done, and I

agree with BRAMWELL, B., in thinking that under the circumstances there is no substantial difference between the present case and *Gorgier* v. *Mieville* (2). I, therefore, concur in thinking that the judgment of the Court of Exchequer Chamber ought to be affirmed with costs.

Appeal dismissed.

Solicitors: *J. B. Batten*; *Trinders & Curtis Haywood.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

OUSEY *v.* OUSEY AND ATKINSON (No. 1)

[COURT FOR DIVORCE AND MATRIMONIAL CAUSES (Sir James Hannen, J.O.), April 30, 1874]

[Reported L.R. 3 P. & D. 223; 43 L.J.P. & M. 35; 30 L.T. 911; 22 W.R. 556]

Divorce—Desertion—Bar to relief—Husband's suit for divorce—Previous separation from wife in bona fide belief that non-consummation due to wife's refusal.

The parties were married in 1868, and in 1869 the husband left the wife, alleging that the separation was caused by her refusal to consummate the marriage. In 1872 the wife committed adultery with the co-respondent, and the husband presented a petition for the dissolution of the marriage on the grounds of the wife's adultery. The wife admitted the adultery and that the marriage had not been consummated, but alleged that the non-consummation was due to the husband's incapacity.

Held: without deciding whether the non-consummation was the fault of the husband or the wife, the husband had acted under a bona fide belief in leaving the wife, and, accordingly, he had not been guilty of such desertion without reasonable cause as to deprive him of a decree of dissolution on the ground of the wife's adultery.

Notes. Considered: *Synge* v. *Synge*, [1900–3] All E.R.Rep. 452; *Davis* v. *Davis*, [1918] P. 85; *Wickens* v. *Wickens*, [1918] P. 265. Followed: *Glenister* v. *Glenister*, [1945] 1 All E.R. 513. Considered: *Allen* v. *Allen*, [1951] 1 All E.R. 724. Referred to: *Russell* v. *Russell*, [1924] A.C. 687; *Williams* v. *Williams*, [1943] 2 All E.R. 746; *Everitt* v. *Everitt*, [1949] 1 All E.R. 908; *Chilton* v. *Chilton*, [1952] 1 All E.R. 1322.

As to defence of just cause for separation, see 12 HALSBURY'S LAWS (3rd Edn.) 256 et seq.; and for cases see 27 DIGEST 365 et seq.

Cases referred to in argument:

Yeatman v. *Yeatman* (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 16 W.R. 734; 27 Digest (Repl.) 365, *3019*.

Townsend v. *Townsend* (1873), L.R. 3 P. & D. 129; 42 L.J.P. & M. 71; 29 L.T. 254; 21 W.R. 934; 27 Digest (Repl.) 343, *2852*.

Jeffreys v. *Jeffreys and Smith* (1864), 3 Sw. & Tr. 493; 4 New Rep. 73; 33 L.J.P.M. & A. 84; 10 L.T. 309; 10 Jur.N.S. 572; 12 W.R. 809; 164 E.R. 1366; 27 Digest (Repl.) 423, *3531*.

Haswell v. *Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; Sca. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 8 W.R. 76; 164 E.R. 832; 27 Digest (Repl.) 444, *3759*.

Pearman v. *Pearman and Burgess* (1860), 1 Sw. & Tr. 601; 29 L.J.P.M. & A. 54; 1 L.T. 415; 8 W.R. 274; 27 Digest (Repl.) 442, *3729*.

Petition by the husband for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent.

The parties were married on Dec. 17, 1868, and lived together until May 29, 1869, when the husband, a commercial traveller, separated from the wife. In November, 1869, the wife became chargeable to the parish, and the husband made arrangements to pay her 8s. a week for her support, which he continued to do until 1871. In 1872, the wife cohabited with the co-respondent, and gave birth to a child. In her answer, the wife pleaded a mere traverse of the adultery, but she later amended her answer to allege that the husband had wilfully and without reasonable excuse separated himself from her, and had deserted her, and was guilty of wilful neglect and misconduct conducing to her adultery.

In evidence, the husband said that his sole reason for deserting his wife was her obstinate refusal to consummate the marriage, and that he was always ready to return to her if she would cohabit with him as his wife. The wife admitted the adultery, and also that the marriage had never been consummated, but she attributed that to the incapacity of the husband.

Searle for the husband.
Inderwick for the wife.

SIR JAMES HANNEN, J.O.—This is a very peculiar case. Both parties agree that the marriage has not been consummated; therefore, plainly it would be to the advantage of both that in some way or other their connection should be put an end to, but this, undoubtedly, is a very unsatisfactory mode of investigating the question which has arisen between them. I cannot say, as to either side, that there is no motive for presenting their case in the way in which they have. On the part of the husband, it may be said that he has taken this course in order to avoid the shame of its appearing that he is not competent for marriage, and that he prefers to throw the shame on his wife by establishing that she has been guilty of adultery. On the other hand, she desires to defend herself against the charge of having violated her duty as a wife. She insists that the fault of the non-consummation of their marriage rests with the husband. Unfortunately in this suit, I have no means of determining that question between them. It ought to have been raised by one or the other by a suit for a declaration of nullity of marriage, on the ground of the incapacity of the opposite party. I must, however, say with regard to the wife's attempted defence on this occasion, that it is a just subject of observation that she did not put forward the case which she now sets up in the first instance, though it must have been a circumstance which was peculiarly in her knowledge. When the application was made to amend the answer, I inquired the reason why such a defence had not been brought forward at the earliest moment, and no excuse was given for the delay.

The matter, therefore, really stands in this way. These two persons are directly in opposition to one another on a point which, at any rate without the evidence of medical men, cannot be determined by the court, and the truth of which must be confined to themselves. The fact that the wife has at a later period had a child, only raises a ground of argument, but it by no means disposes of the matter. I must take it that the question whose fault it was that the marriage was not consummated is one on which I am not able to arrive at any definite conclusion. I must add that, from my experience in such cases, when they are investigated in a proper manner, it is a question on which both the man and the woman may for a considerable time, if not for ever, remain in doubt with whom the fault or with whom the physical defect may lie. It may be merely nervousness on one side or the other which has costributed to the disappointment of both. I think that I am justified on the evidence in saying that it may well have been a matter of doubt on which side the fault of the non-consummation lay; and in that state

of things I think that a husband, taking the view that the fault was not with him but with the wife, and in that state of mind coming to the conclusion that the connection between them was intolerable, leading to misery and not to happiness, because the wife was either unable or resolutely unwilling to consummate, and, therefore, leaving her, cannot be said to have been guilty of such desertion as is contemplated by the Matrimonial Causes Act, 1857. The proceeding, if a mistaken one, would, I think, under such circumstances, be excusable, and the court would not be bound by reason of it to deprive him of the relief to which he would otherwise be entitled in the event of his wife not remaining constant to him.

I am disposed to take that view of the case. Although, perhaps, what the husband did may not be altogether what he ought to have done and what he might be expected to do, although he may not have acted generously in leaving the wife, as he seems to have done, without means of support, until compelled to contribute to her support, yet—assuming as I do, that this was done in consequence of the unhappy condition in which he was at the time, and in consequence of a bona fide belief on his part that she was wronging him and not he wronging her, I think that cannot be treated as desertion, and I am not, therefore, bound to refuse him the relief which he seeks on proof of the wife's adultery with the co-respondent. I, therefore, grant a decree nisi, but I think that I must extend some indulgence to the co-respondent. He must have the benefit equally with the husband of having acted in the bona fide belief that the marriage was void, and, therefore, he will not be condemned in costs.

Solicitors: *Nelson*; *Rowley, Page & Rowley.*

[*Reported by* W. Leycester, Esq., *Barrister-at-Law.*]

OUSEY *v.* OUSEY AND ATKINSON (No. 2)

[Probate, Divorce and Admiralty Division (Sir James Hannen, P.), November 30; December 2, 1875]

[Reported 1 P.D. 56; 45 L.J.P. 33; 33 L.T. 789; 24 W.R. 436]

Divorce—Decree absolute—Failure of petitioner to apply—Right of respondent—Dismissal of petition.

The husband, having been granted a decree nisi on the ground of his wife's adultery, failed to apply to the court within a reasonable time to have the decree made absolute. On an application by the wife to have the decree made absolute,

Held: the court only had power to make a decree nisi absolute at the instance of the innocent party to the suit.

Per Curiam: An application for a decree nisi to be made absolute being a step in the cause, if the petitioner fails to take that step there would seem to be no reason why the respondent should not call on him either to take that step or to have the decree nisi revoked and the petition dismissed for want of prosecution.

Notes. Applied: *Halfen* v. *Boddington* (1881), 6 P.D. 13. Referred to: *Lewis* v. *Lewis*, [1892] P. 212; *Rutter* v. *Rutter* (*No. 2*), [1921] P. 421; *Fender* v. *Mildmay*, [1936] 1 K.B. 111; *Williams* v. *Williams*, [1943] 2 All E.R. 436; *Roberts* v. *Roberts and Peters*, [1959] 2 All E.R. 209.

As to decree absolute, see 12 HALSBURY'S LAWS (3rd Edn.) 405 et seq.; and for cases see 27 DIGEST (Repl.) 686, 687.

Cases referred to:

(1) *Stoate* v. *Stoate* (1861), 2 Sw. & Tr. 384; 30 L.J.P.M. & A. 173; 5 L.T. 138; 164 E.R. 1045; 27 Digest (Repl.) 581, *5405*.

(2) *Latham* v. *Latham and Gethin* (1861), 2 Sw. & Tr. 299; 30 L.J.P.M. & A. 163; 9 W.R. 680; 164 E.R. 1011; 27 Digest (Repl.) 497, *4383*.

(3) *Sidney* v. *Sidney* (1867), 36 L.J.P. & M. 73; 15 W.R. 1094, H.L.; 27 Digest (Repl.) 634, *5950*.

(4) *Hulse* v. *Hulse and Tavernor* (1871), L.R. 2 P. & D. 259; 40 L.J.P. & M. 51; 24 L.T. 847; 19 W.R. 880; 27 Digest (Repl.) 582, *5420*.

(5) *Lewis* v. *Lewis* (1861), 2 Sw. & Tr. 394; 30 L.J.P.M. & A. 199; 4 L.T. 772; 7 Jur.N.S. 831; 164 E.R. 1048; 27 Digest (Repl.) 533, *4789*.

Also referred to in argument:

Prole v. *Soady* (1868), 3 Ch. App. 246; 32 J.P. 279; 16 W.R. 445, L.J.; 27 Digest (Repl.) 690, *6609*.

Mordaunt v. *Mordaunt* (1870), L.R. 2 P. & D. 109, 382; reversed sub nom. *Mordaunt* v. *Moncrieffe* (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 23 W.R. 12, H.L.; 27 Digest (Repl.) 457, *3928*.

Wells v. *Wells and Hudson* (1864), 3 Sw. & Tr. 542; 4 New Rep. 446; 33 L.J.P.M. & A. 151; 10 L.T. 696; 10 Jur.N.S. 755; 164 E.R. 1386; 27 Digest (Repl.) 494, *4352*.

Motion by the respondent wife for a decree nisi to be made absolute, the husband petitioner not having so applied.

Inderwick, Q.C., for the wife.

Dr. Deane, Q.C. (*Cowie* with him), for the Queen's Proctor.

Cur. adv. vult.

Dec. 21, 1875. **SIR JAMES HANNEN, P.**—This was a suit by a husband for a dissolution of his marriage with the wife on the ground of her adultery. The wife and co-respondent pleaded a denial, and the wife also pleaded certain counter charges against the husband. I found that the charges were proved, and that the countercharges were not proved, and I, accordingly, pronounced a decree nisi (see p. 636, ante). Six months having elapsed, and no cause having been shown against the decree, the husband became entitled to have it made absolute, after application by him to the court for that purpose, but he has abstained from making any such application. In this state of circumstances, the wife applied to the court to make the decree absolute. The husband had notice of the motion, but did not appear. Having regard to the general importance of the question involved, I thought it a case in which I ought to avail myself of the power given me by s. 5 of the Matrimonial Causes Act, 1860, and to have the matter argued before me by counsel, instructed by the Queen's Proctor.

The powers of this court in suits for dissolution of marriage are exclusively derived from the Matrimonial Causes Act, 1857, and the subsequent amending Acts. Turning, then, to these statutes, we find that, by s. 31 of the Act of 1857, it is enacted that if the court shall be satisfied that the case of the petitioner has been proved, and shall not find that the petitioner has condoned the adultery, or been guilty of connivance or collusion, it shall pronounce a decree dissolving the marriage. The power of pronouncing an immediate decree is taken away by s. 7 of the Act of 1860, by which it is enacted that every decree for a divorce shall in the first instance be a decree nisi, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall direct, and during that period any person shall be at liberty to show cause why the decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court. The 80th rule of court prescribes that all applications to make absolute a decree nisi for a dissolution of marriage must be made to the court by motion. This

A motion, therefore, is a necessary step in the cause for the purpose of obtaining a decree of dissolution, and the question is whether it can be taken by the party proceeded against.

It has been held that the party against whom the decree nisi has been obtained, cannot be heard to show cause why it should not be made absolute *Stoate* v. *Stoate* (1); and that the lis as between the parties is put an end to by the decree B nisi; *Latham* v. *Latham and Gethin* (2). On this, an argument against the wife was based, that she has no locus standi to be heard at all, but I am of opinion that she has. The language of Sir Cresswell Cresswell, in *Latham* v. *Latham and Gethin* (2), must be taken with reference to the matter then under consideration, namely, alimony pendente lite. That learned judge held that such alimony ceased on the decree nisi being pronounced, but it is clear that he did not intend C to decide that the respondent had no right to be heard at all after the decree nisi, because he did in fact hear her counsel on the question of what amount of alimony was due, and refused to make the decree absolute until it was paid. There are, indeed, many subjects on which the respondent against whom a decree nisi has been pronounced is entitled to be heard. It will be sufficient to specify one. By s. 32 of the Act of 1857, the court is empowered if it shall think D fit on any such decree (that is, on a decree declaring the marriage dissolved), to order that the husband shall secure to the wife such gross sum, or annual sum, as having regard to her fortune, if any, to the ability of her husband and to the condition of the parties it shall deem reasonable. Although this power is rarely exercised in favour of a guilty wife, yet, as, under special circumstances, it may be, it is clear that she must have the right of being heard to show that there are special E circumstances; as, for example, that she has brought her husband a large fortune, and that, without some allowance from him, she will be destitute. I have selected this example of the cases in which a respondent against whom a decree nisi had been pronounced, is entitled to be heard, because it may be thought to have a bearing on the general question now under consideration.

The order for an allowance to the wife, to be made under s. 32, must be embodied F in, or be contemporaneous with, the decree absolute: *Sidney* v. *Sidney* (3). It cannot be made before, and, as it was held in *Latham* v. *Latham and Gethin* (2) that the alimony pendente lite ceases with the decree nisi, this case may be thought to afford an argument in support of the contention that a husband who has obtained a decree against his wife ought not to be permitted to hold the decree perpetually suspended over her, thus leaving her without means, and depriving the court of G the power of compelling him to provide them. The answer to this argument appears to me to be that the legislature has only conferred on the court the power of compelling the husband to make an allowance to his guilty wife by way of condition on his accepting the benefit of a dissolution of his marriage. It cannot be legitimately inferred from this that it was intended that the wife should be able to insist on her husband accepting the benefit. The argument chiefly relied H on in support of the application was derived from s. 3 of the Matrimonial Causes Act, 1868, by which it is enacted that either party dissatisfied with the final decision of the court on any petition for a dissolution of marriage may, within one calendar month after the pronouncing thereof, appeal therefrom to the House of Lords. It was argued that, unless the decree were now made absolute at the instance of the wife, it would be impossible for her to appeal from the decision I of this court if she were so minded. It was not suggested that she had any intention of so doing, but it was contended that a respondent having good grounds for dissatisfaction with the decision arrived at in the decree nisi could be, in effect, deprived of the right of appeal if the court should refuse to make a decree absolute unless it were asked for by the petitioner, who might abstain from applying for it from an expectation that the decree would, on appeal, be reversed. To this it was answered that the "final decision" mentioned in s. 3 was not the decree absolute, but the decree nisi. There is reason to think that it would be well if this contention could be supported, but I am of opinion that it cannot.

The appeal originally given by the repealed s. 156 of the Act of 1857 was undoubtedly from the decree dissolving the marriage, for there was no other; and it appears from the proviso to s. 3 of the Act of 1868 that this was the decree which the legislature had in view in that section, for it enacts that in suits for dissolution no respondent or co-respondent not appearing and defending the suit on the occasion of the decree nisi being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the court, on application made at the time of pronouncing the decree absolute, shall see fit to permit an appeal. It would not, I think, be a reasonable construction of the section to hold that it allows an appeal in some cases from the decree nisi, and in others from the decree absolute. Further, by s. 4 of the Act of 1868, it is enacted that in cases where under "this Act" there shall be no right of appeal (that is, where the respondent has not appeared and defended the suit on the occasion of the decree nisi), the parties respectively shall be at liberty to marry again at any time after the pronouncing of the decree absolute, thus implying that, where there is a right of appeal, the parties must before marrying again wait as required by s. 27 of the Act of 1857 until the time limited for appealing against the decree dissolving the marriage (i.e., the decree absolute) has expired. This is altogether inconsistent with the idea that the appeal ought to have been from the decree nisi. But the fact that the appeal is from the decree absolute affords the answer to the argument founded on the supposed hardship of the respondent being deprived of the right of appeal. The legislature regards the decree dissolving the marriage alone as the subject of an appeal. That is the presumed object of the proceedings, and although, no doubt, as a matter of fact, the decision arrived at on pronouncing the decree nisi is looked on by the respondent in many, if not in a majority of cases as the most important, since it determines the question of her guilt, it is that which the respondent is presumed to be opposing. Until it is pronounced there has not arisen in contemplation of law any ground of complaint.

There is, however, one paramount reason specially applicable to proceedings for dissolution of marriage which leads me, though reluctantly, to the conclusion that I must refuse this application, and it is this: that it appears from the several Acts relating to the Divorce Court that the dissolution of a marriage is to be granted only on the petition of a person who comes within the description repeatedly used in the Acts, of an "innocent party," and solely as a relief to such a person on proof of adultery committed by the opposite party with or without other offences according to the sex of the accused. That this was the case under the Act of 1857 appears to me obvious. There was, then, no decree nisi. How, then, could a respondent ask for a decree dissolving the marriage, there being no charge against the petitioner on which a claim against him to have the marriage dissolved could rest? The only course which could then have been open to the respondent should have been to ask that the petition should be dismissed for want of prosecution. The subsequent legislation, by which the decree of dissolution was divided into two parts, was not intended to give the respondent any greater advantages, or in any way to alter his position, but to give time to the Queen's Proctor and third parties to bring to the knowledge of the court any facts which would deprive the petitioner of his inchoate right to have the decree made absolute.

This principle, that the powers of the court are to be exercised only on behalf of the innocent, is remarkably illustrated by *Hulse* v. *Hulse and Tavernor* (4), where the court refused to make a decree absolute on the ground that the petitioner had been guilty of adultery after the decree nisi. If, then, I were to make this decree absolute at the instance of the wife, I should, in effect, be giving relief not to the innocent, but to the guilty, and on the grounds of known guilt. To make more manifest the anomaly of such a proceeding, let it be supposed that the wife is entitled, as the case now stands, to succeed, but that it could be shown by the Queen's Proctor that the husband had been guilty of adultery since the time expired for making the decree absolute. The wife would be in this position: she was entitled to have her marriage dissolved on the ground of known guilt, and she

might be deprived of this right by the guilt of her husband. Having regard to these consequences, and for the reasons which I have given, I am constrained to hold that the wife is not entitled to succeed in her present application. Her position is one of hardship, for which it may be the law does not afford a remedy; but I think it right to point out that it is not to be assumed as clear that this suit for ever remains in its present position. I am inclined to think that this is not the case, although, as the point is not before me judicially, I do not express a positive opinion on it. By the present law, practice and rules, the petitioner in a divorce suit can alone apply to have a decree made absolute.

This, therefore, is a step in the cause. If, by not taking it, he subjects the respondent to any disadvantage, I can see no reason, as at present advised, why she should not call on him either to take that step or to have the decree nisi revoked, and the petition dismissed for want of prosecution. It is to be observed that this is all she could get in the event of a successful appeal; and, therefore, though it may not be the relief she desires in this case, it would do away with the theoretical hardship she now complains of on behalf of others—of not being able to prosecute an appeal. It would not, indeed, enable the court—if this were a proper case for doing so—to compel the petitioner to secure some allowance to his wife, because, as I have pointed out, the legislature has only enabled the court to exercise this power by way of condition on the petitioner accepting the benefit of a dissolution of marriage. But, on the other hand, her legal position in this respect would not be worse than if her husband had not instituted any proceedings against her.

In making these suggestions I have not overlooked *Lewis* v. *Lewis* (5), in which Sir Cresswell Cresswell expressed a doubt whether, after a decree nisi, he had power to dismiss the petition at the instance of either of the parties to the suit, or in any other manner than on the intervention of the Queen's Proctor or of a third person. But on that the learned judge did not decide the point. I should feel at liberty to act on my own opinion, if, after argument, I should still retain it, that the court had power in that case to revoke the decree nisi and dismiss the petition.

Motion dismissed.

Solicitor: *Rowley, Page & Rowley.*

[*Reported by* W. Leycester, Esq., *Barrister-at-Law.*]

HALL *v.* HALL AND RICHARDSON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir James Hannen, P.), May 13, 1879]

[Reported 48 L.J.P. 57; 40 L.T. 525; 27 W.R. 664]

Divorce—Res judicata—Dismissal of petition by consent—Subsequent petition containing same charges as well as new charges—Right of petitioner to rely on charges in original petition.

A petition for divorce can only be dismissed with the consent of the respondent and co-respondent, but where this is done and the petition is not heard the charges in the petition are not res judicata, and so the petitioner is not prevented from alleging the same charges in a subsequent petition.

Notes. Considered: *Land* v. *Land*, [1949] 2 All E.R. 218. Applied: *Bernard* v. *Bernard*, [1958] 3 All E.R. 475. Referred to: *Goldblum* v. *Goldblum*, [1938] 4 All E.R. 477.

As to absolute bars to divorce petitions, see 12 HALSBURY'S LAWS (3rd Edn.) 293 et seq.; and for cases see 27 DIGEST (Repl.) 374 et seq.

Application by the wife to strike out allegations contained in the husband's petition for dissolution of marriage by reason of her adultery.

In 1873, the husband filed a petition for dissolution of marriage on the ground of the wife's alleged adultery with the co-respondent. The following year the petition was dismissed on the application of the husband, with the consent of the wife and co-respondent, on payment of their costs by the husband. In a later petition filed by the husband, the charges in the original petition were set out in addition to fresh charges.

Willis, Q.C., and *Bayford* for the wife.

Inderwick, Q.C., and *Dr. Tristram* for the husband.

SIR JAMES HANNEN, P.—I am of opinion that the answer which it is proposed to set up to the petition is bad in law. It amounts to a plea of res judicata—that is to say, the wife alleges that the question of her guilt has been determined by the court in her favour. I am of opinion that neither in fact nor in form has there been any such adjudication. It has been contended that the order dismissing the petition ought to be taken as a final determination of the questions raised on the pleadings in the former suit. But it is admitted that no authority can be found for such a proposition derived from the practice of the ecclesiastical courts, and it is certainly also the case that there has been no decision to this effect since this court has been instituted. I have been referred to the practice in the courts of common law and equity, and some allusion has also been made to the practice of the criminal courts. The last, however, have, in my opinion, no bearing on proceedings in this court, because it has been determined that they are of a distinctly civil character.

Turning to the proceedings at common law, it is a matter of common knowledge that the putting an end to a suit before the issue is tried and determined is not a bar to renewing the proceedings at any subsequent time. The particular form in which that end was attained in common law courts was by a judgment of nonsuit, and after a judgment of nonsuit, another action might have been commenced. A change has been made in the proceedings of the courts of common law by virtue of the Orders under the Supreme Court of Judicature Act, 1875, which in effect puts the proceedings of the common law courts on the same footing as those of the Court of Chancery, but the rules of the Judicature Act are not binding on proceedings for divorce. Those proceedings were especially excepted from the Act, and, therefore, no assistance can be derived from a reference to its rules. With regard to the proceedings in courts of equity, there is no doubt that an order of the Court of Chancery of 1845 provided that where, after a case had been set down

to be heard, the bill was dismissed on the application of the plaintiff, such dismissal, unless the court otherwise ordered, should be equivalent to a judgment on the merits, and be treated as a bar to a subsequent suit on the same matter. But, as to that, it is sufficient to say that there never has been any such rule made in this court, and that the rules of the Court of Chancery have no bearing on the practice of this division.

It seems to me that the practice of the court in the matter rests on a perfectly clear and intelligible basis. It is this—that if a petitioner desires to put an end to the proceedings, and have the petition dismissed, he can do so only with the consent of the respondent and co-respondent. That gives the respondent and co-respondent control over the power which the petitioner desires to exercise, and places them in a position in which they can say, "We will not give our consent to this because the effect will be that the matter will be left open and that there will be no determination of it." If the respondent or co-respondent were to say, "I refuse to give my consent to the petition being dismissed," the necessary consequence would be that the matter would have to be tried out; the issues would be determined by the court or a jury, and then the matter would be concluded. But that could not be the case when the petition was dismissed with their consent before the merits were ascertained. It is said that the circumstances in which this petition has been dismissed amount to a compromise; but there is nothing in the nature of a compromise in the case. There was no agreement between the parties. The case amounts to this: the husband asked, the court did it, the wife consenting and the only terms being that the costs should be paid by the husband.

For these reasons, I hold that the answer is insufficient, and that the husband is entitled to proceed on all the charges alleged in the petition. I have finally to say that the fact that the husband applied to have his petition dismissed several years ago is one which cannot but have a very important influence in determining the case when it comes to be tried before a jury.

Application dismissed.

Solicitors: *Lewis & Lewis*; *F. R. A. Franklyn.*

[*Reported by* L. D. POWLES, ESQ., *Barrister-at-Law.*]

ASKEW *v.* WOODHEAD

[Court of Appeal (Sir George Jessel, M.R., Brett and Cotton, L.JJ.), March 3, 1880]

[Reported 14 Ch.D. 27; 49 L.J.Ch. 320; 42 L.T. 567; 44 J.P. 570; 28 W.R. 874]

Settlement—Tenant for life—Leaseholds—Compulsory purchase—Right of tenant for life to annuity—Amount.

The husband was tenant for life of leaseholds under a marriage settlement. The trustees of the settlement had power to sell the leaseholds with his consent which he refused to give. The leaseholds, which had eight years to run, were compulsorily purchased, the proceeds of the sale being paid into court and invested. The purchase money was sufficient to provide an annuity for eight years of a larger amount than the net rent of the leaseholds.

Held: the husband was entitled to an annuity of such an amount as would, in the course of eight years, exhaust the whole fund.

Notes. Followed: *Re Hunt's Estate*, [1884] W.N. 181; *Re Lingard, Lingard* v. *Squirrell*, [1908] W.N. 107. Considered: *Re Simpson, Clarke* v. *Simpson*, [1911–13] All E.R.Rep. 301; *Re Duke of Leeds Will Trusts, Duke of Leeds* v. *Davenport*, [1947] 2 All E.R. 200. Applied: *Re Scholfield* v. *Scholfield*, [1949] 1 All E.R. 490. Referred to: *Worman* v. *Worman* (1889), 43 Ch.D. 296.

As to money deposited in respect of leases or reversions, see 10 Halsbury's Laws (3rd Edn.) 200 et seq.; and for cases see 11 Digest (Repl.) 260 et seq. For the Lands Clauses Consolidation Act, 1845, s. 74, see 3 Halsbury's Statutes (2nd Edn.) 924.

Cases referred to in argument:

Re Money's Trusts (1862), 2 Drew. & Sm. 94; 31 L.J.Ch. 496; 10 W.R. 399; 62 E.R. 556; 11 Digest (Repl.) 260, *1389*.

Re Phillip's Trusts (1868), L.R. 6 Eq. 250; 11 Digest (Repl.) 261, *1395*.

Haynes v. *Barton* (1861), 1 Drew. & Sm. 483; 30 L.J.Ch. 804; 4 L.T. 764; 7 Jur.N.S. 699; 9 W.R. 777; 62 E.R. 463; 11 Digest (Repl.) 270, *1555*.

Lechmere v. *Lady Lechmere* (1735), Cas. temp. Talb. 80; 2 Eq. Cas. Abr. 31, 501; 25 E.R. 673; sub nom. *Lechmere* v. *Earl of Carlisle*, 3 P.Wms. 211, L.C.; 11 Digest (Repl.) 356, *824*.

Costello v. *O'Rorke* (1869), 3 I.R.Eq. 172; 43 Digest 839, *b*.

Wrightson v. *Macaulay* (1845), 4 Hare, 487; 67 E.R. 740; on appeal (1847), 17 L.J.Ch. 54, L.C.; 20 Digest (Repl.) 369, *919*.

Batteste v. *Maunsell*, 10 I.R.Eq. 97; affirmed, 10 I.R.Eq. 314.

Re Taylor's Settlement (1852), 9 Hare, 596; 22 L.J.Ch. 142; 68 E.R. 650; 20 Digest (Repl.) 370, *921*.

Re Birch, Ex parte London, Brighton and South Coast Rail. Co. (1864), 10 L.T. 690; 10 Jur.N.S. 673; 11 Digest (Repl.) 260, *1387*.

Re Pfleger (1868), L.R. 6 Eq. 426; 11 Digest (Repl.) 260, *1384*.

Appeal by the petitioner from a decision of Bacon, V.-C.

By a marriage settlement executed in 1844, leasehold property belonging to the wife was assigned to trustees on trust, with her consent during her life, and after her death with the consent of her husband during his life, to sell the property and hold the proceeds of the sale on trust to invest the same, and to pay the income to the wife for her life, and after her death to the husband for his life, with remainder to other persons. Till the property should be sold the tenants for life were to take the income produced by it in specie. The wife died in 1872, leaving the husband surviving her. In May, 1872, an order was made by the court for the sale of the property, if the husband should consent to a sale. He did not consent. In the same year the property was purchased compulsorily for £1,550 by the corporation

of Sheffield, as the urban authority of the borough of Sheffield, under the provisions of the Public Health Act, 1875, and the purchase money was paid into court, and was afterwards invested in the purchase of £1,640 consols. The question arose what income the husband was entitled to out of the purchase money. The average net annual income of the property had been £137. The lease would have expired in September, 1886. The husband presented a petition asking that, without prejudice to any question as to the alternate adjustment of the rights and interests as between him and the persons entitled in remainder, so much of the fund in court as would raise £137 per year be sold and such yearly sum paid to him. Bacon, V.-C., held that, by virtue of s. 74 of the Lands Clauses Consolidation Act, 1845, the petitioner was entitled to have raised out of the fund an annual income of £137 for the remainder of the term of the lease, if he should so long live.

Hemming, *Q.C.*, and *G. C. Price* for the petitioner.
Eddis, *Q.C.*, and *T. H. Robertson* for the remainderman.
Owen for the trustees of the settlement.

SIR GEORGE JESSEL, M.R.—What we have to decide is the proper construction of s. 74 of the Lands Clauses Consolidation Act, 1845, which provides that the court may direct the application of money paid into court in respect of any lease

> "in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease."

First, I will consider the simple case of a lease settled on one person for life with remainder over to one man absolutely. What application of the fund will give "the same benefit" to the tenant for life and remainderman as they would have had from the lease? Clearly, the purchase of an annuity for the same period as the lease would have run, had it not been taken, and the payment of that annuity to the tenant for life if he shall so long live, and, if he dies before the annuity ceases, then the remainderman will get the benefit of the annuity for the residue of the period. As a general rule, the fund is not sufficient to purchase an annuity equal to the rental of the leaseholds. In this case, however, the lease has fortunately produced a fund which will purchase an annuity greater than the net rental of the lease, and the same rule must be followed; that is, to purchase an annuity for the same period as the lease would have run. That being so, is there anything in the other objection that has been taken? It is said that a different rule must be applied here because, by the form of the settlement, there is a conversion of leaseholds. The leaseholds are settled in the usual manner in such cases on trust for sale with certain consents, but that does not operate as a conversion. There is no conversion until a sale has been made with the required consents, and, therefore, this is simply a leasehold settled on one for life with remainder over. Accordingly, the general rule must be applied, and the order of Bacon, V.-C., varied by referring it to an actuary to ascertain what annual sum will in the course of eight years exhaust the whole fund.

BRETT and **COTTON, L.JJ.**, concurred.

Solicitors: *Pilgrim & Phillips*; *Frere & Co.*; *Geare & Son.*

[*Reported by* E. S. Roche, Esq., *Barrister-at-Law.*]

A

Re BOWIE. Ex Parte BREULL

[Court of Appeal (James, Cotton and Lush, L.JJ.), December 9, 1880]

[Reported 16 Ch.D. 484; 50 L.J.Ch. 384; 43 L.T. 580; 29 W.R. 299]

Bankruptcy—Jurisdiction—Court—London—"Carries on business" within London bankruptcy district—Bank clerk employed in London—Residence—Place where person daily to be found. B

Under the Bankruptcy Rules, 1870, r. 17, a person employed as a clerk in a bank in the city of London "carried on business" there, so that the London Bankruptcy Court had jurisdiction to hear a debtor's summons against him.

Per James, L.J.: A man may be said to reside where he is daily to be found, certainly if he has no fixed sleeping place. C

Notes. The Bankruptcy Act, 1869, s. 59, has been replaced by the Bankruptcy Act, 1914, s. 98.

Explained and Distinguished: *Graham* v. *Lewis* (1888), 22 Q.B.D. 1. Distinguished: *Re Bright* (1901), 18 T.L.R. 37. Considered: *Goerz* v. *Bell*, [1904] 2 K.B. 136. Distinguished: *Cain* v. *Butler* (1916), 85 L.J.K.B. 804. Referred to: D *Re Adoption Application No. 52/1951*, [1951] 2 All E.R. 931; *Matalon* v. *Matalon*, [1952] 1 All E.R. 1025; *Davies* v. *British Geon, Ltd.*, [1956] 3 All E.R. 389.

As to court to which bankruptcy petition is presented, see 2 Halsbury's Laws (3rd Edn.) 301–302; and for cases see 4 Digest (Repl.) 40–41; 90. For the Bankruptcy Act, 1914, s. 98, see 2 Halsbury's Statutes (2nd Edn.) 414.

E

Cases referred to in argument:

Re Williams (1873), 8 Ch. App. 690; 28 L.T. 488, L.J.; 4 Digest (Repl.) 40, *350*.

Re Myer, Ex parte Pascal (1876), 1 Ch.D. 509; 45 L.J.Bcy. 81; 34 L.T. 10; 24 W.R. 263, C.A.; 4 Digest (Repl.) 25, *214*.

R. v. *Cuckfield (Inhabitants)* (1855), 5 E. & B. 523; 25 L.J.M.C. 4; 26 L.T.O.S. 58; 20 J.P. 196; 1 Jur.N.S. 1047; 4 W.R. 11; 119 E.R. 575; 37 Digest 306, *1066*. F

Re Charles, Ex parte Charles (1872), L.R. 13 Eq. 638; 41 L.J.Bcy. 43; 20 W.R. 524; 4 Digest (Repl.) 40, *344*.

Le Tailleur v. *South Eastern Rail. Co.* (1877), 3 C.P.D. 18; 33 Digest (Repl.) 504, *31*.

Re Brown v. *London and North Western Rail. Co.* (1863), 4 B. & S. 326; 2 New Rep. 447; 32 L.J.Q.B. 318; 8 L.T. 695; 27 J.P. 711; 10 Jur.N.S. 234; 11 W.R. 884; 122 E.R. 481; 13 Digest (Repl.) 417, *435*. G

Shiels v. *Great Northern Rail. Co.* (1861), 30 L.J.Q.B. 331; 4 L.T. 479; 7 Jur.N.S. 631; 9 W.R. 739; 13 Digest (Repl.) 418, *448*.

Maybury v. *Mudie* (1847), 17 L.J.C.P. 95.

H

Appeal by Samuel Bruell from a decision of Mr. Registrar Murray, sitting as Chief Judge in the London Bankruptcy Court, dismissing a debtor's summons taken out by him against J. H. Bowie for want of jurisdiction.

J. H. Bowie was clerk at a bank in the city of London. He slept at the house of his mother at Beckenham. A debtor's summons was served upon him in the London Bankruptcy Court on July 13, 1880, by Samuel Bruell, for £147 16s. 3d. I The only address of the debtor given in the summons was the office of the bank, and the summons was served on him there. In his affidavit of July 31, 1880, J. H. Bowie said that he was employed as clerk in a bank, and had no office of his own, and did not reside within the jurisdiction of the London Bankruptcy Court, but at Morton Villa, Brackley Road, Beckenham. Samuel Bruell, on the other hand, in his affidavit dated October, 1880, said that Morton Villa, was not the dwelling-place of J. H. Bowie, but that of his mother, and that his business address was in the city of London. By his affidavit, in answer to this, dated

November, 1880, J. H. Bowie said that he resided at Morton Villa, and had done so for upwards of ten years last past. His mother also resided at Morton Villa; it was rented in her name, but he paid part of the domestic and household expenses, and had no other place of residence. MR. REGISTRAR MURRAY, by an order dated Nov. 12, 1880, dismissed the summons for irregularity, on the ground that at the date of the issuing of the summons J. H. Bowie did not reside within the district or jurisdiction of the London Bankruptcy Court. Samuel Bruell appealed.

By the Bankruptcy Act, 1869, s. 59:

"From and after the commencement of this Act, the following provisions shall take effect with respect to the courts having jurisdiction in bankruptcy, and their officers; that is to say, If the person sought to be adjudged a bankrupt reside or carry on business within the London Bankruptcy District as hereinafter defined, or be not resident in England, then 'the court' shall mean, for the purposes of this Act, the Court of Bankruptcy in London as constituted by this Act. . . ."

By the Bankruptcy Rules, 1870, r. 17 (revoked):

"A debtor's summons . . . may be granted by the London Bankruptcy Court if the debtor resides or carries on business within the district of that court; . . ."

Winslow, Q.C., and *Bigham* for the appellant.

McIntyre, Q.C., and *G. A. Vennell* for the respondent.

JAMES, L.J.—I am of opinion that this appeal must succeed. To carry on business has no technical meaning; we must look at the object and intent of the Act in which they occur. What is the object of the Bankruptcy Act, 1869, s. 59, and r. 17 of the Bankruptcy Rules, 1870, with regard to the distribution of business between the London and district courts? The only object is that the debtor should be sued in his local court, and not be put to needless inconvenience. I am of opinion that a man may be said to reside where he is daily to be found, certainly if he has no fixed sleeping place. For all commercial purposes this man carries on his business in London. He is a salaried clerk. Any more narrow construction of the expression would cause great inconvenience.

COTTON, L.J.—I am of the same opinion. I quite agree that such words must receive a construction in accordance with the object of the Act in which they are found. They are ambiguous words, and may have different meanings according to the position in which they are found. I prefer to base my decision on the ground that the debtor carries on business within the district of the London Court. I do not intend to decide that he does not reside there, but I am clearly of opinion that he carries on business in the City. It is said that a man does not carry on business unless he is a principal, but I do not see that that is necessary. In ordinary language a man is said to carry on business, whether he be a principal or not. If I had to decide whether this man's employment was more properly described as a "business" or an "occupation," I might think that the latter would be the more appropriate term. But "business" is the larger term, and I think it includes his employment.

LUSH, L.J.—I am of the same opinion. In interpreting the words "reside or carry on business," we must look at the object of the Act. The object is that the debtor should not be put to needless inconvenience by being drawn away from the Bankruptcy Court to which he is nearest. The expression to carry on business cannot be meant to be confined to principals. Every person carries on his business where he is to be found during the business hours of the day. The railway cases are distinguishable from this one. A railway company carries on its business at its principal station, not at any small station. The cases have no application to this case. *Appeal allowed.*

Solicitors: *W. W. Wynne & Son*; *F. Clift.*

[*Reported by* FRANK EVANS, ESQ., *Barrister-at-Law.*]

GARNETT *v.* BRADLEY

[House of Lords (Lord Hatherley, Lord O'Hagan, Lord Blackburn and Lord Gordon), May 27, 28, June 6, 1878]

[Reported 3 App. Cas. 944; 48 L.J.Q.B. 186; 39 L.T. 261; 43 J.P. 20; 26 W.R. 698]

Statute—Repeal—Repeal of special enactment by general Act—Need for later Act to show intention to repeal.

When a statute repeals an earlier Act which relates to a definite subject-matter distinctly laid down for the guidance of those to be affected by the earlier Act, or to a particular class of persons who are to be protected or adversely affected by the provisions of the earlier Act, the legislature is presumed to have had that special subject-matter or special class of persons in contemplation when the later Act was passed. Where the later Act is a general Act and its generality is large enough to comprehend the particular matter dealt with by the earlier Act it must be considered whether or not persons who are not specified by the general Act are to be injuriously affected by a provision in that Act depriving them of benefits to which they were entitled under the earlier Act. If they are to be, there must be in the later general Act a sufficient indication of an intention to repeal the relevant provisions of the earlier Act. Otherwise, the two statutes may stand together, the particular earlier Act standing as a proviso or exception to the later general Act.

Considered, whether the effect of a general Act was to repeal the provisions of an earlier Act which had not been made with regard to any specified property or specified class of persons, but had been made as an exception from a general rule as to costs affecting all persons.

Notes. Considered: *Stokes* v. *Stokes* (1887), 19 Q.B.D. 419; *Rockett* v. *Clippingdale*, [1891] 2 Q.B. 293; *Harlow* v. *Minister of Transport*, [1950] 1 All E.R. 898. Referred to: *Bowey* v. *Bell*, *Brooks* v. *Israel*, *North* v. *Bilton*, *Siddons* v. *Lawrence* (1878), 4 Q.B.D. 95; *King* v. *Hawkesworth* (1879), 48 L.J.Q.B. 484; *Ex parte Mercers' Co.* (1879), 10 Ch.D. 481; *The Ganges* (1880), 5 P.D. 247; *Marsden* v. *Lancashire and Yorkshire Rail. Co.* (1880), 42 L.T. 630; *Pellas* v. *Neptune Marine Insurance* (1880), 28 W.R. 405; *Myers* v. *Defries* (1880), 5 Ex.D. 180; *Re Knight's Will* (1884), 26 Ch.D. 82; *Snelling* v. *Pulling* (1885), 52 L.T. 335; *Re Williams*, *Jones* v. *Williams* (1887), 36 Ch.D. 578; *Re Jones*, (1889) 59 L.J.Ch. 157; *Goldhill* v. *Clarke* (1892), 68 L.T. 414; *Re Fisher* (1894), 63 L.J.Ch. 235; *The Dragoman* (1895), 11 T.L.R. 428; *R.* v. *London Justices*, [1895] 1 Q.B. 616; *R.* v. *Speyer*, [1916] 2 K.B. 858; *Reid*, *Hewitt* v. *Joseph*, [1918] A.C. 717; *Donald Campbell & Co., Ltd.* v. *Pollak*, [1927] All E.R.Rep. 1.

As to the repeal of a particular enactment by a general, see 36 Halsbury's Laws (3rd Edn.) 467–468; and for cases see 42 Digest 767–771.

Cases referred to:

(1) *Parsons* v. *Tinling* (1877), 2 C.P.D. 119; 46 L.J.Q.B. 230; 35 L.T. 851; 41 J.P. 311; 25 W.R. 255; 42 Digest 764, *1908*.

(2) *Hawkins* v. *Gathercole* (1855), 6 De G.M. & G. 1; 3 Eq. Rep. 348; 24 L.J.Ch. 332; 24 L.T.O.S. 281; 19 J.P. 115; 1 Jur.N.S. 481; 3 W.R. 194; 43 E.R. 1129, L.JJ.; 42 Digest 636, *394*.

(3) *Foster's Case* (1614), 11 Co. Rep. 56b; 77 E.R. 1222; sub nom. *R.* v. *Foster*, 1 Roll. Rep. 91; 42 Digest 772, *1993*.

(4) *Townsend's Case* (1555), 1 Plowd. 111.

(5) *Stradling* v. *Morgan* (1560), 1 Plowd. 201; 75 E.R. 308; 42 Digest 634, *376*.

(6) *Trudgin's Case* (1579), 11 Co. Rep. 63, b.

(7) *R.* v. *Pugh* (1779), 1 Doug.K.B. 187; 99 E.R. 123; 42 Digest 701, *1773*.

(8) *Fitzgerald* v. *Champneys* (1861), 2 John & H. 31; 30 L.J.Ch. 777; 5 L.T. 233; 7 Jur.N.S. 1006; 9 W.R. 850; 70 E.R. 958; 42 Digest 769, *1960*.

Also referred to in argument:

Evans v. *Rees* (1860), 9 C.B.N.S. 391; 30 L.J.C.P. 16.

The Daioz (1877), 47 L.J.P. 1; 37 L.T. 137; 3 Asp.M.L.C. 477, C.A.; 1 Digest (Repl.) 284, *1879*.

General Steam Navigation Co. v. *London and Edinburgh Shipping Co.* (1877), 2 Ex.D. 467; 47 L.J.Q.B. 77; 36 L.T. 743; 25 W.R. 694; 3 Asp.M.L.C. 454; 1 Digest (Repl.) 246, *1428*.

Appeal from a decision of the Court of Appeal (BRAMWELL and BRETT, L.JJ., KELLY, C.B., dissenting), reversing a decision of the Exchequer Division.

The action was brought by the respondent against the appellant and in an action for slander, was tried before AMPHLETT, B. The plaintiff obtained a verdict, with one farthing damages, and the learned judge declined to certify or make any order as to costs. The master taxed the full costs for the appellant, and the respondent applied to FIELD, J., to review the taxation. He referred the matter to the court, who affirmed the master's decision, relying on the authority of *Parsons* v. *Tinling* (1). This decision was reversed, the majority of the judges in the Court of Appeal holding that none of the statutes as to costs were repealed by R.S.C., 1875, Ord. 55, and that it must be read with reference to them: 2 Ex.D. 349. From this decision the appellant appealed.

Mellor, Q.C., and *R. T. Reid* for the appellant.

Lawrence, Q.C., and *Bigham* for the respondent.

Their Lordships took time for consideration.

June 6, 1878. The following opinions were read.

LORD HATHERLEY.—The appellant in this case was the defendant in an action for slander brought against him by the respondent; and the verdict was obtained by the respondent with damages assessed by the jury at one farthing. The Limitation Act, 1623, s. 6 [repealed], provides that when a plaintiff in an action for slander shall not recover more than 40s. damages, he shall not have more costs than damages; and the question upon this appeal is, whether or not R.S.C., 1875, Ord. 55 coupled with s. 33 of the Supreme Court of Judicature Act, 1875, has had the effect of repealing or modifying the above enactment of the statute of James I. Order 55, made under the Supreme Court of Judicature Act, 1875, is contained in the schedule to that Act, and is made a part of the Act, and must be so dealt with. It directs that "the costs of and incident to all proceedings in the High Court" of Judicature established by the Act "shall be in the discretion of the court," but "subject to the provisions of the Act." The order also provides [r. 2: annulled] that

> "where any action or issue is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom such action or issue is tried, or the court, shall otherwise order."

In the case before us no order has been made by the judge, and the majority of the learned judges in the Court of Appeal have held that the Act of James I, being an Act directed towards a special and limited object, is not repealed by the general affirmative enactment contained in this order, notwithstanding s. 33 of the Supreme Court of Judicature Act, 1875, which repeals certain specified Acts, "and any other enactment inconsistent with this Act and the principal Act." I think that Ord. 55, when speaking of costs following the event, must be taken in the first place to mean that he who has succeeded in his cause shall, without regard to the amount of damages which he shall recover, be entitled to his costs unless the judge shall otherwise order. I take that to be the meaning if we are simply to consider the order itself, and not its effect upon the statute of James.

An argument deserving of very great attention appears to have influenced the minds of the majority of the learned judges in the court below—an argument

derived from a well-known class of authorities, which have determined that an Act directed towards a special object, or special class of objects, will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made directly or by necessary inference to the preceding special Act. The law on the subject is stated in the observations of a text writer (MAXWELL ON THE INTERPRETATIONS OF STATUTES), cited by BRAMWELL, L.J., in the court below, but I prefer taking the law as it is laid down by TURNER, L.J., in a well-known case, which gave rise to a considerable amount of discussion, that of *Hawkins* v. *Gathercole* (2). TURNER, L.J., reviews the whole subject in his judgment, and the doctrine is laid down there as fully as in the learned text writer cited by BRAMWELL, L.J., and the grounds and reasons of it are very fully explained and satisfactorily established. This will be found, I think, on looking into and analysing the various cases on the subject, to be the governing idea and conception, and the conclusion which has been founded upon it by the courts of judicature.

When an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or it may be affected adversely, by a particular clause of the enactment, the legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent statute was passed, and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment, and in that case the court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the legislature had been turned towards the former special enactment, and, in passing the general Act, that it had made the new enactment with the view of embracing every case embraced within the provisions of the previous Act.

Considering the question in that point of view, let us see in the first place what the special Act of James did. That Act can hardly be said to have contemplated a special class of persons; it only says that a person bringing an action for slander who does not recover more damages than 40s. shall not recover more costs than damages. It is simply a general Act striking generally at all persons who bring this class of action, but they do not form any particular class of the community who are entitled to any special observance, care, or regard in the framing of a subsequent Act. I think this will be apparent when you come to consider what the object of this Act of James was. In the common law courts there had been no discretion in the matter of costs, such as the Court of Chancery had at all times asserted. The common law courts were obliged to go back to a legislative enactment in order to arrive at their power of dealing with costs. The Statute of Gloucester, passed in the sixth year of Edward I, is the foundation of the common law jurisdiction as to costs, and that statute bound the common law judges, so that they could not in any way depart from the rule that was laid down, that costs followed the event. Therefore, it was necessary to except out of that strict and rigid rule any case which the legislature might consider worthy of such an exception.

When the Judicature Act was passed this difficulty was got rid of for ever, once for all, as regards the common law courts. The two jurisdictions were mingled, and the same powers and authorities were given to what were formerly the common law courts as had always existed on the part of the courts of equity. The legislature gave its sanction distinctly, as a part of the Supreme Court of Judicature Act, 1875, to Ord. 55 in the schedule. By the Judicature Act the legislature gave a direct authority to all the judges of the courts constituted under that Act, and vested in them a discretion which was to guide and determine them, according to

A the circumstances of each case, in the disposition of costs. In a general application of the rule as to costs it will be considered reasonable and proper that exceptions should be made for the express purpose of preventing this otherwise general rule from governing all cases whatever their circumstances might be. The argument with reference to the withdrawal of any object of a special Act passed anterior to the general Act from its operation entirely fails when you come to see that it was B not a particular class of Her Majesty's subjects who were exempted from the operation of a particular rule, but that a mode was pointed out of administering justice in certain cases, which mode was rendered necessary by the previous course of legislation, which had laid down a distinct and rigid rule not otherwise capable of being disposed of. When the Supreme Court of Judicature Act, 1875, came to be passed it was seen that it was no longer necessary that any such special exemption C should be provided, because in every class of suit, whatever might be the character of the action, or the position of the parties, there was a power left to the judge in his discretion to determine the question of costs.

Let us now see what would be the effect if we did not hold that this Order, together with the Judicature Act, superseded the special enactment of James on the subject of actions of slander. The effect would be this. You would have outstand- D ing an absolute rule applying to a particular class of cases, actions of slander, as hard and fast that the judges should not award the costs as it had been before that they should award them, although you have a subsequent Act of Parliament intended, as it seems to me, to render the course of procedure in the new courts about to be formed under the Act analogous to that which had been for all time the practice of the Court of Chancery. Forseeing that the judges would have full power to E make rules as to costs in future under s. 17 of the Act, and that full power as to costs in reference to all subjects which were formerly the subjects of common law jurisdiction would be placed in the hands of the judge, and that he might at his discretion entirely supersede the operation of that rule in the common law courts, they seem to me, in reference to that object and many other objects contained in the order, to have provided that this difficulty arising from clashing with other Acts of F the legislature should be entirely overcome. They provide for that by s. 33 of the Act of 1875, which expressly enacts that: "From and after the commencement of this Act there shall be repealed the Acts specified in the second schedule to this Act," and also "any other enactment inconsistent with this Act or the principal Act."

Any order whatever as to costs made by the judges as is provided for in the G Act of Parliament itself, would, if you were not to construe this Act as repealing previous Acts with reference to costs, absolutely bristle with inconsistencies. Any Act giving discretion to the court must be inconsistent with any special Act not repealed by s. 33, and any regulation whatever that was made relating to costs would teem with insuperable difficulties if we were not to hold that all those previous Acts, which defeated the intention of the legislature with regard to costs, were repealed H by s. 33. I do not rely much on s. 67 of the Supreme Court of Judicature Act, 1873, with reference to costs in proceedings in the county courts. That was relied upon somewhat as showing that where there was an intention to except a certain class of costs, that class of costs was specified. The rule was relied upon that expressio unius est exclusio alterius; but what I rely upon in this case is, that the enactment of James was not made in regard to any definite portion of property, or any definite I class of persons, but that it was made as a particular exception from a general rule laid down by a previous statute; that that previous statute must be altogether abrogated by the necessity of the case by the Act of 1875; and that, in order to meet the power given to the judges of having an absolute discretion with regard to costs, it is necessary that every portion of the Act of Parliament inconsistent with that discretion should be swept away. Except in the case of some local or special wrong, it must be intended that the full discretion given to the judges of allowing costs should be upheld, notwithstanding any enactment inconsistent with it, and any enactment inconsistent with it must be taken to be abrogated.

There is a series of Acts, referred to by BRAMWELL, L.J., which in special cases give what are called double or treble costs. I can conceive many circumstances which might make a difference between those cases and this which is now before the House. What I see is that the court of Chancery, always having had this jurisdiction with regard to costs, and the courts of common law never having had it since the sixth year of Edward I, there being an intention on the part of the legislature that in all cases before the High Court there should be one common course of procedure, the intention being that the orders and rules on that subject should be sanctioned by the Act, everything inconsistent with them must be considered as done away with by s. 33. The Court of Chancery always had power to regulate costs, and in dealing with costs, might give costs as between party and party, always, of course, below the full costs as between solicitor and client; the court had no power to increase the costs beyond that. Therefore, with respect to those enactments as to double and treble costs, the argument need not be pursued; it will easily be perceived that they relate to quite a different matter from that in which the discretion is to be absolute. Those costs are really penal.

It is enough for me to say that this particular statute of James has been operated upon by the Judicature Act, so as to make it inapplicable to the present case. Under these circumstances I propose to your Lordships to reverse the decision of the court below, and to direct that the appellant should have his costs in the court below and in this appeal.

LORD O'HAGAN.—I am also of opinion that the judgment of the Court of Appeal should be reversed. Formerly the rule as to costs was different in courts of common law and courts of equity. In the latter they were in the discretion of the judge; in the former, with some statutable exceptions, they followed the event, and the successful party took them as of course. The statutes making the exceptions were difficult of construction, and not always capable of satisfactory reconcilement with each other. The purpose of the Judicature Acts was to establish one great tribunal, with consistent and homogeneous action in all its parts, and, as far as possible, an assimilation of practice and procedure. The matter of costs was one of the most important with which the legislature had to deal in carrying out this purpose; and, in entire harmony with it, the order we are considering declares that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the court." The operation of that rule is as large as words can make it, and it was apparently designed to extend to all proceedings the discretionary power which had before governed only those in equity. It is expressly qualified as to mortgagees and trustees, and by the proviso with which we have to deal, that on a trial by jury "the costs shall follow the event," unless the judge shall otherwise determine.

In the first place, assuming the law to be that mere general words do not repeal special provisions unless there is a plain inconsistency between them, I am of opinion that there is here such an inconsistency. An enactment that in a particular instance a successful suitor shall have no more costs than damages, and an enactment that "in all proceedings" the judge may give him such costs as in his discretion he may deem right, seem to me irreconcilable; and if they are, the latter enactment must prevail, substituting the wide discretion for the peremptory rule. Why should we strain to discover another and a narrower construction, when we consider that the general object of the statute was to work an assimilation, which such a construction would pro tanto forbid; and when we find the legislature declaring that, in the event of a conflict between the rules of law and equity, the rules of equity shall prevail? The continuing operation of the statute of James would confessedly limit the discretionary action of the judge which equity maintained; and why should we labour to find reasons for that limitation in opposition to the declared policy of the statute, and in spite of the substantial inconsistency between the old law and the new? If this rule had terminated without the proviso I do not think that the universal discretion of the judge, save in the exceptional cases, could reasonably have been denied; and I do not see in the subsequent words

A anything to abridge it, so as to work a revival of the Act of James I. The directions that "the costs shall follow the event" would, in ordinary understanding, point to the success or failure of the parties to the suit respectively, as determining the right or the liability to the whole of the costs of the cause.

If I am right in holding that the inconsistency between the preceding clause of the rule and the statute is such as to overbear and nullify the latter, "the costs," after B the passing of the Judicature Act, can mean nothing but the general costs, unaffected by the special legislation, which has, in that view, altogether ceased to have effect. I do not see why we should exert legal ingenuity to give to the words an interpretation not attached to them by ordinary usage, and also inconsistent with the principle and policy of the statute in which they are found. The statute aims at uniformity of practice "in all proceedings in the High Court." The suggested C interpretation would continue the diversity between them. The statute contemplates a preference for the rules established in equity: the interpretation would involve the continuance of law directly in antagonism with those rules. If we can fairly avoid these consequences, and reconcile the plain objects of the Judicature Act with a reasonable construction of the rule, we ought to do so. And I think we may accomplish this by adhering to the common meaning of the words, and D holding that the costs to "follow the event" are the ordinary costs incidental to success in an action. The legislature has chosen, in the case of the verdict of a jury, not to take away the general discretion of the judge, but to leave it to himself to say whether he thinks it proper to exercise that discretion, or to allow the verdict to work its own result as to costs in giving them to the successful party. It presumes in favour of the verdict that the costs should follow, unless the judge E intervenes to regulate them; but I note in this no design to re-establish the exceptional law, which was, in my judgment, intended to be done away with by the antecedent words of the rule. There are two interpretations, either of which might possibly be entertained—the one recognising the existence of the antecedent statutes, the other regarding them as repealed, and I prefer the latter, as in my mind manifestly accordant with the general intention of the Act, and calculated F to attain the benefit at which it aimed, and to rectify the mischief it sought to remedy.

As to the argument derived from the repeal of a number of other statutes, as well as that immediately in question, which may be consequent on a decision in the appellant's favour, I think it scarcely legitimate if there be any force in the con- G siderations on which I have relied. If it was the purpose of Parliament to simplify our legal system, and to unify it as far as possible, and for this purpose (inter alia) to give to the court universally the discretion as to costs it had theretofore exercised in equitable proceedings, and if the phraseology of the statute is strong and clear to carry out that purpose, I do not think we are at liberty to baulk the purpose because the effect may be to work the repeal of statutes we may deem bene- H ficial. I give no opinion as to its effect on other Acts which are not before us. Different considerations may apply to them with different results, and each must be dealt with accordingly as the occasion arises. I do not, therefore, feel the force of the argument which was so much relied on in the Court of Appeal; but, whatever its force may be, I think it is counterbalanced and overborne by the special exclusion of the county courts from the operation of the Act as to costs. That I exclusion shows that the attention of Parliament was called to the propriety of limiting the discretion of the judge in particular circumstances, and the omission to limit it in those with which we have to deal persuasively suggests that the limitation was not designed to affect them. As was observed by Grove, J., in *Parsons* v. *Tinling* (1), a very few words would have secured the continuing action of the earlier statutes, but they were not inserted, and their non-insertion derives double significance from the careful reference to the county courts. For these reasons I am of opinion that the proposal of my noble and learned friend should be adopted by your Lordships.

LORD BLACKBURN.—I also have come to the conclusion that the decision of the Court of Appeal was wrong, and that it ought to be reversed. I think that the ground upon which their Lordships went, which is in itself a good ground to apply to proper cases, has been misapplied in the present case.

First of all, I will observe that before the Judicature Acts came into operation there were rules as to costs in courts of common law. They were not by common law at all; they were entirely and absolutely creatures of statute. There had been statutes passed at different times giving costs, the earliest being the Statute of Gloucester. Subsequent statutes were passed at different times giving a plaintiff a right to recover costs in any action. I think the first that gave costs to the defendant was as late as James I. The result was that as a general rule in every case in courts of common law the party who succeeded got his costs, whether he was plaintiff or defendant, whether he succeeded by verdict or on demurrer. From that general rule, however, certain statutes made exceptions in particular cases.

Of the three statutes which come into question in the present case, the first is the Limitation Act, 1623, s. 6. The effect of that statute was to make an exception from the general view which I have stated, and to say that where a party had obtained a verdict and recovered damages less than forty shillings in an action of slander, he should have no more costs than damages. There was no power to certify; it was an inexorable rule. That Act was obviously passed to discourage frivolous actions for slander. Besides that two other statutes were passed for an object very little different, which it is necessary for me to notice. One of those is the 3 & 4 Vict., c. 24 [costs of actions of trespass], which is commonly called "Lord Denman's Act," which says that in actions for tort generally when a party recovers less than forty shillings he shall have no costs at all, unless there be a certificate or order of a particular sort. Then there is the County Courts Act, 1867. That was an Act passed for the purpose of discouraging persons from suing in the superior courts instead of suing in the county courts. It was an enactment in general terms that where a party recovered less than a specified sum in tort he should have no costs at all, unless some particular certificates were given. The question which arises in the present case is: Are these three statutes got rid of under the Judicature Acts?

To ascertain that, we have to construe those Acts and see what they mean. There is first the Act of 1873, the principal Act, and s. 67 of that Act, which affects the provision in the County Courts Act, I shall have to refer to afterwards. The Act of 1875, s. 16, provided that the orders contained in the schedule should be considered part of the Act, subject to all provisions to be made thereafter; and it did make them part of the Act as much as any section in the Act itself. It is upon the construction of Ord. 55 that this question will mainly depend. With regard to the meaning of the proviso to that Order I observe that in the court below the judges say that they do not understand it. It seems to me that its meaning is plain. The general enactment is that costs shall be in the discretion of the court. The proviso says that when a case is tried by a jury it is to be different. If the plaintiff recovers when the action is tried before a judge alone the costs are not to be recovered absolutely, but are to be at the discretion of the judge; if he recovers when the action is tried before a jury there is to be a different rule, that "costs shall follow the event." That means that the successful party, whether plaintiff or defendant, shall have his costs (which would clearly, in my opinion, mean his ordinary taxed costs), unless "upon application made at the trial for good cause shown," an order shall have been made otherwise. Therefore, it remains entirely for us to say, upon the construction of that Order, whether or not it has the effect of getting rid of the three enactments which I have before mentioned, which would certainly have stood in the way of the plaintiff in the present case recovering any costs at all.

Upon that the question arises, I think, upon the construction of the Act. I need only mention one other section in the Act, upon which something has been said. The Act of 1875 by s. 33 provides that a number of Acts named in the

schedule shall be repealed, and there shall be repealed also all statutes "inconsistent with this Act." That brings us to ask, Is the statute of James inconsistent with the Act of 1875 or not? An Act saying that all statutes inconsistent with itself shall be repealed really goes no farther than the general law, but it becomes a question, upon which there is a vast quantity of authority in different ways, as to what shall be the inconsistency which shall cause the repeal of an earlier statute or an existing general rule. I do not know that it is better stated anywhere than in *Foster's Case* (3), where it is said:

> "This Act of 35 Eliz. is all in the affirmative, and therefore shall not repeal or abrogate a precedent affirmative law before; and the said rule that leges posteriores priores contrarias abrogant was well agreed, but as to this purpose, contrarium est multiplex."

He then proceeds to give five instances of different rules, where he says that there may be a contrariety shown in the statute, and he besides refers to *Townsend's Case* (4). There is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred—namely, when the new enactment is couched in general affirmative language, and the previous law, whether a law of custom or not, can well stand with it—for the language used is all in the affirmative—there is nothing to say that the previous law shall be repealed, and, therefore, the old and the new laws may stand together. There the general affirmative words used in the new law would not of themselves repeal the old; but, when the new affirmative words are, as was said in *Stradling* v. *Morgan* (5), such as by their necessity to import a contradiction, the second repeals the first.

Applying that to the present case, I think there could not be any reasonable doubt that a law which says that costs generally shall be in the discretion of the court, and that costs shall follow the event, subject to being taken away if certain things happen, is absolutely inconsistent with statutes which say that the successful party shall, as a matter of right, have his costs. You cannot let the two laws stand together, and say that the costs shall be in the discretion of the court and at the same time that one of the parties shall have them as a matter of right. Neither can you say that the costs shall follow the event, that is, belong to the party who succeeds, unless the court takes them away, and at the same time let a law stands which says that a party shall not have the ordinary taxed costs, but shall only get a farthing. The two are absolutely inconsistent; the one repeals the other.

I should not entertain any doubt of that for a moment, but that there is a rule which has been laid down, which I think is a good rule if properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing and a subsequent enactment has general words which would repeal that particular law or particular custom if they were taken in all their generality, yet, nevertheless, the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together, the particular law standing as an exceptional proviso upon the general law. The contention here is, and the ground upon which the learned judges below went was that in this case the enactment of James I was a particular law within the meaning of this rule, and that it will stand together with the general words in the Judicature Act. During the argument, I was rather impressed with the belief that that ground was sound, and that it was properly applied; but I think, on consideration, that although that doctrine itself was sound, yet it was misapplied to this case, and I will proceed to state why.

That general rule has been acted upon in numerous cases. I may refer to *Trudgin's Case* (6); *R.* v. *Pugh* (7); *Hawkins* v. *Gathercole* (2); and *Fitzgerald* v. *Champneys* (8). In all these cases, however, the particular statute relied upon was a statute in favour of a particular class of persons, or the property of a

particular class of persons. Where that is the case, the reason for the rule which has been acted upon is exceedingly plain and strong. It would be very unfair to pass an enactment taking away from a particular person, or class of persons, his or their rights, without hearing what he or they have got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class, which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it, and it is not to be supposed that the legislature would do what was unfair. Therefore, I think that, where only general words are used, there is a strong presumption that the legislature did not intend to take away a particular privilege, right, or property of a particular class, unless they have done something to show what was their intention.

I think that principle will reconcile almost all the cases, and it is a good and and intelligible principle. But when we come to the present case I do not think it applies at all. The statute of James and the other two statutes I have mentioned were not passed in favour of a particular class of persons at all. In discouraging actions of slander the legislature was not giving a privilege to a particular class; it was passing a general enactment for the benefit of all His Majesty's subjects. And to Lord Denman's Act, and the County Courts Act exactly the same remark applies.

I only wish to add one word more. I wish to guard myself against being supposed to decide as to the effect of this rule upon other statutes which have been mentioned, or its applicability to them. For instance, Jervis's Act [the Justices Protection Act, 1848] contains certain provisions in favour of justices against whom actions might be brought maliciously, giving them greater costs than there would be in other cases. Again, there is the Dramatic Copyright Act, 1833, in which double and treble costs are given to the owners of the copyright which is infringed. I wish to guard myself from being supposed to express an opinion one way or the other upon what would be the effect of Ord. 55 upon such a class of enactments. I am confining what I am now saying to the three Acts I have mentioned.

One word as to s. 67 of the Act of 1873. This general order is made "subject to the provisions of the Act," and s. 67 of the Act of 1873 is, of course, a provision of that Act. That section enacts that:

> "The provisions contained in ss. 5, 7, 8, & 10 of the County Courts Act, 1867, shall apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a county court."

That enactment, therefore, does not touch the cases in which a county court cannot give relief, and a county court cannot entertain an action of slander. For that reason it seems to me that, inasmuch as an action of slander is not within s. 67, it is not within the provisions to which Ord. 55 was to be subject. I agree in the motion which has been made by my noble and learned friend.

LORD GORDON.—I entirely concur in the opinions stated by your Lordships. I simply content myself with saying that, after full consideration, and especially having regard to s. 33 of the Supreme Court of Judicature Act, 1875, it appears to me that there is to be found there a repeal of the Act of James I and of the two other Acts which have been referred to in the course of the discussion in this case. I think the provisions of Ord. 55 are inconsistent with those statutes, and, therefore, they are repealed.

Appeal allowed.

Solicitors: *C. Butcher*, for *H. Patteson*, Sheffield; *Stevens & Co.*, for *Cutts, Jones & Middleton*, Chesterfield.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

STURLA AND OTHERS *v.* FRECCIA AND OTHERS

[House of Lords (Lord Selborne, L.C., Lord Hatherley, Lord Blackburn and Lord Watson), June 15, 17, 18, 1880]

B [Reported 5 App. Cas. 623; 50 L.J.Ch. 86; 43 L.T. 209; 44 J.P. 812; 29 W.R. 217]

Evidence—Admissibility—Hearsay—Public document—Report of committee of foreign government.

In an action by the appellants to establish their title to the property of one B. who died intestate in 1871 the appellants sought to prove that they were C the next-of-kin of M., who died in 1803, B. being his daughter and sole next-of-kin. In support of their case they submitted a report of a committee appointed by a foreign government to inquire whether a man named M. was fit to be given a certain post, that report containing statements as to his age and birthplace. The respondents, defendants in the action, denied that the M. referred to was the father of B., and contended that the report was not D admissible in evidence.

Held: it had not been shown that there was any strict inquiry by the committee into the matters which the appellants sought to prove, and, therefore, the report was inadmissible.

Evidence—Admissibility—Hearsay—Statement against interest—Entry made in E *course of duty—Reputation as to public right—Pedigree—Public document.*

Per Lord Blackburn: Hearsay evidence is admissible in the following cases: (i) a document on the face of it appearing to be against the interest of a deceased person who made it is evidence; (ii) where a deceased person in the course of his duty makes a contemporaneous entry in a book or document of something which he has done in the course of his business, after his death it F would be received in evidence; (iii) evidence of reputation by deceased persons in a position to know as to a public or quasi public right is admissible; (iv) statements by deceased members of the family made ante litem motam are evidence to prove pedigree; (v) public documents, made by a public officer, i.e., a document made for the purpose of the public making use of it and being able to refer to it.

G **Notes.** Considered: *Haines* v. *Guthrie* (1884), 13 Q.B.D. 818. Applied: *Evans* v. *Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241. Considered: *Mercer* v. *Denne*, [1905] 2 Ch. 538; *Bird* v. *Keep*, [1918] 2 K.B. 692. Applied: *Lilley* v. *Pettit*, [1946] 1 All E.R. 593. Referred to: *Re Turner*, *Glenister* v. *Harding* (1885), 29 Ch.D. 985; *Re Trufort*, *Trafford* v. *Blanc* (1887), 36 Ch.D. 600; *Amys* v. *Barton* (1911), 5 B.W.C.C. 117; *Re Djambi* (*Sumatra*) *Rubber Estates* (1912), 107 L.T. H 631; *Heyne* v. *Fischel* (1913), 110 L.T. 264; *Ward* v. *Pitt*, *Lloyd* v. *Powell Duffryn Steam Coal Co.*, [1913] 2 K.B. 130; *Collis* v. *Emphlett*, [1918] 1 Ch. 232; *Finn* v. *Shelton Iron, Steel and Coal Co.* (1924), 131 L.T. 213; *Davey* v. *A.-G.* (1934), 50 T.L.R. 588; *Thrasyroulos Ioannu* v. *Papa Christoforas Demetriou*, [1952] 1 All E.R. 179.

As to hearsay evidence, see 15 Halsbury's Laws (3rd Edn.) 294 et seq.; and for I cases see 22 Digest (Repl.) 71 et seq.

Cases referred to:

(1) *Doe d. Patteshall* v. *Turford* (1832), 3 B. & Ad. 890; 1 L.J.K.B. 262; 110 E.R. 327; 22 Digest (Repl.) 109, *899*.

(2) *Chambers* v. *Bernasconi* (1834), 1 Cr.M. & R. 347; 4 Tyr. 531; 3 L.J.Ex. 373; 149 E.R. 1114, Ex. Ch.; 22 Digest (Repl.) 47, *296*.

(3) *Higham* v. *Ridgway* (1808), 10 East, 109; 103 E.R. 717; 22 Digest (Repl.) 93, *709*.

(4) *Price* v. *Earl of Torrington* (1703), Holt, K.B. 300; 2 Ld. Raym. 873; 1 Salk. 285; 90 E.R. 1065; 22 Digest 104, *840.*

(5) *Irish Society* v. *Bishop of Derry* (1846), 12 Cl. & Fin. 641; 8 E.R. 1561, H.L.; 22 Digest (Repl.) 344, *3672.*

(6) *Merrick* v. *Wakley* (1838), 8 Ad. & El. 170; 3 Nev. & P.K.B. 284; 1 Will. Woll. & H. 268; 7 L.J.Q.B. 190; 2 J.P. 264; 2 Jur. 838; 112 E.R. 802; sub nom. *Meyrick* v. *Wakley*, 8 C. & P. 283; 22 Digest (Repl.) 339, *3618.*

(7) *R.* v. *Debenham (Inhabitants)* (1818), 2 B. & Ald. 185; 106 E.R. 334; 22 Digest (Repl.) 327, *3443.*

(8) *Oldis* v. *Donmille* (1695), Show. Parl. Cas. 58; 1 E.R. 40; 16 Digest (Repl.) 219, *1072.*

(9) *Price* v. *Littlewood* (1812), 3 Camp. 288; 22 Digest (Repl.) 327, *3442.*

(10) *Arnold* v. *Bishop of Bath and Wells* (1829), 5 Bing. 316; 2 Moo. & P. 559; 7 L.J.O.S.C.P. 120; 130 E.R. 1083; 22 Digest (Repl.) 330, *3486.*

Also referred to in argument:

Collins v. *Maule* (1838), 8 C. & P. 502, N.P.; 22 Digest (Repl.) 358, *3841.*

Lloyd v. *Wait* (1842), 1 Ph. 61; 6 Jur. 45; 41 E.R. 554; 22 Digest (Repl.) 102, *811.*

Stead v. *Heaton* (1792), 4 Term Rep. 669.

Annandale (Peerage) Case (1844), 1 Scots Peerage, 269; cited in 5 Bli.N.S. p. 251; 5 E.R. 304, H.L.; 37 Digest 35, *63.*

Pritt v. *Fairclough* (1812), 3 Camp. 305, N.P.; 22 Digest (Repl.) 106, *864.*

Russel's Case (1692), 4 Mod. Rep. 128.

Devon (Peerage) Case, Sir Harris Nicolas' Rep. Appendix xxiv.

De Roos Claim (1804), Minutes of Evidence, 339.

Vaux Peerage (1837), 5 Cl. & Fin. 526; 3 State Tr.N.S. App.A., 1283; 7 E.R. 505, H.L.; 22 Digest (Repl.) 309, *3208.*

Matthews v. *Port* (1688), Comb. 63; 90 E.R. 345; 22 Digest (Repl.) 309, *3201.*

Norris v. *Le Neve* (1731), 2 Barn.K.B. 26; 94 E.R. 334; 22 Digest (Repl.) 309, *3206.*

Stainer v. *Droitwich (Burgesses)* (1695), 1 Salk. 281; 91 E.R. 247; sub nom. *Steyner* v. *Droitwich (Burgesses)*, Holt, K.B. 290; Skin. 623; sub nom. *Stayner* v. *Diotwisch (Burgesses)*, 12 Mod. Rep. 85; 22 Digest (Repl.) 377, *4076.*

Vernon v. *Manners* (1572), 2 Plowd. 425; 3 Dyer, 319 a; 75 E.R. 640; 30 Digest (Repl.) 255, *120.*

Pitton v. *Walter* (1719), 1 Stra. 162; 93 E.R. 448; 22 Digest (Repl.) 303, *3130.*

Nairn (Peerage) Case (1873), unreported.

Shrewsbury Peerage (1858), 7 H.L.Cas. 1; 11 E.R. 1, H.L.; 22 Digest (Repl.) 114, *967.*

Wharton Peerage Case (1845), 12 Cl. & Fin. 295; 8 E.R. 1419, H.L.; 22 Digest (Repl.) 279, *2826.*

R. v. *Martin* (1809), 2 Camp. 100; 22 Digest (Repl.) 327, *3440.*

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (James, Brett and Cotton, L.JJ.), reported 12 Ch.D. 411, affirming a decision of Malins, V.C.

In 1871 a Mrs. Brown died at her house in Hertford Street, Mayfair, intestate, and, as she had no known relations, her property, amounting to about £200,000, was taken possession of on behalf of the Crown. She was the daughter and sole next-of-kin of one Antonio Maria Mangini, who had represented the Genoese government in London from 1781 till his death in 1803. Various persons came forward claiming to be next-of-kin to Mrs. Brown, and in 1876 Malins, V.-C., decided in favour of the Freccia family, the respondents. After this decision the Sturla family, the appellants, came forward, and alleged that they were the true next-of-kin to Mangini. According to the case of the respondents Mangini was born in 1735, at a village called St. Ilario, about seven miles from Genoa; but the

A appellants asserted that the person through whom the respondents claimed was not the Mangini who had been so long settled in London, who, as they said, was born at Quarto, a hamlet in the Ligurian mountains, near Genoa, in 1744. The evidence upon which they chiefly relied was a document purporting to be a report made by a board or committee called the "Giunta di Marina" to the Genoese government in 1790, upon the occasion of Mangini making an application to the B government to promote him from the position of "consul" in London, to that of "diplomatic agent" for the government. In this document he was described as being at the time about forty-five years of age, and a native of Quarto. The authenticity of the document was disputed by the respondents.

J. Pearson, *Q.C.*, *Wills*, *Q.C.*, and *E. Beaumont* for the appellants.
Napier Higgins, *Q.C.*, *Bagshawe*, *Q.C.*, *Everitt*, and *Eyre* for the respondents.

C

LORD SELBORNE, L.C.—The question on this appeal is one as to the reception of evidence. It is sought to put a document in evidence for the purpose of proving that the person who was consul in London whose estate of inheritance to his daughter, Mrs. Brown, is now in question, was a native of Quarto, near Genoa, and, at the time that report was made, aged about forty-five years. The document D has been tendered for that purpose, and for that purpose only. Upon that question of evidence we have heard the argument at very full length on behalf of the appellants. I believe none of your Lordships thinks it necessary to hear the respondents on that point. The evidence has been rejected by the court below and I think all your Lordships are of opinion that its rejection was unavoidably necessary by reason of the rules of evidence applicable to questions of this kind by the E law of England. There is abundant evidence which has been brought to your Lordships' notice to accredit as authentic and in good faith the report which contains the passage which it is desired to use; but what your Lordships must consider in this case is what is the nature of that report, and how far the statements contained in it can be brought within the rules of the English law of evidence as to matter incidental to the proof of pedigree.

F The nature of the report is this. Mr. Mangini had been consul in London for about ten years. He desired to have a somewhat higher authority as the agent of the republic of Genoa, and he had made application in writing for that appointment. He was, and he remained, in London; and there is no evidence before your Lordships as to any relatives of his at Genoa having had anything whatever to do with the statements contained in this report, nor is there any evidence what- G ever to connect any of those statements with the representations proceeding directly from Mr. Mangini himself. The public authority at Genoa with whom rested appointments of this description was called the "Collegi," being in point of fact a kind of joint assembly of certain parts of the executive government of Genoa and the Senate; and it appears to have been a common practice of theirs—whether universal or not I will not assume one way or the other—to refer applications of H this kind to a species of executive sub-committee, which was called the "Giunta di Marina," or "Navy Board." It seems to have been composed, if I am not mistaken, of two members of the Senate and one of the Finance Board, or the reverse. The nature of the reference appears upon the face of it. It was to learn what they could about persons who had made applications for the appointment, and to report the result to the "Collegi," with which the appointment I rested; in fact it was an executive sub-committee to assist a Department of the government by collecting and reporting information as to applicants for public appointments, or applicants for appointments of this particular kind.

It does not appear that any particular rules were prescribed to them as to the kind of information which they would collect, still less as to the evidence which they were to require in support of that information. What the law of Genoa as to legal evidence may be we do not know; and certainly there is nothing here upon which we are enabled to assume that it is precisely the same as the law of England upon matters of this kind. But whatever it is, there is nothing to lead

to the conclusion that in the discharge of this particular duty the sub-committee of the executive government of Genoa were bound to confine themselves to receiving any particular description of evidence whether of that kind which the law of Genoa would be satisfied with in judicial proceedings, or of the kind which the law of England requires in such proceedings; and it would be a very violent and improper supposition to assume that in point of fact they were obliged to limit themselves to that sort of information which we should regard as evidence in matters of this description in the courts of this country. The report which they make contains the history of what they had collected in some way or other as to the life of this gentleman. I have no doubt whatever that they received information which they thought was correct upon all the points which are comprehended in that report; but whence that information was received does not appear by the report at all; and no ground whatever has, I think, been shown to your Lordships for the presumption that it, or any part of it, was received from members of Mr. Mangini's family. There is conjecture, which may not be unreasonable, that if this committee in Genoa was acquainted with the members of the Mangini family, then it would have had recourse to them; but there is nothing whatever to show that in point of fact they did so, or that there were no other means by which they might have obtained such information as is contained in the report.

If your Lordships look through that information you find it concludes by stating that every Genoese who, during the time that Mr. Mangini had been consul in London, had had occasion to ask for his good offices, had been received by him with courtesy and hospitality, and was very well satisfied with the manner in which he discharged his duties as consul in this country. The board, therefore, had probably been in communication with some person who had been acquainted with Mr. Mangini, at least in the discharge of his duties as consul in London; and there is nothing at all to show that the information received may not have been obtained from some such persons, and if from them, there is nothing whatever to show whether those persons obtained the information from Mangini himself, or from others who were acquainted with him and talked about him. On the other hand there is nothing at all to show that all that time there were not people living at Genoa who were acquainted with Mr. Mangini more or less, who had heard more or less about him, and from whom this information may have been obtained; but that those persons obtained their information from the members of Mangini's family, or from Mangini himself, is a conclusion which is quite possible—it may be so, but it has no element of reasonable certainty about it. If, therefore, it was necessary that the information which is contained in this report to be receivable in this country should be the ground of statements proceeding from Mangini himself, or from some member of the family to which Mangini truly belonged, there is not anything whatever, either in the nature of the case, or in the tenor of the report itself, or in any other evidence which has been brought to your Lordships' knowledge, to lead to that conclusion; and I am of opinion that it is necessary by the law of this country, to make this evidence receivable, that it should at least appear to have been founded upon statements made by members of Mangini's family, or by Mangini himself.

Several classes of cases in the law of this country, in which evidence not depending upon the oath of persons who have personal knowledge is received in matters of pedigree, have been referred to at your Lordships' Bar. It appears to me that none of those classes of cases has really any tendency whatever to support the appellants' proposition in this case. Two of them may be laid aside at once—those which consist of declarations made against interest, and of entries made in the course of business by those whose business it was to make such entries. They may both be laid aside at once, because each of them has views of its own which I need not further advert to. They both involve as a necessary element that the subject-matter of the declaration, in the one case, and of the entry, in the other, must be that which was necessarily within the personal knowledge of the person making the entry. That can have no application whatever here, because not only

A has this not been shown to have been within the personal knowledge of the Giunta at Genoa, but it would be in the highest degree improbable that it actually was or could have been so. Other classes of cases were referred to, namely, the inquisitions of competent public officers, courts, or other persons having legal jurisdiction to inquire under a public authority into matters within their legal jurisdiction, and finding by inquisition, or by visitations of the Heralds, the result of the B inquiries which it was their duty to make. I do not think that that class of cases has any bearing at all on the matter. It does not appear that this Giunta di Marina had any legal jurisdiction whatever. They had nothing in the nature of a court, nothing in the nature of persons who, like the Heralds, had authority for a public purpose by the law of this country to make particular inquiries, whose duty it was in the exercise of that authority to proceed upon just proof, and who may C be presumed to have discharged their duty properly, and to have taken such proof as the law of the country requires as to the several matters before them.

There is a case somewhat analogous to that, but distinguishable from it, of the "funeral certificates" entered in the Heralds' books. They stand upon this ground —that it was the duty of the Heralds as a public authority to receive such certificates from persons who had been competent witnesses, and to record them in their D books. Therefore, the fact of their being recorded shows that the duty was duly discharged, and is evidence that they did receive from persons who were competent witnesses such declarations. To go now into particular cases, and to consider whether or not the evidence of books or documents of that nature should be received, which may be more or less open to criticism, appears to me to be entirely unnecessary. This case is quite unlike that. This is not a body who had any such E legal jurisdiction; it is not a body who are shown to have been, or who can be presumed to have been, bound to proceed on any such kind of proof. It appears to me to have been perfectly open to them to go upon any species of information, hearsay or otherwise, to which they themselves thought credit could be given; and therefore I am wholly unable to apply any analogy derived from those cases of court commissioners, or other bodies of persons having a special duty or authority F to make particular kinds of inquiries by the English law, to whose proceedings credit is prima facie given.

I do not think it is necessary to dwell further upon the case; some ground must be shown for the reception of a document of this kind as evidence. It appears to me that no ground has actually been shown, and under these circumstances I think your Lordships must decline to receive this particular evidence.

G

LORD HATHERLEY.—I have come to the same opinion as that which has been expressed by my noble and learned friend. I have anxiously listened to hear whether or not there was any case made by the appellants which could at all be brought within the range of the now very numerous authorities which have settled and determined with tolerable precision the rule to be adopted with reference to H evidence which may come within the class of hearsay evidence, for it amounts to no more than that.

I need not go through, or attempt to classify, the cases; but when you come to the character of the document which it is sought to produce, what do you find? It is not the entries made in that document, but there appear to be books kept, about which we have not any very precise information as to how they were kept, or I whose duty it was to keep them, and the like, but they were kept on behalf of a body called the Giunta di Marina, which was selected by the Senate to make inquiries as to such things as they thought it necessary to inquire into, and it reported apparently to them. In the particular instance before us they reported upon a reference made to them to learn something about the antecedents, the character, and the present status of Mr. Mangini, who was serving as consul in this country for the republic of Genoa; and he was anxious to advance himself in his vocation by acquiring such authority as he thought would be derived from a change in his designation. He was anxious, therefore, to obtain from the Senate

the distinction of being called "agent" of the republic, instead of bearing the simple name of "consul"; a point which he thought would lead to some advantage in his position, on the one hand, as regards himself and his influence at the court to which he was accredited, and as regards his standing at that court among the qualified Ministers who might appear there from other states. The Senate referred this matter to the Giunta, and desired them to get more information, for that is what it comes to, about his position and character. The consequence would be that they would have to report, which they subsequently did. The question now is how far these reports, which they so made, can be put in evidence in proof of facts which are narrated in them, not as specific findings important and essential to the duty they had to perform, but simply as part of the narrative upon which their recommendation is finally made.

The cases that come most near to the present matter are those in which persons make entries consistently with the duty imposed on them, and make those entries, as it was held in *Doe d. Patteshall* v. *Turford* (1) they must do to make them evidence, at the time of the duty being performed. In the particular case for which the document is brought in on the present occasion these two things are sought to be proved, viz.: that there is mention of Mangini having been born at Quarto, which is a place near Genoa, and it is important in the case pending between these parties to prove that he was born at Quarto. But when you compare that with the importance which it occupies in the report, certainly one is not much impressed in favour of an inquiry such as is usual in pedigree matters having been had recourse to by the tribunal, or committee, as I would rather call it, which had been formed, for it simply mentioned incidentally, as a description of this gentleman who had been employed for some time in the service of Genoa, that he was born at this place called Quarto, a matter which is not of the slightest importance with regard to anything that they were investigating, or directing their particular attention to at that time. Then it is said, and with more plausibility undoubtedly, that the question of his age, which it is also sought to prove by putting in this document, was one of more immediate reference to the duty they were then engaged upon. If you were to refer to anybody to give an account of all he knew of a person who offered himself for your service, whether it be public or private service, the probability is that among other things the age of the person concerned would be one of the points upon which you would wish to have information. The place where he was born you would probably care little about, at least in a case situated as this is, and with an employment of the character of that he was seeking, viz., "agent" instead of "consul" in England. But this point of the age, although it comes in incidentally among the numerous matters they may have inquired into, is not the direct point in issue between the parties. It might make a great difference in collateral matters which they say they are ready to prove in consequence of the discrepancy of age between one claimant of the property and the other.

The present suitors say that the point as to age is of considerable importance; but to the Senate, who made the reference to the Giunta, a difference of five, or six, or seven years would be a matter of very slight importance, if of any at all, as the man had been in their service before his election to this office, for there is no reason to suppose that the election turned in any way on the age of the person brought forward. On the other hand, see what difficulty you get into with regard to the extension of the law as to hearsay evidence, in which you cannot be too particular, if you admit such a document as this. It appears to me, as I said before, that they are simply a committee; if the document were admitted you might take the committees of all public bodies as making statements which you would be entitled to bring in to prove collateral matters which happened to form part of the statement; and if you are to be at liberty to make this statement evidence, you will thereby extend the rule laid down in *Doe d. Patteshall* v. *Turford* (1) to an alarming extent. You would extend it to the reports of the committees of all public bodies, all municipal corporations; all these might be brought

forward as containing statements which it has been assumed were to be sifted, inquired into, and made part of the evidence in a case. What proof have we, in any way, that such steps have been taken by this Giunta as would be required in order to establish the fact by way of proof, or to establish evidence of any value whatever with reference to the particular controversy which is now going on?

A great number of other cases were inquired into besides that of this gentleman; some questions put by LORD WATSON will show at once into what sort of inquiry you may be launched in matters of this kind. You might take eight, nine, or ten candidates for an office at the disposal of some municipal corporation, and a reference by the corporation might be sent to a committee of its own body to report which was the best candidate, and, among other matters, in bringing forward the report of the committee, you might find a statement of the age of the person whose employment is in question. Not only do I say that I have looked in vain for any evidence of there being any investigation such as could be denominated, in any sense according to our views, evidence in this country. So far from it being shown that the Giunta took any steps, by the examination of witnesses, or the like, or the examination of the baptismal certificates, or by inquiring from any member of the family, so that the declaration of that member might be treated, though not on oath, as a declaration that might be introduced, there is nothing of that kind established before us. On the contrary we know, from what took place in similar matters in the reports of commissions, that no such rigorous investigation was entered into. Not only is there no evidence on the subject, but there is nothing to lead one to presume that any such step was taken.

I do not think this matter comes near the case of the Heralds' books, nor under commissions for making specific inquiries, these specific inquiries falling under the head of the discharge of a duty, which duty is discharged in the only proper manner in which it could be discharged, and the law, therefore, taking notice that such had been the course of investigation and inquiry, and such had been the result of the due execution of the commission, and the due execution of their duty gives credit to what the return states upon the matter, although even there the extent to which evidence has been admitted seems to be limited by *Doe d. Patteshall* v. *Turford* (1), and very narrowly limited, to the actual question, and the actual certainty of its being a contemporaneous entry with the duties so discharged. That case has been still more narrowed in *Chambers* v. *Bernasconi* (2). But here there is nothing approximating to any one of those cases, and you at once have a floodgate opened to a large mass of documents, which are not always eminent in the ascertainment of truth—public commissions, and so on—without the least narrative of how these reports were arrived at, or the evidence on which they were arrived at, or anything whatever to satisfy you that you had an authentic report made by the persons in the discharge of a duty, and the report entered at the time the duty was discharged. I should have been glad to have found any case that would have assisted in the investigation of truth, because one is grieved at all times to be obliged to enter upon the consideration of the admission of evidence with so much caution and so much suspicion. But unfortunately the habits of mankind are not such at present as to lead one to desire any extension of the privilege of having evidence given and taken as part of the res gestæ of that which it is sought to prove, when you do not find any of the ordinary safeguards of evidence, such as the examination of witnesses in person. There is no such safeguard as that and the power of cross-examination; and it is only from the difficulty which has arisen in some cases of adhering with the utmost rigour to the rules with regard to hearsay evidence that any of these classes of evidence to which I have been referring, which appear from the cases cited in argument the exceptions from the rule of hearsay evidence, have been established.

I do not think we ought, in a case of this character, to extend the rule to cases where we have not yet found it applied, when it is so easy to foresee extreme hardship and possibly utter failure of justice which would arise from such an extension of the rule. I think, therefore, on the present occasion the course which

the court below took in excluding this document was right, and I, therefore, concur in thinking that the decision of the court below ought to be affirmed.

LORD BLACKBURN.—I am also of the same opinion. In deciding the present question, I assume, what I believe is a matter of controversy, that this document is a genuine document, actually being what it purports to be, and satisfactorily proved to be what it purports to be. Having stated that, I inquire whether or not it is admissible evidence—its weight is another question—to prove that the Consul Mangini, about whose next-of-kin the inquiry is, was born at Quarto in a particular year. That is what it amounts to in the result. It may be some evidence, of more or less weight, tending towards that, but I do not think it is evidence of it, and I will proceed to state the reason why. I shall not attempt in so doing to enter upon a full inquiry into the law of evidence. I do not believe it would be possible, and I do not believe it would be proper, in such a case, because one might be inadvertently ruling disputed points. But so far as it is necessary to decide this case one must express an opinion.

It is not disputed that the general rule of English law is that hearsay evidence is not receivable. The reason probably is the want of the safeguards of cross-examination. However, the law undoubtedly is that, as a general rule, hearsay evidence is not admissible; but to that a great many exceptions have been introduced. I do not say that, if we were beginning the law from the beginning, one would be able to say exactly why so much should be admitted and no more; probably it would be difficult to say that in all cases, but the exceptions have been established and exist, and we have to see whether this case comes within any one of them.

The first and one of the most important exceptions is briefly expressed in a dictum in *Higham* v. *Ridgway* (3), that documents on the face of them appearing to be against the interest of a deceased person who stated the matter are evidence. I need not enter into the qualifications of that further than to point out that in no point of view can this Giunta di Marina, who made this statement, and presumably are all dead by this time, be said to have been making statements against their own pecuniary interests. Then there is a second class of cases, of which *Price* v. *Torrington* (4) may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of something which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There again I do not go into the qualifications, or express any opinion upon the different matters introduced, further than to point out that in no sense of the word can it be said that the Giunta di Marina was making any statement in the course of business contemporaneous with the fact; and it is impossible to say that it falls within that principle. There comes another large class of cases, where from the nature of the thing evidence of reputation from deceased persons is admissible; whether it is a public right or a quasi public right, evidence of reputation in such cases is admissible if you prove that the deceased person was of the class who would know, and had stated it. Upon that again I merely say that the question we are now inquiring into, namely, the history of a private individual, is not a matter in which, in any sense, reputation generally can be received.

Another class of cases comes nearer to it. It has been established for a long while that in questions of pedigree—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice, but, for whatever reason—it has been thoroughly established that the statement of deceased members of the family, made ante litem motam, before there was anything to throw doubt upon them, are evidence to prove pedigree, and such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them. If any

member of the family, as a person who personally would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances.

If in this case there had been any evidence whatever showing that Mangini himself had told this Giunta di Marina that he was born at Quarto in a particular year, that would clearly have been evidence, if it was believed to be genuine; indeed it would have been almost irresistible evidence. But there is not the slightest pretence for saying he did so. His written communication to the Genoese government does not say a word about where he was born, or his age. He did not think it material or necessary, when he was being appointed consul, to tell them so. If it could be shown that the Giunta di Marina, when they made this inquiry, and made this report to the government, had asked Mangini the question, the answer would have been evidence to show that Mangini had said it, or if it could be shown that they had asked other members of the family, and that they had said it, it might be evidence. It might be a question how far that could be shown, but if it was shown upon admissible evidence, then it would become a question whether it would be itself admissible evidence on the ground that it was a statement by a member of the family. But there is no pretence for saying that any one of these things is proved. What does appear is that the Giunta di Marina, for some reason which I cannot tell, thought that this Mangini had been born at Quarto, and was then forty-five years of age, and they wrote that down. Upon no principle that has been hitherto stated could that be admissible evidence.

There comes another class of cases on which the argument principally rested, for it is only within that class of cases that the counsel for the appellants have made any serious struggle to show that this document is admissible. It is an established rule of law that public documents are admitted for certain purposes. What is a public document within that rule is of course the great point which we have now to consider. Public documents are admissible, and I think I can hardly state it better than by taking what PARKE, B., said, in delivering the opinion of the judges in *Irish Society* v. *Bishop of Derry* (5). His Lordship there says (12 Cl. & Fin. at p. 668):

> "The fifth exception related to an entry in one of the books of the First Fruits Office of the collation and admission of John Freeman to the Rectory of Camus. Writs were issued from the Court of Exchequer to the bishops to ascertain the value of the first fruits and twentieths, and returns were made by the bishops. Search for the writs and returns was made, and the book was offered as secondary evidence of returns. We think the entry was properly received."

That was the point decided—that the writs having been issued to the bishop to return the first fruits in his diocese, and the return of them being presumably lost, as it could not be found, the entry in the First Fruits Office (the copy of it) was good secondary evidence of the return. Of course, that involved in it that the return itself would be evidence. Then his Lordship says:

> "The writs related to a public matters—the revenue of the Crown, and the bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received. It was contended that the bishop could not be permitted to make evidence for himself [that is one objection which he meets] and, therefore, that the entry though admissible between other parties was not to be received for the bishop; and the case was compared to an entry in the book of a union, of a surgeon's attendance, *Merrick* v. *Wakley* (6), and the receipt of a certificate in a parish book, *R.* v. *Debenham* (7), which have been rightly held to be inadmissible for the surgeon in one case, or the parish keeping the book in the other. But neither of these was an entry of a public nature, in the proper sense of that word; the former was a memorandum, intended to operate as a sort of check

to the surgeon, the latter a memorandum for the parish officer, concerning merely the particular parish and its rights with relation to another."

Then he goes on to say (ibid. at pp. 668, 669):

"In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not."

Then he puts the case of the person who made a marriage register turning out to be interested, and says that would not prevent the register being received as evidence.

Taking that decision, the principle upon which it goes is that there should be a public inquiry, and a public document made by a public officer. I do not think that "public" is to be taken there as meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor, and an entry probably in a corporation book concerning a corporation matter, or something in which all the corporation is concerned, would be public within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire, as might be said to be the case with the bishop acting under the writ issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done. But I think that the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards. In many cases entries in the parish register of births, marriages, and deaths, and other entries of that kind, before there were any statutes relating to them, were admissible, and they were public then because the common law of England made the entries, kept in that sense by a public officer for the purpose of a register, a public document. I think it will be found that in any case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be returned and kept as a register to be referred to ever after.

Taking that view of the matter, I think it becomes clear that this document is not evidence. Supposing that this inquiry had been carried on under the authority of the English Crown, and the Crown had required of a magistrate that some confidential report should be made, it would not be public in one sense, but it would be public in the sense that it would concern the Crown, and from common respect for the Crown one would suppose that what the magistrate told the Queen would be what he firmly believed and considered he had good reason for believing, but I do not think it would come within the sense and meaning of the rule that a public document would be admissible as evidence on the ground that a public officer in making the statement for the public was likely to speak the truth, and must prima facie be presumed to have spoken the truth. I do not say there is any decision on that point, but that would illustrate the principle.

Every other case that I am aware of falls within one of the principles of the limitations I have stated. The visitations of the Heralds were proof. There the Court of Chivalry was a prescriptive court, and the object of the Court of Chivalry and the inquiry of the Heralds was that they should inquire into arms and pedigrees for the very purpose of making a register of them, and for both these reasons it is clear that when the visitation of the Heralds appointed for these purposes was made, those things would be, and always have been, respected as evidence. There seems to be some misapprehension on the point that it was received in committees of privileges as to peerages on the ground that there was some peculiar rule there. It was received, as was proved by several of the cases cited, in trials at nisi prius where evidence of pedigree was received. Here I may observe that in

A all these cases where you have got the means of proving a fact by a public document, the question whether that fact is of importance or not must depend on the subject of the inquiry. If the document proves that a deceased member of the family had authenticated a pedigree, of course that becomes as strong evidence as you can have, if pedigree was the subject of the inquiry there. I rather think that in one of two of the cases mentioned in peerage inquiries about the funeral B certificates, that was the ground of the decision. I think that the book of the Heralds which was produced had a copy of all the certificates of the funerals which had been returned by those who attended the funerals, and a case in SHOWER'S PARLIAMENTARY CASES (*Oldis* v. *Donmille* (8)) shows what the practice was of heralds attending the funerals of great men. I think the effect of what was decided was that it was good secondary evidence of the certificate, just as in *Irish* C *Society* v. *Bishop of Derry* (5) it was decided that the First Fruits Book was good secondary evidence of the returns. It being established by that means that there was a certificate signed by the executors, that certificate stated on the face of it that the executor who ought to have signed it was a near relation, and taking them to be signed in that way, of course the document that was produced became extremely good evidence of pedigree. It would not, probably, have been evidence of D anything else, not of reputation. It might have been evidence of reputation, where reputation was admissible, but only because pedigree was the subject of the inquiry.

Frequently in the cases cited, half-a-dozen different reasons have been given, which might be all good or bad, for admitting them. Take for instance *Price* v. *Littlewood* (9), where, the question being about a private right to a pew, the judge admitted the entry, and gave two reasons, saying first of all that it was E evidence of reputation. I confess I think that was a mistake. I do not see how the ownership of a pew can be a matter of reputation. Secondly, he said that it was a public document. I have considerable doubts whether the entry in the vestry there was public enough to make it a public document, but it might be that it was intended for the information of all the parishioners who liked to come and see it. Supposing in *Arnold* v. *Bishop of Bath and Wells* (10), the entry had been made F by the bishop on his visitation that such and such a man was the clergyman of the parish, and had been admitted some twenty years before secundum consuetudinem, and supposing it was wrong to admit all that as a public document, that falls completely within the principle which I think *Irish Society* v. *Bishop of Derry* (1) establishes. The bishop made his visitation and recorded it under the wish and intent that it should be kept publicly as a register to be seen by everybody G in his diocese. If he had not the right to make such an inquiry so as to make it evidence in future, that is another affair; but, if he had, then he was a public officer performing what he thought a public duty, with the view and intent that it should be public.

Taking all that into consideration, can the document in this case be said to come within that class of evidence? I think it is impossible to look at it in that H way. There is not the slightest evidence of the least circumstance to lead me to the conclusion that it was ever intended that this private and confidential report should be seen by Mangini, or anybody interested in it. It was meant for private information to guide the discretion of the government, and it is not, like the bishops' return of the first fruits, for public information, to be kept in the office, and to be seen by all in the diocese who might be concerned when there came to I be any litigation. But this was meant as a private and confidential report, and it certainly seems to me according to common sense that it ought not to be received. But I base my judgment on this, that no case has gone so far as to say that such a document could be received, and clearly, unless it is to be brought within some one of the exceptions, it would fall within the rule that hearsay evidence is not admissible.

LORD WATSON.—I also am of opinion that this document is not admissible as evidence. I have not been able to find in the authorities cited any warrant for

holding that secondary evidence is admissible according to the law of England, where there exists no reasonable presumption that the statement offered in evidence was derived either from the personal knowledge of the party who made it or from some legitimate source. I mean legal evidence. I think in all those cases where secondary evidence is admissible as a substitute for primary evidence, it can only be received when it either plainly appears to be directly drawn from that which would have been primary evidence, or drawn, not directly, but by some one competent to infer the result from legal evidence under his consideration. One of these presumptions I think is excluded by the circumstances of the case, I mean personal knowledge on the part of those members of the committee who drew up the report of 1790. On the other hand, it does not appear to me that either the terms of the report, or its character, warrant the suggestion that there was legal evidence before the committee upon which they arrived at the results at which they did arrive for the benefit of those who were appointed to exercise an act of patronage. It does not appear to me that the duty cast upon the committee necessarily, or even by fair implication, involved the necessity of making any quasi-judicial or strict inquiry into the circumstances which they were about to report.

The sort of commission that was given here was one of a very roving description, to find out every little circumstance, whatever it might be, wherever they could pick it up, and in whatever manner they could ascertain it. I cannot conceive, when you take these circumstances into consideration along with the undoubted fact that this was not made for the purpose of being recorded in a public register, that it can have the authority of a register. No doubt the document survives; but the fact that a document intended for a temporary purpose of this kind is found after a long lapse of years in the archives of a government does not constitute it of the authority of a register. I have no hesitation under these circumstances, upon the facts of the case itself, and seeing that no authority can be adduced in support of it, and no authority which, to my mind, warrants the principle, in saying that this is a document which cannot be reasonably presumed to be founded upon legal testimony. I have no hesitation in concurring in the result at which your Lordships have arrived.

Appeal dismissed.

Solicitors: *Lowless & Co.*; *Eyre & Co.*; *Foster & Spicer.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

WHEELDON *v.* BURROWS

[Court of Appeal (James, Baggallay and Thesiger, L.JJ.), June 17, 20, 1879]

[Reported 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196]

Easement—Implied grant—Grant of part of tenement—Implication of easements necessary to enjoyment of property granted—Reservation from grant—Need for express reservation—Exception—Easement of necessity.

On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass by implication to the grantee all those continuous and apparent easements and quasi easements which are necessary to the reasonable enjoyment of the property granted and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, save in the case of an easement of necessity the reservation of which will be implied. Otherwise no implication can be made of the reservation of an easement to the grantor.

Notes. Considered: *Allen* v. *Taylor* (1880), 16 Ch.D. 355. Applied: *Brett* v. *Clowser* (1880), 5 C.P.D. 376; *Shubrook* v. *Tufnell* (1882), 46 L.T. 886. Considered: *Russell* v. *Watts* (1885), 10 App. Cas. 590. Applied: *Ford* v. *Metropolitan and Metropolitan District Rail. Cos.* (1886), 17 Q.B.D. 12; *Brown* v. *Alabaster* (1887), 37 Ch.D. 490. Considered: *Birmingham, Dudley and District Banking Co.* v. *Ross* (1888), 38 Ch.D. 295; *Tows* v. *Knowles*, [1891] 2 Q.B. 564; *Gordon* v. *Ogilvie* (1899), 15 T.L.R. 239; *Union Lighterage Co.* v. *London Graving Dock Co.*, [1900–3] All E.R.Rep. 234; *Ray* v. *Hazeldine*, [1904] 2 Ch. 17; *Schwann* v. *Cotton*, [1916–17] All E.R.Rep. 368. Applied: *Hansford* v. *Jago*, [1920] All E.R.Rep. 580. Considered: *Cory* v. *Davies*, [1923] 2 Ch. 95. Applied: *Aldridge* v. *Wright*, [1929] 2 K.B. 117. Considered: *Borman* v. *Griffith*, [1930] 1 Ch. 493; *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114; *Liddiard* v. *Waldron*, [1933] All E.R.Rep. 276. Applied: *Re Webb, Sandom* v. *Webb*, [1951] Ch. 808. Referred to: *Grosvenor Hotel* v. *Hamilton*, [1891–4] All E.R.Rep. 1188; *Bunting* v. *Hicks* (1894), 70 L.T. 455; *Broomfield* v. *Williams*, [1897] 1 Ch. 602; *Re Lloyd, Lloyd* v. *Lloyd*, [1903] 1 Ch. 385; *Strick* v. *City Offices Co.* (1906), 22 T.L.R. 667; *Mallam* v. *Rose*, [1915] 2 Ch. 222; *Derry* v. *Sanders*, [1919] 1 K.B. 223; *Simpson* v. *Weber*, [1925] All E.R.Rep. 248; *Greg* v. *Planque*, [1935] All E.R. 237.

As to implied grant of easement, see 12 Halsbury's Laws (3rd Edn.) 538–543; and for cases see 19 Digest (Repl.) 40 et seq.

Cases referred to:

(1) *Suffield* v. *Brown* (1864), 4 De G.J. & Sm. 185; 3 New Rep. 340; 33 L.J.Ch. 249; 9 L.T. 627; 10 Jur.N.S. 111; 12 W.R. 356; 46 E.R. 888, L.C.; 19 Digest (Repl.) 45, *238*.

(2) *Palmer* v. *Fletcher* (1663), 1 Lev. 122; 1 Keb. 553, 625; 1 Sid. 167; 83 E.R. 329; 19 Digest (Repl.) 54, *293*.

(3) *Nicholas* v. *Chamberlain* (1606), Cro. Jac. 121; 79 E.R. 105; 19 Digest (Repl.) 33, *162*.

(4) *Tenant* v. *Goldwin* (1704), 2 Ld. Raym. 1089; Holt, K.B. 500; 1 Salk. 21, 360; 6 Mod. Rep. 311; 92 E.R. 222; 7 Digest (Repl.) 287, *138*.

(5) *Pyer* v. *Carter* (1857), 1 H. & N. 916; 26 L.J.Ex. 258; 28 L.T.O.S. 371; 21 J.P. 247; 5 W.R. 371; 156 E.R. 1472; 19 Digest (Repl.) 43, *228*.

(6) *Swansborough* v. *Coventry* (1832), 9 Bing. 305; 2 Moo. & S. 362; 2 L.J.C.P. 11; 131 E.R. 629; 19 Digest (Repl.) 54, *295*.

(7) *Cox* v. *Matthews* (1673), 1 Vent. 239; 3 Keb. 133; 86 E.R. 160; 19 Digest (Repl.) 42, *223*.

(8) *Roswell* v. *Prior* (1701), Holt, K.B. 500; 12 Mod. Rep. 635; 90 E.R. 1175; sub nom. *Rosewell* v. *Prior*, 1 Ld. Raym. 713; 6 Mod. Rep. 116; 2 Salk. 460; 19 Digest (Repl.) 47, *252*.

(9) *Compton* v. *Richards* (1814), 1 Price, 27; 145 E.R. 1320; 19 Digest (Repl.) 54, *294.*

(10) *White* v. *Bass* (1862), 7 H. & N. 722; 31 L.J.Ex. 283; 5 L.T. 843; 26 J.P. 694; 8 Jur.N.S. 312; 158 E.R. 660; 19 Digest (Repl.) 42, *225.*

(11) *Crossley & Sons, Ltd.* v. *Lightowler* (1867), 2 Ch. App. 478; 36 L.J.Ch. 584; 16 L.T. 438; 15 W.R. 801, L.C.; 19 Digest (Repl.) 90, *521.*

(12) *Watts* v. *Kelson* (1871), 6 Ch. App. 166; 40 L.J.Ch. 126; 24 L.T. 209; 35 J.P. 422; 19 W.R. 338, L.JJ.; 19 Digest (Repl.) 48, *265.*

(13) *Pinnington* v. *Galland* (1853), 9 Exch. 1; 1 C.L.R. 819; 22 L.J.Ex. 348; 22 L.T.O.S. 41; 156 E.R. 1; 19 Digest (Repl.) 33, *166.*

(14) *Clark* v. *Cogge* (1607), Cro. Jac. 170; 79 E.R. 149; 19 Digest (Repl.) 46, *245.*

(15) *Staple* v. *Heydon* (1703), 6 Mod. Rep. 1; 2 Ld. Raym. 922; 3 Salk. 121; 87 E.R. 768; 19 Digest (Repl.) 100, *594.*

(16) *Chichester* v. *Lethbridge* (1738), Willes, 71; 125 E.R. 1061; 19 Digest (Repl.) 112, *689.*

(17) *Dutton* v. *Tayler* (1700), 2 Lut. 1487; 125 E.R. 819; 19 Digest (Repl.) 107, *654.*

(18) *Davies* v. *Sear* (1869), L.R. 7 Eq. 427; 38 L.J.Ch. 545; 20 L.T. 56; 17 W.R. 390; 19 Digest (Repl.) 107, *657.*

(19) *Richards* v. *Rose* (1853), 9 Exch. 218; 2 C.L.R. 311; 23 L.J.Ex. 3; 22 L.T.O.S. 104; 18 J.P. 56; 17 Jur. 1036; 156 E.R. 93; 19 Digest (Repl.) 44, *235.*

Also referred to in argument:

Curriers' Co. v. *Corbett* (1865), 2 Drew. & Sm. 355; 5 New Rep. 458; 12 L.T. 169; 29 J.P. 469; 13 W.R. 538; 62 E.R. 656; on appeal, 4 De G.J. & Sm. 764, L.JJ.; 19 Digest (Repl.) 42, *224.*

Ellis v. *Manchester Carriage Co.* (1876), 2 C.P.D. 13; 35 L.T. 476; 25 W.R. 229; 19 Digest (Repl.) 43, *226.*

Eastwood v. *Lever* (1863), 4 De G.J. & Sm. 114; 3 New Rep. 232; 33 L.J.Ch. 355; 9 L.T. 615; 28 J.P. 212; 12 W.R. 195; 46 E.R. 859, L.JJ.; 28 Digest (Repl.) 793, *430.*

Ewart v. *Cochrane* (1861), 5 L.T. 1; 25 J.P. 612; 7 Jur. 925; 10 W.R. 3; 4 Macq. 117, H.L.; 19 Digest (Repl.) 47, *262.*

Keates v. *Lyon* (1869), 4 Ch. App. 218; 38 L.J.Ch. 357; 20 L.T. 255; 33 J.P. 340; 17 W.R. 338, L.JJ.; 40 Digest (Repl.) 343, *2780.*

Hinchliffe v. *Earl of Kinnoul* (1838), 5 Bing.N.C. 1; 1 Arn. 342; 6 Scott, 650; 8 L.J.C.P. 105; 132 E.R. 1004; 19 Digest (Repl.) 46, *246.*

Morris v. *Edgington* (1810), 3 Taunt. 24; 128 E.R. 10; 19 Digest (Repl.) 16, *49.*

Appeal from a decision of Bacon, V.-C., in an action brought by the owner in fee simple of a piece of land in Derby to restrain the owner of the adjoining land from trespass.

In 1856 and 1857 one Allen became owner in fee of both the pieces of land in question, that now belonging to the plaintiff being divided from the rest by a wall. In 1858 Allen built close to this wall a shed or workshop, which was lighted by skylights only. In 1861 Allen altered this shed, by raising the wall and the roof, inserting four windows in the wall, and doing away with the skylights. One of these windows was afterwards covered by a millwright's shop, built by Allen on the land now belonging to the plaintiff, but there still remained in the wall of the shed three windows, and it was in seeking to prevent the access of light to these windows that the defendant committed the alleged trespass, which gave rise to the present action. Allen continued in occupation of the two pieces of land till 1867, when he sold them to one Wooley, who in 1871 sold them to one Tetley, by whom they were advertised for sale by auction in 1875. At the auction, William Wheeldon, the plaintiff's husband, became the purchaser, for £200, of lot 10, which was described in the particulars of sale as

A "All that valuable piece of eligible building land, containing by admeasurement 638 square yards, or thereabouts, situate in and having a frontage to Stockbrook Street of 40½ feet and a depth of 121 feet or thereabouts, together with the building thereon now used and occupied by Mr. William Wheeldon as a millwright's shop. This lot is suitable for the erection of a factory or mill."

B By deed, dated Jan. 6, 1876, Tetley conveyed this lot to Wheeldon in fee simple, the parcels being described as

"All that piece or parcel of land or ground containing by admeasurement 638 square yards, or thereabouts, and having a frontage of 40½ feet to Stockbrook Street, together with the building erected on part of the said piece of
C land, and now used and occupied as a millwright's shop, which said piece of land and hereditaments, are bounded on or towards . . . the south by other hereditaments remaining the property of the said Samuel Tetley . . . together with all walls, fences, sewers, gutters, drains, ways, passages, lights, watercourses, mines, minerals, liberties, privileges, emoluments, rights, members, easements, and appurtenances whatsoever to the said piece of land and here-
D ditaments belonging, or in any wise appertaining, and all the estate, right, title, interest, use, trust, property, possession, claim, and demand whatsoever, of him the said Samuel Tetley, of, in, to, or upon the same hereditaments or premises."

The adjoining piece of land, which was numbered lot 6, and was described in the particulars of sale as "all that valuable silk mill, elastic webb manufactory, shops
E and premises, known as Spa Mill," and including the workshop already mentioned, was not sold at the auction, but was afterwards sold by private contract to the defendant W. J. B. Burrows for £2,000. Tetley conveyed it to Burrows by deed, dated April 7, 1876, describing it as bounded in part by a piece of land sold and conveyed to one William Wheeldon, the general words of the conveyance being

F "together with all houses, outhouses, edifices, buildings, yards, gardens, walls, fences, sewers, gutters, drains, ways, paths, passages, lights, waters, watercourses, liberties, privileges, emoluments, rights, members, easements, and appurtenances whatsoever to the said mill or factory, buildings, hereditaments, and premises hereinbefore described, or any of them, belonging or in anywise appertaining, and all the estate, . . . whatsoever of him the said Samuel Tetley, of, in, to, and upon the same hereditaments and premises."

G In January, 1878, the plaintiff, the widow and devisee of William Wheeldon, erected hoardings near the edge of her land facing the windows of the defendant's shed, for the purpose of asserting her right to the uncontrolled use and possession of her land. The defendant knocked down these hoardings for the purpose of asserting his right to an easement of light in respect of the three windows, and
H Mrs. Wheeldon brought this action to restrain the defendant from trespass. The defendant pleaded that the windows were, when the buildings were conveyed to him, apparent continuous easements necessary to the convenient enjoyment of the buildings, and that such windows or lights were then expressly or impliedly reserved to the grantor, and were now vested in the defendant; that Tetley sold both tenements at about the same time and under the same conditions of sale;
I and that the lights and easements of each tenement were reserved thereto, and the plaintiff was not entitled to obstruct the same. The vice-chancellor held that the plaintiff was entitled to the injunction claimed, as the defendant could not prevent her from obstructing the light coming to the windows in question, since the plaintiff's land had been conveyed to her predecessor in title without any express reservation of a right to such light, and no reservation of such right would be implied. The defendant appealed.

Sir Henry Jackson, *Q.C.*, and *Colt* for the defendant.

Horton Smith, *Q.C.*, and *Romer* for the plaintiff, were not called on to argue.

THESIGER, L.J.—Prior to the month of November, 1875, Samuel Tetley was owner of property in Derby, which included a piece of vacant land having a frontage to the street, and a silk manufactory and workshops at the rear of and abutting upon that vacant land, having in one of the workshops windows which opened upon that land. Tetley was minded to sell, and he appears to have put up the property in several lots for sale by auction. In respect of some of the lots, including a lot which was afterwards sold to the defendant, the sale by auction was abortive. However, an agreement was made at the auction to sell one of the lots of vacant land to the plaintiff's husband, and that lot was conveyed to him on Jan. 6, 1876, with these general words, "together with all walls, fences, sewers, gutters, drains, ways, passages, lights, water-courses," and the other general words, "easements and appurtenances whatsoever to the said piece of land and hereditaments belonging or in anywise appertaining." The conveyance contains no reservation in express terms of any right to the grantor in respect of his other land. On Feb. 18, 1876, a contract was made by which Tetley contracted to sell to the defendant the silk manufactory and the workshop which had the windows opening upon the land previously sold and conveyed to the plaintiff's husband. This action arises from a claim on the part of the defendant to have as of right the light enter into those windows, or, to put it in another way, to prevent the plaintiff from obstructing these windows by building on her land. Upon the matter coming before the vice-chancellor, he held that no right in respect of the windows was reserved, either impliedly or expressly, under the conveyance of January, 1876; and consequently that the defendant, as privy in estate with the grantor of the land which was the subject of the conveyance, was entitled to no right of light through those windows. In other words, he decided that the plaintiff was entitled to build upon her land, although the result of that building might be to obstruct these lights.

I am of opinion, both upon principle and upon authority, that the vice-chancellor decided rightly. We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements and quasi easements which are necessary to the reasonable enjoyment of the property granted, and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense—namely, that a grantor shall not derogate from his grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter. So far, however, from that distinction being one which was laid down for the first time by, and which is to be attributed to, Lord Westbury in *Suffield* v. *Brown* (1), it appears to me that it has existed almost as far back as we can trace the law upon the subject; and I think it right as the case is one of considerable importance, not merely as regards the parties, but as regards vendors and

purchasers of land generally, that I should go with some little particularity into what I may term the leading cases upon the subject.

The first case to which I refer is *Palmer* v. *Fletcher* (2), where the first proposition which I have stated as a general rule was laid down or decided. The other proposition was mooted, but there was a difference of opinion among the members of the court upon it, and it was not decided. It appears, therefore, that, upon the proposition that if a man wishes to derogate from his grant or to reserve any right to himself, he should state so in the grant itself, there was a difference of opinion in the court, and that point was not decided.

The next case of importance is *Nicholas* v. *Chamberlain* (3). The ground of the decision is stated to be because the conduit was "necessary, and quasi appendant thereto." If that determination is held to mean that in all cases this doctrine of implied reservation stands upon exactly the same footing as the doctrine of implied grant, I think it will be found that over and over again that has been overruled. But it is clear, as I have already suggested, that to the second rule under which a man is prevented from derogating from his grant there are certain exceptions, one of those being in regard to easements which have been called of necessity; and if *Nicholas* v. *Chamberlain* (3) only decides that point it appears to me to be quite right.

That it was not meant to decide more than what I have suggested is, I think, shown by the next case, *Tenant* v. *Goldwin* (4). There LORD HOLT, in delivering the judgment of the court, deals with the point which had been mooted in *Palmer* v. *Fletcher* (2). He says (2 Ld. Raym. at p. 1093):

> "As to the case of *Palmer* v. *Fletcher* (2), if, indeed, the builder of the house sells the house with the lights and appurtenances, he cannot build on the remainder of the ground so near as to stop the lights of the house; and, as he cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground, and kept the house without reserving the benefit of the lights, the vendee might build against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights."

I think it will be found that, putting aside *Pyer* v. *Carter* (5), there has been no distinct decision which in any way affects the principle laid down in those clear and distinct terms by LORD HOLT.

The next case to which I will refer is *Swansborough* v. *Coventry* (6), which has been cited on both branches of the argument addressed to us by counsel for the defendant. That was a case of a sale by auction of different lots to different persons at the same time, and it was argued (and I particularly direct attention to this) that such a case must stand upon exactly the same footing as if the land in respect of which the easement was claimed had been conveyed first. Consequently, the case would be one in which a grant of the easement would be implied. Observe what that admits. It admits that priority in time of the conveyance was a material point for consideration, because, if it had not been admitted, then the court might have gone to the general question, not whether the conveyances were at the same time, not whether the one preceded the other by a few minutes, or a few days, or a few years, but whether upon the severance of the property there was this (if I may use the expression) continuous and apparent easement in respect of which a reservation might be claimed, or an implication of a grant might be made. TINDAL, C.J., deals with the matter, as it appears to me, upon the supposition that the general maxim is that a man who conveys property cannot derogate from his grant by reserving to himself impliedly any continuous apparent easements. He says (9 Bing. at p. 309):

> "It is well established by the decided cases that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can anyone who claims under him, build upon

the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by TWISDEN and WYNDHAM, JJ., in the case of *Palmer* v. *Fletcher* (2), 'that no man shall derogate from his own grant.' The same law was adhered to in the case of *Cox* v. *Matthews* (7); by HOLT, C.J., in *Rosewell* v. *Prior* (8); and, lastly, in the later case of *Compton* v. *Richards* (9). And in the present case, the sales to the plaintiff and defendant being sales by the same vendor and taking place at one and the same time, we think the rights of the parties are brought within the application of this general rule of law."

It appears to me, therefore, that this is a decision which fortifies the previous decision of LORD HOLT.

I now come to *Pyer* v. *Carter* (5), which seems to break the hitherto unbroken current of authority on this point, and there can be no doubt that the defendant is justified in saying that, if that case is right, this appeal ought to be allowed. That was a case of a somewhat special character. A house was conveyed to the defendant by a person who was the owner of that house and also of the house which was subsequently conveyed to the plaintiff. There had been during the unity of the ownership the enjoyment of the easement of a spout which extended from the defendant's premises over the plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water, when it came on to what were subsequently the plaintiff's premises, was conveyed into a drain on the plaintiff's premises, which drain passed through the defendant's premises, and in that way went out into the common sewer. Subsequently the house over which this easement existed was conveyed to the plaintiff, and upon an obstruction of the drains in the defendant's house, which, be it observed, immediately caused a flooding of the plaintiff's house by the water coming from the defendant's house, the plaintiff brought his action, and it was held that the plaintiff was entitled to maintain his action, and that upon the original conveyance to the defendant there was a reservation to the grantor of the right to carry away this water which came from the defendant's premises by the medium of the drain which also went through his premises. Though those circumstances were special in their character, there is no doubt that the principles laid down by the Court of Exchequer were as wide as possibly could be. The court laid down that there was no distinction between implied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject.

Although it is possible that the actual decision in *Pyer* v. *Carter* (5) was not exactly overruled, the principles there laid down were clearly and distinctly overruled by the same court in *White* v. *Bass* (10), the facts of which case were these. A man was the owner of land and of a house which had windows through which the light, not as an easement but as a matter of enjoyment, had come for some time. He let the land (reserving the house) to trustees, subject to covenants by which they were to build in a particular manner upon the land, and if those covenants had been complied with and they had built in the specific manner, there would have been no obstruction to the lights of the house which the lessor reserved. Therefore, if we were entitled in these cases to go back to matters which existed before the time of the conveyance, we should have found here, as clearly as could be shown, an intimation on the part of the lessor that, if building was to be permitted on the adjoining land, it was only to be permitted under such conditions as would prevent the lights of the house being obstructed. That being originally the position of matters it was followed by a conveyance of the reversion in the land to the trustees, subsequently to that conveyance the house was conveyed to another person, and, buildings having been put upon the land occupied by the trustees contrary to the terms of the original covenant and of such a kind as obstructed the lights of the house, an action was brought by the person to whom the house was conveyed. In that action it was decided that the defendant held his land unfettered by the original covenant, and unfettered by any implied reservation, and that he was entitled to build in such a way as he thought proper on

his land, although the effect of what he did might be to obstruct the lights of the plaintiff. In giving judgment POLLOCK, C.B., says this (7 H. & N. at p. 730):

> "My brother PETERSDORFF has cited no authority for the precise matter which he has urged before us, and I think that in construing a conveyance of land we must collect what the parties intended from the language they have used. It seems to me that we cannot look into the lease of Oct. 2, 1855, for it is merged in the fee, a conveyance of the reversion having been made to the lessees, and we must look to that conveyance alone in order to ascertain the rights of the parties. In that conveyance there is no covenant by the purchasers not to build on the land so as to obstruct the light and air coming to the windows of the plaintiff's house, nor indeed any limitation of the right to use the land."

No case can be more clear and distinct upon the point which we have to decide to-day, and the case is admitted by the defendant to be such, but he suggested that we ought to overrule it as being an exception to the general current of authority. So far from that being the case, *Pyer* v. *Carter* (5) appears to me to have been the exception, and not *White* v. *Bass* (10). The latter case was followed by *Suffield* v. *Brown* (1). A good deal has been said about that case, and the principles upon which this court ought to act in dealing with decisions of courts of co-ordinate authority have been also discussed. I think I may say for myself (and I believe I am expressing the views of the other members of the court) that we ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal and absolutely binding on this court so as to prevent us from even looking into the grounds or considering the case which was before the particular Lord Chancellor. No doubt the greatest weight ought to be given to such decisions, and unless they are shown to be manifestly wrong or manifestly contrary to the general current of authorities on the point decided, it appears to me that we ought not to take upon ourselves to overrule them.

That being so, let us look a little more narrowly into that case. First, we have to see what was decided, and by that I do not mean what was absolutely necessary to be decided, but what the Lord Chancellor really took upon himself to decide, and, although he might have decided the case upon other grounds, put as his ratio decidendi. Upon that point there can be no doubt. We have only to read the close of his judgment to see that he put it entirely upon this principle, which I have stated as the second of the general rules applicable to cases of this kind, that a man cannot derogate from his own grant, and that as a general rule no implication can be made of a reservation of an easement to the grantor, although there may be an implication of a grant to the grantee. The Lord Chancellor closes his judgment by saying (having dealt with some of the authorities as to continuous and apparent easements):

> "But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made."

Although, therefore, it is perfectly true that, looking to the special circumstances of that case, it might have been decided upon those special circumstances so as even to admit the proposition for which the defendant contends, it is equally clear that the Lord Chancellor did not so decide the case, but decided it upon a distinct negative of that proposition. If we were to stop here, it seems to me that, looking to the fact that this was not a case in which the point in question was mooted for the first time, but that the point had been mooted and decided as early as the third year of the reign of Queen Anne, we should not be justified in doing anything but follow the principles enunciated by LORD WESTBURY.

Suffield v. *Brown* (1) has been confirmed by an equally high authority, for in *Crossley & Sons, Ltd.* v. *Lightowler* (11) LORD CHELMSFORD, L.C., had to deal with a similar question, and he there says (2 Ch. App. at p. 486):

"LORD WESTBURY, however, in the case of *Suffield* v. *Brown* (1), refused to accept the case of *Pyer* v. *Carter* (5) as an authority, and said,

> 'It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation.'

I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for non constat that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor, except in case of necessity."

The only case in the Court of Appeal which is suggested as being contrary to this high authority of two Lord Chancellors is *Watts* v. *Kelson* (12), where no doubt there are observations of MELLISH, L.J., to the effect that the order of conveyance in point of date is immaterial, that *Pyer* v. *Carter* (5) is good sense and good law, and that most of the common law judges have not approved of LORD WESTBURY's observations upon that case. But, putting aside for the moment the fact that this was a mere dictum of the lord justice during the arguments, I must observe that this is not exactly so, as in *White* v. *Bass* (10) the judges of the Court of Exchequer had distinctly, as regards the reasoning of *Pyer* v. *Carter* (5), overruled that case. No doubt, also, JAMES, L.J., says: "I am satisfied with the decision in *Pyer* v. *Carter* (5)." But in the considered judgment of the court, where, if it had been intended to say that *Suffield* v. *Brown* (1) was not law, one would have thought there would have been something distinct upon the point, there is not one word to the effect of that which had been said by the lords justices during the argument. All that is said about it is this. MELLISH, L.J., who delivered the judgment, after referring to *Nicholas* v. *Chamberlain* (3) said (6 Ch. App. at p. 174):

> "This case has always been cited with approval, and is identical, not only in principle, but in its actual facts, with the case now before us. It was expressly approved of by LORD WESTBURY in *Suffield* v. *Brown* (1), where, though he objected to the decision in *Pyer* v. *Carter* (5), in which it was held that a right to an existent continuous apparent easement was impliedly reserved in the conveyance by the owner of two of the alleged servient houses, yet he seems to agree that the right to such an easement would pass by implied grant where the dominant tenement is conveyed first."

That is what the Court of Appeal had to decide in *Watts* v. *Kelson* (12). Therefore, *Watts* v. *Kelson* (12) is no authority to justify us in overruling *Suffield* v. *Brown* (1), still less for overruling it, supported as it is by *Crossley & Sons, Ltd.* v. *Lightowler* (11).

Thus, then, as it appears to me, stand the principal authorities on the general rules of law which I stated at the commencement of this judgment. Other cases which have been cited during the argument illustrate the exceptions to the second of those general rules. As I have already said, there is an undoubted exception in cases where the easement is what is called a way of necessity. Thus in *Pinnington* v. *Galland* (13), which was a case of disturbance of a right of way, there were five closes, two of them called the Holme Closes, which were separated from the others by the only available highway and were conveyed subsequently in point of time to the conveyance of the remaining closes through which this way de facto ran. In deciding that the way still existed, MARTIN, B., appears to me to have put the case entirely upon the exception to which I am referring. He says this (9 Exch. at pp. 12, 13):

A "Secondly, assume that the conveyance to Mr. Dearle was executed the first. In this case the Rye Holme Closes were for a short period of time the property of Mr. Dickinson, after the property in the land conveyed to Mr. Dearle had passed out of him. There is no doubt apparently a greater difficulty in holding the right of way to exist in this case than in the other; but according to the same very great authority, the law is the same, for the note [1 Wm. Saund
B 323, n.] proceeds thus: 'So it is when he grants the land and reserves the close to himself'; and he cites several authorities which fully bear him out: *Clark* v. *Cogge* (14), *Staple* v. *Heydon* (15), *Chichester* v. *Lethbridge* (16). It no doubt seems extraordinary that a man should have a right which certainly derogates from his own grant; but the law is distinctly laid down to be so, and probably for the reason given in *Dutton* v. *Tayler* (17), that it was for the
C public good, as otherwise the close surrounded would not be capable of cultivation."

Those last words clearly show that the whole foundation of the judgment in *Pinnington* v. *Galland* (13) was that the way claimed in the case was a way of necessity, and it is equally clear, as it seems to me, that MARTIN, B., and the court whose judgment he delivered in no way disputed the general maxims to which I have
D referred.

Davies v. *Sear* (18) also appears to me to have been decided on the same basis. There a man, a builder, had got a lease of land for the purpose of building upon that land, and he proposed to build upon it in such a way that through an archway which was at all events standing to such an extent as to show that it was intended
E to be used for a passage—that through that archway should be the only means of communication with stables which were to be erected. That being the position of things, a portion of the land was sold to a third person, and the question arose whether it was open to that person to build upon his land in such a way as to obstruct this one only way into the stables. LORD ROMILLY, M.R., held that it was not. Why? He founded his opinion upon the basis of this exception to
F which I am referring. He says (L.R. 7 Eq. at p. 431):

"The question is, whether the defendant has a right to shut up the archway, and to intercept all access to Erskine Mews through this passage. This depends upon whether this easement is reserved by implication on the assignment of the house to the defendant; and this depends upon whether the easement is apparent, and also is a way of necessity."

G These cases in no way support the proposition for which the defendant in this case contends; but, on the contrary, support the proposition that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception to which I have referred of easements of necessity, you cannot imply a
H similar reservation in favour of the grantor of land.

Upon the question whether there is any other exception, I must refer both to *Pyer* v. *Carter* (5) and to *Richards* v. *Rose* (19), and, although it is unnecessary for us to decide the point, it seems to me that there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the
I special circumstances in *Pyer* v. *Carter* (5), and I cannot see that there is anything unreasonable in supposing that in such a case, where the defendant under his grant is to take the easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land, and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of considera-

tion in any subsequent case, if the question whether *Pyer* v. *Carter* (5) is right or wrong arises for discussion, to consider that point.

Richards v. *Rose* (19), although not identically open to exactly the same reasoning as would apply to *Pyer* v. *Carter* (5), still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable—is there not, on the contrary, something very reasonable—in supposing in that case that the man who takes a grant of the house first and takes it with the right of support from the adjoining house, should also give to that adjoining house a reciprocal right of support from his own?

One other point remains, and that I shall dispose of in a very few words. It is said that, even supposing the maxims which I have stated to be correct, this case is an exception which comes within the rule laid down in *Swansborough* v. *Coventry* (6) and *Compton* v. *Richards* (9), namely, that, although the land and houses were not, in fact, conveyed at the same time, they were conveyances made as part and parcel of one intended sale by auction. It seems to me that that proposition cannot be supported for one moment. We start here with an absolute conveyance in January, 1876. What right have we to look back to any previous contract or to any previous arrangement between the parties? If it had been the case of an ordinary contract, and there had been parol negotiations, it is well-established law that you cannot look to those parol negotiations in order to put any construction upon the doctrine which the parties entered into for the purpose of avoiding any dispute as to what might be their intentions in the bargain made between them. The same rule of law applies, and even more strongly, in the case of a conveyance, which alone must regulate the rights of the parties. In the cases which have been cited the conveyances were founded upon transactions which in equity were equivalent to conveyances between the parties at the time when the transactions were entered into, and those transactions were entered into at the same moment of time, and as part and parcel of one transaction. There may be, and, according to *Swansborough* v. *Coventry* (6), there is, another exception to the rule which I have mentioned; but here the sale by auction was abortive as regards the defendant's property. There was a conveyance in January of the plaintiff's property without any reservation, and there was no contract of purchase on the part of the defendant until more than a month after that conveyance had been complete. I believe I am expressing the view of the other members of the court when I say that it appears to the court that under such circumstances there is no exception to the general rule. For these reasons, therefore, the appeal must be dismissed.

JAMES, L.J.—The lord justice has been kind enough to express the judgment of the court. I only want to say something in addition—that in *Nicholas* v. *Chamberlain* (3) the court seems to have proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house. The appeal is dismissed with costs.

BAGGALLAY, L.J.—I agree.

Solicitors: *E. Warriner* for *W. B. Hextall*, Derby; *Aldridge, Thorn & Morris* for *John Smith*, Derby.

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

A

THE M. MOXHAM

[Court of Appeal (James and Mellish, L.JJ., and Baggallay, J.A.), February 8, 9, 1876]

B [Reported 1 P.D. 107; 46 L.J.P. 17; 34 L.T. 559; 24 W.R. 650; 3 Asp.M.L.C. 191]

Conflict of Laws—Tort—Damage to immovable property in foreign country—Negligence—Liability—Determination according to lex loci—Damage by British ship to pier in foreign country—Negligence of master and crew.

Liability for a tort committed by a British subject and causing damage to C immovable property in a foreign country is to be determined according to the law of the foreign country.

An English ship, owing to the negligence of her master and crew, ran into and damaged a pier on the coast of Spain and the owners of the pier by the consent of the parties proceeded against the ship in the Admiralty Court for the damage. It was proved that according to Spanish law the D maxim respondeat superior did not apply in such a case, and, therefore, under that law the owners of the ship were not responsible for the damage occasioned by the negligence of the master and crew.

Held: this constituted a good defence to the action.

Notes. Distinguished: *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1883), 10 Q.B.D. 521. Applied: *Machado* v. *Fontes*, [1897] E 2 Q.B. 231. Considered: *United Africa Co., Ltd.* v. *Owners of M.V. Tolten, The Tolten*, [1946] 2 All E.R. 372. Referred to: *British South Africa Co.* v. *Companhia de Moçambique*, [1891–4] All E.R.Rep. 640; *Carr* v. *Fracis Tunes*, [1902] A.C. 176.

As to the jurisdiction of English courts in respect of torts committed abroad, see 7 Halsbury's Laws (3rd Edn.) 84–88; and for cases see 11 Digest (Repl.) 449 et seq.

F Cases referred to:

(1) *The Halley* (1868), L.R. 2 P.C. 193; 5 Moo.P.C.C.N.S. 262; 37 L.J.Adm. 33; 18 L.T. 879; 16 W.R. 998; 3 Mar.L.C. 131; 16 E.R. 514, P.C.; 11 Digest (Repl.) 431, *773*.

(2) *Phillips* v. *Eyre* (1869), L.R. 4 Q.B. 225; 9 B. & S. 343; 38 L.J.Q.B. 113; 19 L.T. 772; affirmed (1870), L.R. 6 Q.B. 1; 10 B. & S. 1004; 40 L.J.Q.B. G 28; 22 L.T. 869, Ex. Ch.; 11 Digest (Repl.) 449, *880*.

(3) *General Steam Navigation Co.* v. *Guillou* (1843), 11 M. & W. 877; 13 L.J.Ex. 168; 152 E.R. 1061; 11 Digest (Repl.) 502, *1209*.

(4) *R.* v. *Anderson* (1868), L.R. 1 C.C.R. 161; 38 L.J.M.C. 12; 19 L.T. 400; 33 J.P. 100; 17 W.R. 208; 11 Cox, C.C. 198, C.C.R.; 14 Digest (Repl.) 150, *1124*.

H Also referred to in argument:

Scott v. *Lord Seymour* (1862), 1 H. & C. 219; 32 L.J.Ex. 61; 11 W.R. 169; 158 E.R. 865; sub nom. *Lord Seymour* v. *Scott*, 1 New Rep. 129; 8 L.T. 511; 9 Jur.N.S. 522, Ex. Ch.; 11 Digest (Repl.) 451, *887*.

Bullock v. *Caird* (1875), L.R. 10 Q.B. 276; 44 L.J.Q.B. 124; 32 L.T. 814; 23 I W.R. 827; 11 Digest (Repl.) 538, *1488*.

The Schooner Exchange v. *McFadden*, 7 Cranch, 116.

The Zollverein (1856), Sw. 96; 27 L.T.O.S. 160; 4 W.R. 555; sub nom. *The Zolverein*, 2 Jur.N.S. 429; 11 Digest (Repl.) 536, *1466*.

R. v. *Coombes* (1786), 1 Leach, 388; 1 East, P.C. 367; 11 Digest (Repl.) 147, *1101*.

Cope v. *Doherty* (1858), 4 K. & J. 367; 27 L.J.Ch. 600; 31 L.T.O.S. 173; 4 Jur.N.S. 451; 6 W.R. 537; 70 E.R. 154; affirmed, 2 De G. & J. 614, L.JJ.; 11 Digest (Repl.) 536, *1467*.

General Iron Screw Collier Co. v. *Schurmans* (1860), 1 John. & H. 180; 29 L.J.Ch. 877; 4 L.T. 138; 6 Jur.N.S. 883; 8 W.R. 732; 1 Mar.L.C. 60; 70 E.R. 712; 41 Digest 160, *6.* A

Lloyd v. *Guibert* (1865), L.R. 1 Q.B. 115; 6 B. & S. 100; 35 L.J.Q.B. 74; 13 L.T. 602; 2 Mar.L.C. 283; 122 E.R. 1134, Ex. Ch.; 11 Digest (Repl.) 422, *722.*

Doulson v. *Matthews* (1792), 4 Term Rep. 503; 100 E.R. 1143; 11 Digest (Repl.) 370, *371.* B

Mostyn v. *Fabrigas* (1774), 1 Cowp. 161; 98 E.R. 1021, Ex. Ch.; 11 Digest (Repl.) 450, *886.*

Appeal from an interlocutory decree of the High Court of Admiralty on a motion to strike out certain paragraphs in an answer filed by the defendants, owners of *ss. Moxham* in a cause of damage instituted on behalf of the Marbella Iron Ore Co., Ltd., against the *M. Moxham*, her tackle, apparel and furniture, and the freight due for the transportation of the cargo now or lately laden on board thereof, and against the owners of the steamship. C

The plaintiffs, the Marbella Iron Ore Co., Ltd., were an English joint-stock company, established under the Companies' Act, 1862, for the purpose of exporting iron ore from Marbella, in Spain, to England and other places. The offices of the company were at No. 1, Crown Buildings, Queen Victoria Street, London. The plaintiffs were at the time of the grievances hereinafter mentioned, possessed of a pier, situate at Marbella, for the purpose of shipping iron ore on board ships. At about 8.30 a.m. on Oct. 5, 1874, the *M. Moxham* came to Marbella to load iron ore from the pier, and it was alleged that, in fine weather, those on board the *M. Moxham* negligently navigated the ship so that she came into violent collision with the pier, causing great damage. By their answer the defendants denied liability. They also pleaded that the collision happened with the jurisdiction of Spain and said that, if the collision was occasioned by any negligence or improper navigation of those on board the *M. Moxham* it was solely occasioned by the negligence of the master or mariners of the *M. Moxham*, and not by the defendants or any of them, and that by the law of Spain in force at the time and place of the collision the master and mariners of the ship, and not the ship or her owners, were liable in damages in respect of a collision occasioned as in the petition alleged, and by such law neither the *M. Moxham* nor the defendants nor any of them were or was liable in respect of the damages proceeded for in this cause. The plaintiff moved in the court below to strike out this plea on the ground that the same formed no answer to the action. Sir Robert Phillimore ordered the plea to be struck out, holding that English law governed the question, and from this decree the defendant appealed. D E F G

Watkin Williams, Q.C., and *E. C. Clarkson* (*J. C. Mathew* with them) for the defendants.

Butt, Q.C., and *Benjamin, Q.C.*, (*R. E. Webster* with them), for the plaintiffs. H

JAMES, L.J.—This case is that of the owners or occupiers of a piece of the Spanish soil bringing an action against the owner of an English ship, for damage done by that ship in knocking down a pier attached to the Spanish land. In this respect it is a very novel action, and very grave difficulties indeed might have arisen as to the jurisdiction of this court to entertain any action or proceedings whatever with respect to an injury done to the land of a foreign State. The question of jurisdiction has probably been successfully got over by what has been done in this case, that is to say that, the ship in question—the owner of which is sued, and which by a figure of speech may be called the delinquent ship—having been sued in Spain, was released upon an agreement between the parties that all remedies against the ship and against the owners of that ship should be tried in this country. Such an agreement would give jurisdiction by contract, not only jurisdiction by consent; and it must be taken that the parties agreed that their I

A ship should be liable here in the same way as she would have been liable according to the law of Spain. Possibly this would get rid of the question, and the Court of Admiralty would have jurisdiction to enforce against the ship an equitable right arising from this equitable contract by virtue of which the ship was released from its liability under the jurisdiction in Spain.

It was properly conceded by counsel for the plaintiffs that the question must B be tried exactly in the same way as if it were being tried in Spain, and he admits that he could not successfully argue in support of the decision of the court below unless he could make out that it would be the duty of the Spanish court, if the action had proceeded there, to apply the principles of the English law to the case. The principle of the English law applicable to the case, according to him, is that the master and crew of the vessel being the servants of an English owner, are by the English law themselves C liable, and on the principle of respondeat superior, make their principals responsible for their negligence; and, further, that they carry with them this doctrine, so that it extends to every foreign country, and every foreigner who is brought in any way into contact, whether by way of contract or tort, with the master and crew as the agents of the owner. No authority was cited for that proposition, and I am unable to follow the principle. One can understand that a contract between master D and servant, or relations between principal and agent, may affect the contracts made by the agent, qua agent, with foreign people, that is to say, may affect the nature and extent of the agency; but the liability of one man to answer for the acts of another in matters of tort seems a thing which at least cannot be carried by the agent into a foreign country. If I take my coachman to France, and through his negligence an accident occurs, and damage is done, the doctrine of E respondeat superior does not apply if that doctrine is unknown in France, the place where the damage was done.

It appears to me, therefore, that the contention that the personal status arising from the fact that the shipowner and his servants were virtually in England was carried into Spain cannot avail, as the wrong is done absolutely, according to the allegation in the plea, on Spanish soil. It was done within the Spanish territory; F it was done by a vessel to something which is in Spain. It is the law of Spain, according to the allegation here, that where the wrong act is done by a servant of this particular kind, when it is done by the master and crew of a ship, the owner of the ship has not that wrong imputed to him, and the rule respondeat superior does not make him answerable for that which is the actual wrong doing of his servants. If that is so, why is he not entitled to the benefit of the Spanish law? G It is settled in all the cases, that if the act is lawful, even if the act is excusable, or if the act has been legitimised by a subsequent act of the legislature, in that case this court would take into consideration that state of the law, that is to say, if by the law of the country a person is justified or excused for the thing done, he is not answerable here. Why is he answerable if by the law of the country he never was answerable for it? I ventured to observe to counsel for the plaintiffs in the H course of the argument, that you do not talk of the thing that is wrong: it is the man that is wrong, and if he is not a wrongdoer according to the law of the country where the wrong is done, that is to say, if he is not answerable for his servant, he is not answerable according to the Spanish law, and it is our duty to give him the benefit of the Spanish law in this case.

I **MELLISH, L.J.**—I am of the same opinion. A great many cases have been cited in the argument in this case, but they almost all relate to actions respecting either wrongs to personal property or to actual personal injuries, and the law respecting personal injuries and respecting wrongs to personal property appears to me, in the result of those cases, to be perfectly settled, and that is, that no action can be maintained in the courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of this country.

The two cases of *The Halley* (1) and *Phillips* v. *Eyre* (2) seem to me, together with the other cases in conformity with them, to be conclusive upon the subject. In *The Halley* (1) there was a collision with a ship in foreign waters. By the law of the foreign country the ship was liable; the owners were liable as owners of the ship; by the law of England the ship and owners were not liable, because there was a pilot on board, who was navigating the ship, having been compulsorily taken on board, and the negligent act was his act. Beyond that it was held that, notwithstanding that the ship and the owners of the ship were liable according to the law of the country where the act was committed, yet, inasmuch as they were not liable by the law of England, no action could be maintained against them. In *Phillips* v. *Eyre* (2), which was an action brought for a crime committed in a foreign country, it was decided that the liability of the defendant had been taken away by the law of the country where the act was committed, and, therefore, that no action could be brought in this country.

If that is the rule respecting personal wrongs and wrongs to personal property, it seems to me a fortiori it must be the rule respecting wrongful acts to real property in a foreign county. Whether the rule respecting wrong to immovable property in a foreign country does not go still further, and prevent an action being brought at all is not a question which it is necessary to determine in this case, because, having regard to the consent of the parties and the agreement that has been entered into, I do not think it is pretended that any objection could be taken in this case with reference to the jurisdiction; but it appears to me beyond all question a fortiori if the rule before mentioned is applicable to personal property and wrongs, it must be applicable to damage done to real property in a foreign country. It is said that, though that is the general rule, yet here the act was not done in the foreign country, because the wrongful act was committed on board an English ship on the high seas. I agree that for acts on board an English ship no doubt the ship carries the English law with it, but I am not convinced that it carries the English law with it with reference to wrongful acts done by guiding an English ship against a pier which is part of a foreign country. It is unnecessary to consider—though I do not think it would present any more difficutly—what would be the rule if the ship was outside the three mile limit, and they had fired a gun and caused damage within the foreign territory. Here the ship itself was within the Spanish dominions at the time it committed the wrong; she was just coming into a Spanish port where she had no right to go, except by licence given to her by the law of Spain, and where she was bound to obey the law of the country while she was there. In that position she comes in contact with that which is stated in the plea to be part of the soil of Spain, and so renders it necessary to apply the general rule that no action can be brought in this country in respect of an alleged wrongful act committed in a foreign country which is not wrongful by the law of that country.

It is said by counsel for the plaintiffs that, although that is perfectly true as a general rule, and although he admits that, if the act itself was not considered a careless act by the law of Spain, no action could be brought in this country, yet, inasmuch as it is considered a wrongful act by the law of Spain as far as the master is concerned, when you come to the question whether the master alone is liable or the ship and the owner also that question is not to be governed by the law of Spain but by the law of England. I do not think any sufficient authority has been cited for that proposition, and it appears to me it would make a further distinction in the law which would be very inconvenient in the result. There is a well-known distinction between substantive law and mere procedure. If it could be proved that this question of liability turned upon mere procedure by the law of Spain, then that law would not be regarded in this country. It appears to me that the rule that a particular person is not to be liable at all, although somebody else possibly may be liable, is a part of the substantive law of the country where the act is committed, and that, therefore, if by the substantive law of the country where the

act is committed, which is to govern the case, the defendant is not liable, then he would be discharged altogether.

If there is any authority wanted for that proposition it is laid down by PARK, B., in *General Steam Navigation Co.* v. *Guillou* (3). That was a case of an injury done on the high seas by a French ship, and there he says (11 M. & W. at p. 895):

> "The injury complained of is averred to have arisen on the high seas, and out of the jurisdiction of England, and not to have been committed by the defendant personally, but by a third person, who was master of the French vessel, the defendant being a French subject. So far the plea is free from obscurity; if the defendant was not liable for the act of that other by that law which is to govern this case he has a good defence to the action, and for the defendants it is contended that the plea means to aver that by the law of France he was not liable for those acts, but that a body established by the French law, and analogous to an English corporation; were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant, and not the servant of the individual composing that body, and if such be the true construction of this plea, we all are strongly inclined to think that there is a good defence to this action."

I am of opinion that that rule applies to this case, and that, if the defendant is not liable for the act of the master by the law which is to govern the case, he has a good defence to the action, and if, therefore, according to the true rule, the law which is to govern the case be Spanish law, the defendant is not liable by that law, and has a good defence to the action.

BAGGALLAY, J.A.—I am of the same opinion. The learned judge of the court below seems to have relied very much in his judgment upon the decision in *R.* v. *Anderson* (4), but that case, it appears to me, was a very distinguishable one from the case with which we have to do now. In that case the argument proceeded much more upon the question whether Anderson was liable, inasmuch as he was a foreigner, in a French ship in French waters, than if he had been an Englishman, but their Lordships thought that, he having entered into articles to serve on board an English ship, so long as he remained on board that ship he was in the same position as an English subject would have been. The great difference is that in that case the offence was fully and entirely committed in the vessel upon which Anderson and the murdered man were. I am unable to see any analogy between that case and the present.

The learned judge of the court below referred to several other cases, and among them *The Halley* (1), which he said appeared to his view to follow the same course as *R.* v. *Anderson* (4). There, again, I am unable to agree with the learned judge. Where a suit is instituted in an English court in respect of a tort committed in a foreign country, it is not sufficient for the plaintiff to show that there is a liability on the part of the defendant in respect of foreign law, but he must also show a liability in respect of the English law, and, therefore, in *The Halley* (1), inasmuch as by English law there was no liability on the owners by reason of their having engaged a pilot by compulsion, it was not open to the plaintiff to claim or receive damages, because, by the law of Belgium the owners were not relieved from responsibility because they did employ a pilot by compulsion. The principles seem to be laid down much more clearly and distinctly, I think, in *Phillips* v. *Eyre* where WILLES, J., said (L.R. 6 Q.B. at pp. 28, 29):

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled, first, the wrong must be of such a character that it would have been actionable if committed in England. Therefore, in *The Halley* (1), the Judicial Committee pronounced against a suit in the Admiralty, founded upon a liability by the law of Belgium, for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, for whom, therefore, as not being his agent, he was not

responsible by English law; secondly, the act must not have been justifiable by the law of the place where it was done."

If English law alone is applicable to this case, there would have been an actionable wrong just as if the wrong had been committed in England; then the question remains would it have been justifiable by the law of the place where it was done. For the purpose of the present proceedings we are bound to presume that according to the law of Spain, there is no liability or responsibility on the part of the owners of the ship for the acts of the master and crew. It appears to me, therefore, by applying the principles so enunciated in *Phillips* v. *Eyre* (2) we are able to arrive at the conclusion in the present case that the law of Spain, and not the law of England, applies. I am reminded by my learned brother that the words "for action justifiable" must mean with regard to the particular defendant against whom the action is brought. We, therefore, think it is clear from that that the proceedings against the defendant must fail by reason of there being no liability under the Spanish law.

Appeal allowed.

Solicitors: *Parker & Clarke*; *Ellis & Co.*

[*Reported by* J. P. Aspinall, Esq., *Barrister-at-Law*.]

KNAPP *v.* KNAPP

[Probate, Admiralty and Divorce Division (Sir James Hannen, P.), May 5, 1880]

[Reported 6 P.D. 10; 49 L.J.P. 69; 43 L.T. 384; 29 W.R. 80]

Divorce—Desertion—Petition on grounds of adultery and cruelty filed within two years of husband's desertion—Petition withdrawn—Second petition filed after desertion for two years on grounds of adultery and desertion.

The husband left the wife for another woman and, before two years had elapsed, the wife filed a petition for divorce on the grounds of his adultery and cruelty. That petition was withdrawn, it being doubtful whether the charge of cruelty could be sustained. After two years had elapsed, the wife filed a fresh petition on the grounds of the husband's adultery and desertion.

Held: as the husband had been in desertion from the time when he left the wife, that state of things had continued for more than two years, and so the wife was entitled to a decree nisi.

Notes. Since the Matrimonial Causes Act, 1937, s. 2 (now the Matrimonial Causes Act, 1950, s. 1 (1): 29 Halsbury's Statutes (2nd Edn.) 389), the period of desertion has been three years.

Considered: *Kay* v. *Kay*, [1904–7] All E.R.Rep. 429; *Jordan* v. *Jordan*, [1939] 2 All E.R. 29. Referred to: *Chapman* v. *Champman and Thomas* (*Taylor intervening*), [1938] 1 All E.R. 635.

As to termination of desertion, see 12 Halsbury's Laws (3rd Edn.) 263 et seq.; and for cases see 27 Digest (Repl.) 360 et seq.

Petition by the wife for dissolution of marriage on the ground of her husband's adultery and desertion.

A petition for dissolution, filed by the wife, on the ground of her husband's adultery and cruelty, came on for hearing on Nov. 2, 1877, and was withdrawn by the wife at the hearing, it being doubtful whether the charge of cruelty could

be sustained. A fresh petition for dissolution, alleging adultery and desertion "for two years and upwards," was filed by the wife on Feb. 12, 1880.

Inderwick, Q.C. (*Bayford* with him), for the wife.

The husband did not appear.

SIR JAMES HANNEN, P.—The case is perfectly clear, and would not call for any remark were it not that I have found that some misapprehension exists in regard to desertion in circumstances like these. It is quite plain that when the husband left his wife, eloping with another woman, he deserted the wife, and, if that state of things had continued without anything more for two years, the wife would have been entitled to institute a suit for dissolution of marriage. It is true that she did institute a suit for dissolution of marriage on the ground of cruelty and adultery, so that, some time before two years had elapsed, she was seeking to have her marriage dissolved; but that is not inconsistent with her afterwards abandoning that suit, and, after having waited the requisite time, instituting a fresh suit for dissolution on the ground of her husband's adultery and desertion, for, as it appears, he has, since he left her, been cohabiting with the woman in whose company he eloped. There never was a time at which the wife was bound to go back and live with him, because she was always justified in refusing to do so as long as he continued to live with the woman for whose company he had abandoned her; and, therefore, as it was in the beginning desertion on his part, and the circumstances have never been changed, that state of things, which was a desertion in the first instance, has continued a desertion for now more than two years. Consequently, the wife is entitled to succeed. I, therefore, pronounce a decree nisi, with costs, and custody of the children to the wife.

Decree nisi.

Solicitors: *Crowder, Anstie & Vizard*, for *Simpson & Hockins*, Manchester.

[*Reported by* L.D. Powles, Esq., *Barrister-at-Law.*]

MISA *v.* CURRIE AND OTHERS

[House of Lords (Lord Chelmsford, Lord Hatherley and Lord O'Hagan), June 23, 26, 1876]

[Reported 1 App. Cas. 554; 45 L.J.Q.B. 852; 35 L.T. 414; 24 W.R. 1049]

Bank—Banker's lien—Lien on all documents deposited by debtor customer—Effect on lien of equities between customer and third party.

Bank—Banker's lien—Lien of bank as collecting agent—Request by customer to debtor to pay amount due to bank—Lien on request.

A banker has, on all documents which are placed in his hands by a customer who is indebted to him in the course of banking transactions, a lien which is not affected by any equities which may exist between that customer and a third party.

The appellant purchased from L. drafts on Cadiz. The day before the purchase-money was payable, L. deposited with the respondents, his bankers, to whom he was largely indebted, a document, dated the following day, requesting the appellant to pay the purchase-money to the respondents. The next day the appellant paid the amount by cheque, and the respondents handed him the request signed by L., but on the same day L. stopped payment, and the appellant, accordingly, instructed his bankers not to honour the cheque, which was subsequently dishonoured. When the drafts were presented to the drawer they were dishonoured. In an action on the cheque brought by the respondents against the appellant,

Held: (i) there was good consideration between L. and the appellant at the time the cheque was given, which could not be affected by subsequent events; (ii) even if the request to the appellant was given to the bank merely to enable them to collect the amount for L., the request was a security valuable to them on which they had a lien, and their parting with it in exchange for the appellant's cheque was good consideration moving from them; and, therefore, the bank were entitled to succeed.

Notes. Considered: *M'Lean* v. *Clydesdale Banking Co.* (1883), 9 App. Cas. 95. Applied: *Stott* v. *Fairlamb* (1883), 52 L.J.Q.B. 47. Considered: *Fleming* v. *Bank of New Zealand*, [1900] A.C. 577. Referred to: *Hogarth* v. *Lathan* (1878), 47 L.J.Q.B. 339; *Re Matthews, Ex parte Matthew* (1884), 12 Q.B.D. 339; *Elwell* v. *Jackson* (1885), 1 T.L.R. 454; *Re Romer, Ex parte Snell* (1893), 62 L.J.Q.B. 610; *Nash* v. *De Freville* (1900), 69 L.J.Q.B. 484; *R. E. Jones, Ltd.* v. *Waring and Gillow, Ltd.*, [1926] All E.R.Rep. 36; *Re Cuthbert, Ex parte Monnoyer British Construction Co.* v. *Trustees*, [1936] 1 All E.R. 342; *Oliver* v. *Davis*, [1949] 2 All E.R. 353.

As to banker's lien, see 2 Halsbury's Laws (3rd Edn.) 210–213; and for cases see 3 Digest (Repl.) 321–330.

Cases referred to:

(1) *Barnett* v. *Brandao* (1843), 6 Man. & G. 630; 7 Scott, N.R. 301, Ex. Ch.; reversed sub nom. *Brandao* v. *Barnett* (1846), 3 C.B. 519; 12 Cl. & Fin. 787; 7 L.T.O.S. 525; 136 E.R. 207, H.L.; 3 Digest (Repl.) 321, *992*.

(2) *De La Chaumette* v. *Bank of England* (1829), 9 B. & C. 208; Dan. & Ll. 318; 7 L.J.O.S.K.B. 179; 109 E.R. 78; 3 Digest (Repl.) 138, *71*.

Appeal from a decision of the Court of Exchequer Chamber, affirming a decision of the Court of Exchequer in an action on a cheque brought by the respondents against the appellant.

A firm of Lizardi & Co., who were merchants in London, and carried on an extensive business with Spain and the continent, had been customers of Glyn, Mills, Currie & Co., bankers, with whom they had two accounts, a drawing account, and

A a loan account. In the year 1873 Lizardi & Co. were largely indebted to Glyn & Co. on both accounts. The plaintiff, Misa, was a wine merchant carrying on business in London, and at Xeres, near Cadiz, in Spain. In the beginning of February, 1873, Misa instructed his agent in London to purchase from Lizardi drafts on Cadiz to the value of about £2,000. Accordingly, on Tuesday, Feb. 11, a contract was effected between Lizardi and Misa for the sale and delivery by B Lizardi to Misa of four drafts to the amount of £2,000, at fifteen days' date, and the same day Lizardi left at Misa's office four drafts upon Manuel Paul, of Cadiz, at fifteen days' date, the total amount in English money being £1,999 3s. These drafts were forwarded the same evening to Misa at Xeres. The custom in the purchase of drafts and bills on foreign countries was that they were to be paid for on the post day next after the contract. The post days being Tuesdays and C Fridays, the purchase-money for the four drafts became payable in the usual course of business on Friday, Feb. 14. Glyn & Co. had for some time previous to Feb. 13 been pressing Lizardi & Co. to reduce the amount of their debt, and on that day they paid in to the credit of their drawing account the sum of £6,925, and in the afternoon handed to Mr. Currie, one of the partners in Glyn & Co., a document in these words:

D

"London, Feb. 14, 1873.

"M. Misa, Esq., 41, Crutched Friars.

"Please to pay to Messrs. Mills, Glyn & Co., or bearer, the sum of nineteen hundred and ninety-nine pounds three shillings, for bills remitted to you last post.

"£1,999 3s.

E

F. DE LIZARDI & Co."

In the afternoon of Feb. 14, Glyn & Co. sent this document to Misa's office to inquire whether it would be paid. Pritchett, Misa's manager, answered that it would be paid. An hour afterwards he sent a cheque for the amount to Glyn & Co., and received from them the document handed to them by Lizardi. Soon after send- F ing the cheque, Pritchett was informed that Lizardi had stopped payment, and he thereupon instructed Messrs. Barnett, Hoare & Co., upon whom the cheque was drawn, not to pay it. Accordingly, on its being presented by Glyn & Co., it was refused payment. Lizardi shortly afterwards absconded, and was adjudicated a bankrupt, his liabilities amounting to upwards of a million sterling, and his assets to very little. The four bills upon Paul to the order of Misa were endorsed by G him. They became due on Feb. 27, and upon being presented to the drawer on that day were dishonoured. This action was then brought by Glyn, Mills, Currie & Co. against Misa upon the cheque for £1,999 3s. The cause was tried before KELLY, C.B., who directed a verdict for the plaintiffs, leave being reserved for the defendants to move for a rule to show cause why the verdict should not be set aside, and a verdict entered for the defendants, or a nonsuit. In Hilary Term H 1874, the Court of Exchequer (KELLY, C.B., PIGOTT, and CLEASBY, BB.), refused an application by the appellant for a rule, and their decision was affirmed by the Court of Exchequer Chamber (KEATING, LUSH, and ARCHIBALD, JJ., LORD COLERIDGE, C.J., dissenting).

Watkin Williams, *Q.C.*, and *Wood Hill* (*Cohen*, *Q.C.*, with them) for the appellant.

I *J. Brown*, *Q.C.*, and *Murray* for the respondents.

LORD CHELMSFORD.—The question upon this appeal is whether the respondents are entitled to recover from the appellant the amount of a cheque for £1,999 3s., drawn by him on his bankers, Messrs. Barnet, Hoare & Co., in favour of Lizardi & Co., or bearer. The Court of Exchequer held that Glyn & Co. were entitled to recover, and upon appeal the judges in the Exchequer Chamber, with the exception of LORD COLERIDGE, C.J., agreed in that judgment. Upon the argument at your Lordships' Bar, the appellant contended, first, that there was

a failure of consideration between Lizardi and Misa; secondly, that Glyn & Co. were not holders for value of the cheque sued on, but were merely collecting the money for Lizardi as his bankers.

In support of the first proposition, it was argued that the true character of the contract between Lizardi and Misa was, that Lizardi should transmit a sum of £2,000 to Cadiz for Misa, and that Misa would pay Lizardi £1,999 3s. fifteen days thence, and that, Lizardi not having sent the money, there was a total failure of consideration for Misa's cheque. It appears to me that this is an entire misapprehension of the contract, which was nothing else but a purchase of bills by Misa from Lizardi. The statement in the Special Case is that Misa's agent effected a contract between Lizardi and Misa for the sale and delivery by Lizardi to Misa of drafts to the amount of about £2,000 sterling, at an agreed rate of exchange from London to Cadiz, to be at fifteen days' date. All these conditions were punctually complied with, and Misa received precisely what he bargained for, and there is nothing to show whether he continued to hold the bills or passed them to other parties. It was, however, alleged that the whole transaction was a fraud on the part of Lizardi from the beginning, and that when he drew the bills he knew that he had no effects in Paul's hands, and, therefore, that the bills would not be paid. Unless such original fraud on the part of Lizardi can be proved, the contract is binding. But there is no proof that Lizardi knew when he drew upon Paul that the bills could not be paid. In Paul's protest he does not say that he has no effects of Lizardi's in his hands, but that he has no realised effects, and it is not unlikely that the other reason assigned in the protest, viz., its being well known that Lizardi had suspended payment, induced Paul to refuse to pay the bills. Suppose Lizardi had applied to Misa for payment of the bills on Feb. 14, and Misa had refused payment, I entertain no doubt that Lizardi might have sued him upon the contract, Misa's only remedy against Lizardi being upon the bills, which, supposing they had then been refused payment, he might have been able to make available by way of set-off against Lizardi's claim. I have no doubt that as between Misa and Lizardi there was a sufficient consideration for the cheque upon which the action is brought.

It was conceded that, if your Lordships are of that opinion, it disposes of the entire case. But the Court of Exchequer Chamber decided in favour of the bank on a totally different ground. Lush, J., in delivering the judgment of that court, said:

> "We think it must be assumed on the facts stated in the Case that if the action had been brought by Lizardi the defendant would have had a good answer to it, on the ground either of fraud or failure of consideration, it matters not which. The only question, therefore, is whether under the circumstances stated the plaintiffs are to be considered the holders of the cheque for value."

Lord Coleridge, C.J., expressed an opinion that they were not. The learned counsel for the appellant argued that Glyn & Co. were not holders of the cheque for value, because the document handed to them by Lizardi on Feb. 13, dated the 14th, upon the delivery up of which the cheque was given, was either a void instrument under the Stamp Act, or was a mere order to Glyn & Co. to collect the money for Lizardi.

[His Lordship dealt with a point which does not now call for report, and continued:] It was further argued that Glyn & Co. did not receive the order upon Misa for themselves, but merely to enable them to collect the amount of it for Lizardi, and, therefore, their parting with it for the cheque was no consideration moving from them. The answer to this argument lies in the statement in the Special Case that Lizardi, being largely indebted to Glyn & Co., and they having been for many days previously to Feb. 13 "urgently pressing him to reduce the amount of his indebtedness," he on Feb. 13 gave them, with other cheques to the amount of £6,925 5s. 8d., this order on Misa, evidently to be applied in re-

duction of his debt. But supposing it was merely paid in by Lizardi to Glyn & Co., they would have had a lien upon it, and, if it was available against Misa, the giving it up for the cheque was the parting by Glyn & Co. with a security which was valuable to them.

The case in the Exchequer Chamber turned entirely upon the question whether the pre-existing debt from Lizardi to Glyn & Co. formed a sufficient consideration for the cheque on which the action was brought, LORD COLERIDGE, C.J., differing from the rest of the judges, being of opinion that it did not. It is unnecessary to enter into this question. The court decided the case upon the assumption that Lizardi's order was worthless, and that, therefore, the giving it up by Glyn & Co. could form no consideration for the cheque they received in exchange. This being removed out of the way, the pre-existing debt was the only consideration which could be a foundation for their claim. I have already expressed my opinion that Misa would have had no defence to an action brought by Lizardi upon the draft or order upon him, and, that draft or order having been given by Lizardi to Glyn & Co. towards payment of his debt to them, the giving up that document was undoubtedly a detriment to Glyn & Co. which amounted in law to a sufficient consideration, moving from them for the cheque which was substituted for it. As already mentioned, it was admitted by the learned counsel for the appellant that if your Lordships were of opinion that there was consideration between Lizardi and Misa, it disposed of the whole case. I submit to your Lordships, therefore, that the judgment of the Court of Exchequer Chamber should be affirmed.

LORD HATHERLEY.—I agree in the opinion which has been pronounced by my noble and learned friend. The case, although it has required considerable time for its full discussion, is reduced to really very short heads of argument.

The first question which arises for consideration is: What was the position of Misa with reference to Lizardi on Feb. 14, the day on which he gave his cheque to Glyn & Co., under the circumstances to be afterwards mentioned? As regards Lizardi, Misa was in this position. He had bought of him bills upon Cadiz, for which he had engaged to pay £1,999 3s. The terms of the contract were that Lizardi, having procured and handed to Misa bills payable at Cadiz for a certain amount (it was not the same amount, but an amount for which the sum of £1,999 3s. was to be paid in cash), Misa would immediately, on or before the next post day pay to him the sum of £1,999 3s., although the bills themselves would not be payable until, I think, eleven days afterwards, namely, Feb. 25. On Feb. 14, therefore, Lizardi was in a position to demand payment from Misa of the sum I have mentioned—£1,999 3s. We have no evidence before us of the condition of things at that time with regard to Lizardi's solvency or insolvency. All that appears is that Glyn & Co., to whom he was largely indebted, but to whom he had also given very large securities in appearance, though they were not all genuine or valuable, had their doubts or misgivings about his solvency, and were pressing him for payment. But the bills, having been procured, as I have said, had gone out to Cadiz, and had reached their destination. They had not been presented for payment at that time, because they were not to be due until Feb. 25, but they were in the hands of Misa abroad, ready to be used according to the bargain he had entered into with Lizardi. That being the position of things between Misa and Lizardi, I cannot have any doubt whatever that at that time there was a full consideration between them. The subsequent events which made that consideration fail cannot be taken into account in estimating their position at that time, and the position of Lizardi towards a third person. That third person would be ignorant of the duty that Lizardi owed to Misa, and the possibility of Misa being, in consequence of that failure of duty on his part, entitled to say that, as between him and Lizardi, in the subsequent events which happened, the consideration had failed, could not affect him.

This being their position, we find on the one hand, that as between Glyn & Co., the respondents, and Lizardi, Glyn & Co. were so far in doubt as to his solvency

at this date that they had begun to press him before Feb. 12, through the medium of one of their partners, Mr. Currie, with reference to payment. Lizardi assured Mr. Currie that he was mistaken in his suspicions, and handed him a list of the securities deposited with the respondents. Mr. Currie still not being satisfied with what Lizardi had said, continued to press him to reduce his debt. On Feb. 13 Lizardi, under this pressure, paid in to the credit of his drawing account at Glyn & Co.'s two cheques, making together £6,925, and on that same day, the 13th, he handed this document, on which so much argument has taken place, to Mr. Currie. The document is partly written and partly printed, but the only observation which arises upon that is that the fact of some words being printed shows that the particular form of the transaction was not an uncommon one as between parties dealing in matters of this character. The only explanation we have of it is that we are told that Mr. Currie deposed at the trial that it was usual for Lizardi to sell bills on the exchange, and then to draw an order like the present on the purchaser of the bills, and that that was the usual course of business when bills were sold. It was also deposed by Mr. Currie that such orders were sometimes accepted by writing "accepted" across them—that is, by the person on whom they were drawn writing his name across the paper making it payable at his bankers.

A good deal of argument has arisen whether this document is to be treated as a bill of exchange, or whether it is to be treated simply as an authority authorising Glyn & Co. to collect this debt due to Lizardi from Misa. If I be right in the conclusion I have come to that at this time there was a good debt constituted between Lizardi and Misa, and that Lizardi was then in a position to have demanded payment, it does not, I apprehend, become very material what the exact character of this document was. Supposing it to be necessary to hold it to be an authority, I do not see, regard being had to the lien which bankers have upon all documents which are placed in their hands by customers who are indebted to them in the course of their banking transactions, that it would make any very important difference whether it were held to be an authority or a bill of exchange.

All that can be said about the transaction is this. Lizardi, being hard pressed by Glyn & Co. for securities, represents to them that he has a debt of £1,999 3s. due to him from Misa, and he says: "I will do this in order that you may be quite safe. This debt is not payable until the 14th, and I cannot give you any right to receive it until that day, because it is not due till then. You know that as well as I do, but in order to give you all possible security I will leave this document at your bank, so that when the money becomes due you may be in a position to demand payment of it." I apprehend that that is much more the character of the transaction than holding it to be a mere authority for the collection of the money. If it were necessary, I should be prepared to hold that Glyn & Co. had a right of lien, holding this document in their hands, until the time came when they would call on Misa to make the payment under Lizardi's contract. It was a document which they might hand over to Misa to have the words "accepted, &c.," written across it, or to have the payment made, according as they were disposed to do. In fact Glyn & Co. took the course of going to Misa on the day it was dated, and asking him if it would be paid. Misa's agent, Pritchett, said that it would certainly be paid, and tendered then and there his cheque for the payment. That having been done, it seems to me to be of very little importance, as I said before, in what capacity this document was given. Pritchett recognised that on that day there was this debt due to Lizardi of £1,999 3s. He saw that it was directed by Lizardi to be paid to Glyn & Co., instead of being paid to himself, and when the instrument was presented to him for Misa he said: "It shall be paid. We are ready, at this moment to give you a cheque for it." If he had done so, I suppose no question could have arisen in this matter, which has caused so much litigation since then. But Glyn & Co.'s clerk declined to give up the document for the cheque, and very properly, because he had no

authority so to do. He returned to the bank with the document, and in the course of the afternoon Misa's agent sent a cheque for £1,999 3s. to the bank. Glyn & Co. were content to deliver up the document in exchange for the cheque, and so they became possessed of that cheque, and Pritchett, on behalf of Misa, obtained possession of the document signed by Lizardi.

It appears to me, therefore, that, as between Glyn & Co. and Misa, the court below were right in saying that there was a document of value to Glyn & Co. which had been deposited with them on the 13th to be put in force in the mode in which alone it could be put in force on the 14th, and that the cheque was given in consideration of the delivery up of the said document. As I have said, if it were necessary I should be prepared to hold that in this case, according to the decision in *Brandao* v. *Barnet* (1), that the custom of bankers is now perfectly well established, and must be known to every mercantile person in the city of London, Misa, like others, is bound by his knowledge of that custom. He must have been perfectly well aware that all moneys paid into a bank are subject to a lien, and that all documents as well as moneys deposited with a banker are subject on the banker's part to a lien in respect of any balance that may be due to him from his customer. When Misa's agent paid in this cheque due to Lizardi, he was aware that it was going into Glyn & Co.'s bank; the very document he got in exchange for it informed him of that fact. In truth, Lizardi, being at that time in a position in which he himself could have demanded the money, executes this negotiable instrument with every intent, as Misa knew, of paying it into his bankers, and giving the bankers that lien upon it which the case I have referred to decided that they had upon all documents which came into their hands.

I will advert to the ground upon which LORD COLERIDGE, C.J., rested his opinion. That opinion, of course, makes one pause in coming so confidently to a conclusion as one otherwise might have done, still I cannot say that I have any doubt in my own mind as to the correctness of the conclusion to which I have come. *De La Chaumette* v. *Bank of England* (2) does not seem to me to have any bearing upon this case. There is no evidence that any question was there raised as to any right of lien as between the parties who were acting, the one as principal, and the other as agent. It appeared from the circumstances of that case that the party suing was suing simply as an agent of a person who was bound to show that he had given good and valuable consideration, and, although something is said in the case of its being simply a debt due and nothing more, there is nothing said about there being a right of lien which authorised him to say: "Whatever comes into my hands I am entitled to hold as against you in respect of a balance that is due to me." I think in the present case the circumstances of that lien is quite sufficient of itself, without any proof of additional acts, either done or forborne to be done on the part of Glyn & Co. On the other hand, looking fairly through the evidence in the case, and looking especially at the pressure which was being put by Glyn & Co. upon Lizardi for payment, I am not prepared to say that there was not a forbearing in respect of the delivery of the first instrument, because if that instrument had not been put into their safe custody on the 13th, they might have been then in the position to pursue their suspicions to the full result, to have analysed that list of securities as to which Mr. Currie had already expressed his misgivings, and to have taken proceedings upon Feb. 13 to bring Lizardi to that state of avowed and open bankruptcy that he was afterwards obliged to confess himself to be in. They did nothing on the 13th, and I think that alone would be a sufficient forbearance.

On the whole case I hold that Lizardi was in a condition to demand that payment, that that payment was made to him by a negotiable instrument on the footing of the acknowledgment of a previous instrument which had been drawn for the recognition on Misa's part of his debt, and that he was entitled so to deposit that instrument with his bankers as to entitle them to sue in their own names for payment of that instrument, which they have done, without being affected with any of the consequences which might subsequently occur on Feb. 25,

from the dishonouring of the bills, and the failure of consideration. It appears to me that it would be a very serious thing indeed in its effect upon the numerous transactions carried on by means of cheques in the city of London if we were to hold that any bankers holding those enormous drafts, which are drawn daily and which we read of in the accounts of the transactions of the Clearing House, are to be exposed to an inquiry as to what equities may subsist between any one of their customers, upon all of whose documents delivered to them they have supposed themselves to have a lien, and third persons, so that they might find themselves affected with equities with regard to that customer, and consequently be unable to give that credit which their right of lien at present enables them to give, and thereby contributes so much to carrying forward the vast trade of this metropolis.

LORD O'HAGAN.—I am of the same opinion. On the question of consideration between Lizardi and Misa, I have been unable to entertain a doubt. The bargain was for the sale of bills on a foreign house. The sale was completed. The bills were delivered. The price became payable; and the transaction, so far, was complete. Lizardi gave what he agreed to give. Misa received all that he had bought, and, two days afterwards, he became liable to discharge the purchase-money. If at the appointed time he failed to do so, his liability being perfect, an action would have been instantly maintainable against him; and if there had been legal machinery for the immediate trial of it, he would have been wholly defenceless and compellable to pay. His liability did not arise on the acceptance of the bills, or after the money had been disbursed at Cadiz. Until a fortnight after the second post, when the price was payable, neither of these things was to occur. In the meantime, it was competent to Lizardi to do with the realised price of the bills what he pleased, and to Misa, on the other hand, to deal with the bills at his discretion, and nobody can tell from any information before your Lordships, what he did with them, or where they are now. On the first point, therefore, which does not appear, I think, to have been even argued in the Exchequer Chamber, it seems to me that the respondent's argument prevails.

As to the second point, upon the relation between Glyn & Co. and the defendant, I am equally unable to appreciate the force of the argument from failure of consideration. Briefly, Lizardi owed a large debt to his bankers. His difficulties became known. He was pressed for payment or security. He lodged, not for the purpose of collection by his bankers, but to gain his creditors' forbearance, among other things in all worth £6,000, the draft of Lizardi upon Misa for the price of the bills which had been delivered. They inquire whether Misa will honour it, and he answers, by his agent, that he will, and sends his cheque for the amount, getting in return what alone constituted a sufficient consideration—the draft deposited to secure the debt due to Lizardi. That debt being undoubted, the bankers, having forborne upon the lodgment of the securities, at least for a time, to press for what was owing to them, and having got an actual assignment of Lizardi's admitted claim, seem to me clearly entitled to recover upon the cheque given by Misa, given for ample consideration, and substituted for a bill which they had held for ample consideration. If the cheque had been handed to Lizardi and by him to the plaintiffs, the case would have been the same substantially. That cheque was intended to be, and was accepted as, an actual payment; and as, if the value of it had passed in cash, Lizardi could not certainly have been required to give it back, the difficulty seems not less to produce the same effect by rendering it valueless in the hands of a third party, whose debt, pro tanto, it was plainly taken to discharge. In that way, I think the transaction should be regarded. The bankers took it, not, I repeat, for collection but for payment of a debt. But even if Lizardi had sent the security to the plaintiffs as his bankers, and not as his creditors, it would have been in their power to hold it as affected by their lien with exactly the same result. So that, in my judgment,

with very sincere respect for the opinion of the Lord Chief Justice of the Common Pleas, quacunque via data, whether they took as bankers or as creditors, they are equally entitled to maintain this action, and the decision of the Court of Exchequer and of the Exchequer Chamber ought to be sustained.

Appeal dismissed.

Solicitors: *Dawes, Sons & Rolph*; *Murray, Hutchins & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

SMITH *v.* WHEATCROFT

[CHANCERY DIVISION (Fry, J.), June 4, 5, 1876]

[Reported 9 Ch.D. 223; 47 L.J.Ch. 745; 39 L.T. 103; 27 W.R. 42]

Sale of Land—Misrepresentation—Personal considerations of parties immaterial—Purchaser, without knowledge of vendor, acting for third party.

Specific Performance—Sale of land—Contract—Receipt for deposit set up by purchaser as contract—Written memorandum containing further terms introduced by vendor at trial—Specific performance of contract stated in receipt with variation.

Where personal considerations do not enter into a contract and the parties would have been willing to make the same contract with any other person, the fact that, unknown to one party, the other was acting on behalf of some other person is not such a misrepresentation as would invalidate the contract.

On June 16, 1876, the plaintiff met the defendant to discuss buying land from the defendant. The plaintiff said that he wished to buy the property as it joined his father's land and the defendant's father had promised to sell it to his (the plaintiff's) father. The plaintiff offered the defendant £565 for the land, which was refused, but the defendant said that he would accept £575 and suggested that the plaintiff think it over and return next week. The plaintiff in the meantime decided not to buy the land and came to an agreement with an iron company to purchase the land on their behalf for £600. On June 26, 1876, the plaintiff again met the defendant and agreement was reached for the sale of the land for £600 to the plaintiff. The defendant was not aware of the arrangement with the iron company. The plaintiff was given a receipt for a deposit of £60 which contained the bare essentials of the agreement for the sale. The defendant subsequently learnt of the arrangement with the iron company and tendered the deposit back to the plaintiff, saying that he could not make a title to the property. The defendant afterwards refused to complete the contract. The plaintiff brought an action for specific performance of the agreement contained in the receipt of June 26, 1876. At the trial the defendant set up as the true agreement a written memorandum of the same date which contained a reservation of mineral rights. The plaintiff submitted to the variation set up by the written memorandum.

Held: (i) the defendant was not induced to enter into the contract for the sale of the land by a misrepresentation of the plaintiff; and (ii) specific performance would be granted of the agreement appearing on the receipt with a variation to include the reservation of mineral rights.

Notes. Considered: *Nash* v. *Dix* (1898), 78 L.T. 445; *Gordon* v. *Street*, [1899] 2 Q.B. 641. Distinguished: *Phillips* v. *Brooks, Ltd.*, [1918–19] All E.R.Rep. 246. Considered: *Said* v. *Butt*, [1920] All E.R.Rep. 232; *Sowler* v. *Potter*, [1939]

4 All E.R. 478; *Dennant* v. *Skinner*, [1948] 2 All E.R. 29. Referred to: *Berners* v. *Fleming*, [1925] All E.R.Rep. 557; *Lake* v. *Simmons*, [1927] All E.R.Rep. 49; *Ingram* v. *Little*, [1960] 3 All E.R.Rep. *332*.

As to mistake in contract and specific performance, see 8 HALSBURY'S LAWS (3rd Edn.) 80 et seq., ibid., vol. 26, p. 904, ibid., vol. 36, pp. 303 et seq.; and for cases see 35 DIGEST (Repl.) 103 et seq., 42 DIGEST 521 et seq., 562 et seq. As to materiality of misrepresentation, see 26 HALSBURY'S LAWS (3rd Edn.) 853, 854; and for cases see 35 DIGEST (Repl.) 50, 51.

Cases referred to:

(1) *London and Birmingham Rail. Co.* v. *Winter* (1840), Cr. & Ph. 57; 41 E.R. 410, L.C.; 40 Digest (Repl.) 41, *239*.
(2) *Legal* v. *Miller* (1750), 2 Ves. Sen. 299; 28 E.R. 193; 42 Digest 523, *866*.
(3) *Lindsay* v. *Lynch* (1804), 2 Sch. & Lef. 1.
(4) *Jeffrey* v. *Stephens* (1860), 2 L.T. 716; 6 Jur.N.S. 947; 8 W.R. 427; 42 Digest 515, *797*.

Also referred to in argument:

Harding v. *Cox* (1748), cited 1 Vern. at p. 227, n.
Phillips v. *Duke of Buckingham* (1683), 1 Vern. 227; 23 E.R. 432; 42 Digest 475, *436*.
Fellowes v. *Lord Gwyder* (1829), 1 Russ. & M. 83; 39 E.R. 32, L.C.; 42 Digest 477, *453*.
Nelthorpe v. *Holgate* (1844), 1 Coll. 203; 8 Jur. 551; 63 E.R. 384; 42 Digest 546, *1067*.
Bonnett v. *Sadler* (1808), 14 Ves. 526; 33 E.R. 622, L.C.; 30 Digest (Repl.) 436, *790*.
Cadman v. *Horner* (1810), 18 Ves. 10; 34 E.R. 221; 42 Digest 476, *448*.
Davis v. *Symonds* (1787), 1 Cox, Eq. Cas. 402; 29 E.R. 1221; 42 Digest 466, *343*.
Bagot v. *Easton* (1877), 7 Ch.D. 1; 47 L.J.Ch. 225; 37 L.T. 369; 26 W.R. 66, C.A.; 36 Digest (Repl.) 572, *1300*.
Clinan v. *Cooke* (1802), 1 Sch. & Lef. 22; 35 Digest (Repl.) 289, **83*.
Martin v. *Pycroft* (1852), 2 De G.M. & G. 785; 22 L.J.Ch. 94; 20 L.T.O.S. 135; 16 Jur. 1125; 1 W.R. 58; 42 E.R. 1079, L.JJ.; 30 Digest (Repl.) 411, *551*.
Barker v. *Cox* (1876), 4 Ch.D. 464; 46 L.J.Ch. 62; 35 L.T. 662; 25 W.R. 138; 42 Digest 579, *1450*.
Lord Irnham v. *Child* (1781), 1 Bro.C.C. 92; 2 Dick. 554; 28 E.R. 1006, L.C.; 35 Digest (Repl.) 282, *41*.
Joynes v. *Statham* (1746), 3 Atk. 388; 26 E.R. 1023, L.C.; 35 Digest (Repl.) 282, *38*.

Action for specific performance of an agreement by the defendant to sell certain closes to the plaintiff.

The defendant was owner of a piece of land at Crich which he offered for sale. The plaintiff wished to buy it, and an interview took place between them on June 16, 1876. The defendant asked £600 for the land, but eventually said he would take £575. The plaintiff offered £565, which the defendant refused, and said he would give him a week to think over it. At this interview the plaintiff stated that he wished to buy the property, as it joined some land belonging to his father, and that the defendant's father had promised to sell it to the plaintiff's father. The plaintiff then went away and returned on June 26. In the meantime he had made up his mind not to buy the property for himself, but received authority from the Butterley Iron Co., a large firm of colliery proprietors and iron founders, to purchase it for them for £600. Accordingly at the interview on June 26, 1876, the plaintiff agreed to buy the land for that sum, and the following receipt was signed by the defendant:

"Received June 26, 1876, of Joseph Smith, the sum of £60 deposit on account of purchase-money of the Greaves Closes by the brook at Crich; purchase money £600. To be completed on Sept. 29, next."

On Aug. 3, 1876, the plaintiff saw the defendant and then expressly told him that he had bought the land for the Butterley Iron Co. The defendant was very annoyed and on Aug. 11, 1876, called on the plaintiff and tendered him the deposit back, on the ground that he found that he could not make a title to the property because he had discovered that his stepmother had a right of dower in the land, and he afterwards refused to complete the contract. The plaintiff then brought his action claiming specific performance of the agreement contained in the receipt of June 26.

By the statement of defence the defendant alleged that the receipt did not contain the true terms, or all the terms of the contract; that the agreement alleged in the statement of claim was not valid, and that, if any agreement binding on him was come to, it was for the purchase of the surface only of the land, and that he had reserved all the minerals and mining rights to himself. He also alleged that the plaintiff had obtained the agreement by misrepresenting himself as the purchaser, when the real purchasers were the Butterley Iron Co. The plaintiff, both by his amended statement of claim and his reply, insisted that the receipt contained the true terms of the agreement, and denied that there had been any reservation of the minerals. At the trial another agreement was produced by the defendant, which was signed by the plaintiff, and dated the same day as the receipt. The terms of this agreement were more full than those contained in the receipt, but were to the same effect with the exception that there was a reservation of all minerals, stone, and clay, with full liberty to enter at all times and search for and get the same.

North, Q.C., and *Hamilton Humphreys* for the plaintiff.
Cookson, Q.C., and *Russell Roberts* for the defendant.

FRY, J., stated the facts, and continued: It is the common case of the plaintiff and defendant that there was an agreement, the plaintiff of course alleging that the agreement is one which ought to be performed; the defendant, while admitting at the Bar there was an agreement, alleges two things: First, that the agreement sued upon by the plaintiff was not the true agreement, and he sets up a variation, and says that, under the circumstances, that variation ought to defeat the plaintiff's title to specific performance. The second head of defence urged on behalf of the defendant is this, that the agreement which was so obtained and so entered into was tainted with fraud, to use the language of the defendant's counsel, or, to put it more precisely, as the statement of defence puts it, it was obtained by misrepresentation. These are the two questions I have to determine.

With regard to the first, namely, the alleged parol variation of the agreement, what happened was this. On June 26, 1876, as I have already mentioned, the contract was made between the parties. That memorandum of agreement being produced by the defendant, and admitted by the plaintiff in the witness-box, the plaintiff's counsel have submitted to the variation which is set up by that written memorandum of agreement; that is to say, they are willing to take the land subject to the reservation of the mines and minerals. It appears to me to be proved that the plaintiff signed a memorandum containing that statement as part of the agreement. It does not escape my attention that the plaintiff at the same time says that the agreement was never read over by him, and that nothing was said at the interview with regard to the reservation of the mines and minerals. But seeing that that point was never raised by the plaintiff's pleadings, and seeing that the point might have been raised, that is to say, the plaintiff had the opportunity of showing that the memorandum of agreement did not contain the terms of the bargain, and that he knew, when he brought this case to a hearing, of the existence of that memorandum, I think I should be going too far to allow the plaintiff to show that that memorandum did not comprise the true terms. I, therefore, do think that the plaintiff must be bound to submit to the terms of that written instrument, or to have the action dismissed. In that case the plaintiff submits to have the reservation.

That being the state of things, then arises the further question whether I ought to dismiss the action because of the variation between the agreement stated by the plaintiff in his pleadings and the agreement to which under the compulsion of the court, in a certain sense, the plaintiff submits? I take the general rule with regard to parol variations to be as stated by LORD COTTENHAM in *London and Birmingham Rail. Co.* v. *Winter* (1). He said this (Cr. & Ph. at p. 62):

> "It would depend on the particular circumstances in each case whether the variation set up from the written contract—I am paraphrasing the words of the antecedent sentence—is to defeat the plaintiff's title to have specific performance, or whether the court will perform the contract, taking care that the subject-matter of this parol agreement and understanding is also carried into effect, so that all parties may have the benefit of what they contracted for."

What are the special circumstances in this case? According to the uncontradicted evidence before me this memorandum was never read over by the plaintiff. The plaintiff sues then upon the memorandum which was given, namely, the receipt. I am bound to say I think it would have been more prudent on the part of the defendant if he had made the receipt correspond more exactly than it did with the terms of the contract, because it did not profess to be a mere receipt for money referring to the contract, but it did profess to a certain extent to express the terms of the contract.

The defendant in his statement of defence sets up undoubtedly that the receipt does not contain the true terms or all the terms of the purchase; that is to say, the defendant alleges that there are terms in the receipt which are not true, and that there are terms in the contract which are not in the receipt. Then he says further, the agreement, if there is any agreement binding on the defendant, was for the purchase of the surface only of the said land with a reservation to the defendant of all minerals and mining rights. I observe the defendant does not say what the real agreement between the parties was. He does not say the real terms of the bargain were these, and then state them. Still less does he admit that there was any agreement, for he makes it hypothetical, and he says the agreement, if any agreement binding on the defendant was come to, was for so-and-so. Still less does he by his defence submit to perform the real agreement which he had set up. Then I should add that, after the reply of the plaintiff, and not till after the reply, the defendant filed an affidavit of documents by which he disclosed this written agreement. Up to that time he had, I think, with great impropriety refused to show the agreement to the plaintiff, and on one occasion, when the plaintiff had come to the office of the defendant, who is a solicitor, for the purpose of inspecting this agreement, he was treated with the greatest incivility, ordered off the premises, and the defendant absolutely refused to show the agreement to the plaintiff. Therefore, down to that time, it does not rest with the defendant to say the plaintiff ought to have been in possession of the terms of the memorandum of agreement. It is quite true that, after the affidavit of documents was filed, the plaintiff re-amended his statement of claim, and did not adopt the memorandum of agreement, and to that extent, and to that extent only, is there any foundation for the defendant's argument that the plaintiff repudiated this agreement.

It appears to me the mere fact that the plaintiff so re-amended his statement of claim, without adopting the terms of the agreement so disclosed by the defendant, and which the plaintiff still says, did not embody the true terms, is not a ground upon which I can say it is inequitable or unjust that the plaintiff, submitting to the variation between the receipt and the agreement, should have specific performance of this agreement. At least three cases have been cited to me upon this point. The first, I think, in point of time is *Legal* v. *Miller* (2). There the defendant set up the agreement fully, disclosed to the plaintiff what he said was the true agreement between the parties, set up the parol agreement distinctly, and appears further than that to have submitted in effect to perform the agreement which

A he set up, and the litigation would have been ended if the plaintiff had been willing to adopt the true agreement, because SIR JOHN STRANGE, M.R., says (2 Ves. Sen. at p. 299), it

> "would be very hard upon a defendant if a plaintiff should unconscientiously bring the defendant into a court of equity, when the defendant should insist
B on an agreement different from that which the plaintiff sets up, and the plaintiff should reply to his answer, and insist on his former demand, and go into a long proof; and afterwards, finding he cannot have the decree prayed by his bill, should resort to that which the defendant sets up, and insist on a decree for it."

It may be when the defendant sets out the agreement, and the man is willing to
C perform it, if the plaintiff still insists on that which is not the true agreement, he may find himself in a great difficulty.

The next case which is referred to is *Lindsay* v. *Lynch* (3). There the LORD CHANCELLOR OF IRELAND came to the conclusion that he would be opening a door to new frauds if he allowed the plaintiff to avail himself of the agreement which was set up and which he had throughout refused to act upon. He said (2 Sch. &
D Lef. at p. 10):

> "On principle, therefore, for example sake, and to prevent practices which must tend to great fraud, I conceive that the bill ought to be dismissed, notwithstanding the admissions of the defendant in his first answer";

but he allowed another bill to be filed. It appears to me that that case is not
E one which makes it incumbent on me to pursue the same course in this case. I do not think I should be opening any door to fraud by allowing the plaintiff to submit to a parol variation. *Jeffrey* v. *Stephens* (4) is a case in which the defendant also set up an agreement, but which agreement had been repudiated from the first by the plaintiff. The plaintiff had been in possession under the agreement, and had throughout the period of his possession repudiated the true
F agreement by acting in contravention of it. There was an additional difficulty which also was relied upon by SIR JOHN ROMILLY, M.R., that the agreement set up by the defendant, like the agreement set up by the plaintiff, was void for uncertainty.

These cases seem to me to be all very different from the present case. If in this case the defendant had stated the terms of the agreement distinctly and
G precisely, if he had stated that there was one variation, and one variation only, on which he relied, and if in addition to that he had submitted to perform the agreement, it is exceedingly likely, if the plaintiff, after that, had insisted on another agreement, I should have found it my duty to dismiss his action with costs. But instead of setting out the true agreement, he only alleged that the receipt, which he himself had prepared, did not contain the true terms, and did
H not contain all the terms—he alleged that there was no binding agreement, and he alleged the agreement was tainted with fraud. That head of defence, therefore, fails.

The next question is whether there is fraud in the agreement. [HIS LORDSHIP then referred to the circumstances of the interview on June 16, 1876.] Considering that conversation of June 16 it appears to me that the reference to the promise
I of the father of one to the father of the other to sell it, and the reference to the plaintiff's father having adjoining property, were made with a view to induce the defendant to abate the purchase-money. They were not made, in my judgment, with a view to induce the defendant to sell. The defendant was anxious to sell before this date, he had been offering it to other persons; he was not a person, therefore, who was induced by personal considerations to sell, but these motives were suggested to the defendant as a reason why he should sell for less, and they failed to operate on his mind. Then the plaintiff goes away and returns on June 26. It appears to me that there was nothing said on June 26 which amounted

to any representation at all. The only question is whether I can find that there was a personal motive operating on June 16 which was allowed to operate on June 26. I have already observed it appears to me that that was not the case. Now I must compare these facts with the allegation made by the defendant. The defence is this, that the plaintiff induced the defendant to sign the receipt by falsely representing to the defendant that he wished to purchase the Greaves Closes for for his own personal use and enjoyment, and in order that he might hold the same along with other land belonging to him or to his father, and adjoining the said closes. In my judgment he did not induce the signature of that receipt by any false representation whatever. I think the defendant was willing to sell, and that the only representation made was for the purpose of inducing an abatement of the price, and it failed.

The next allegation with regard to misrepresentation is this, that the plaintiff induced the defendant to sign the receipt by falsely representing to the defendant that the defendant's father, now deceased, had promised the plaintiff's father to sell him the closes for the same purpose of personal enjoyment. That appears to me to fall under the same observation. I think the whole suggestion with regard to personal enjoyment is entirely unfounded. I cannot help observing it appears to me that this defence is an afterthought. On that account I am inclined to give full credence to the statements of the plaintiff, especially as they have not been met by any evidence on the part of the defendant. [His Lordship then referred to the meeting on Aug. 3, 1876, when the plaintiff told the defendant that he had bought the land on behalf of the Butterley Iron Co.] Then on Aug. 5 a letter is addressed by the plaintiff's solicitor to the defendant with regard to the performance of the contract, and on Aug. 11 the defendant calls on the plaintiff, at his house, and tenders him the deposit on the simple ground that he cannot make a title because his stepmother had a right of dower in the land. He expresses no annoyance; he does not say he has been deceived; does not suggest he would not have sold to anybody else on the same terms. No doubt, on Aug. 16, he writes a letter in which he says he has been deceived. What is remarkable is, that even in that letter he does not suggest he had taken less from the plaintiff than he would have done from anyone else. It appears to me, on the general question, I cannot try the case more favourably than by considering that the principle which is laid down by Pothier will apply. He says what he considers to be the principle which should govern these cases (Pothier, Traité des Obligations, para. 19):

> "An error in regard to the person with whom I contract ought to destroy the consent, to annul the agreement. I think I ought to decide this question by this distinction. Every time that the consideration of the person with whom I think I am contracting enters as an element into the contract I intend to make, error with regard to the person destroys my consent, and consequently renders the agreement void. On the contrary, when the consideration of the person with whom I think myself to be contracting does not enter at all into the contract, and I should have been equally willing to make the same contract with any person in the world as with him with whom I think I am contracting, the contract ought to stand."

I ask myself here whether the defendant has shown that any personal considerations entered into the contract. Has he shown me that he would have been unwilling to enter into the contract in the same terms with anybody else? I say distinctly he has failed to produce such result in my mind, and that being so, I think the second head of defence must fail as well as the first.

Solicitors: *Johnson & Weatherall*, for *Cursham*, Ripley, Derbyshire; *Chester, Urquhart, Mayhew & Holden.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

ELLIS *v.* GREAT WESTERN RAIL. CO.

[Court of Exchequer Chamber (Cockburn, C.J., Bramwell, Cleasby, Pollock and Amphlett, BB., and Mellor, J.), May 11, June 24, 1874]

[Reported L.R. 9 C.P. 551; 43 L.J.C.P. 304; 30 L.T. 874]

Railway—Negligence—Level crossing—Unlit and unmanned crossing—Plaintiff injured by train—Evidence by plaintiff that train had no lights and had not given warning whistle—Negligence of railway company.

On a dark Sunday evening in December the plaintiff had occasion to use a level crossing over the defendants' railway line. There were gates for vehicles on each side of the line, which were closed, and there were small gates adjoining through which foot passengers could pass. These gates were not shut. The plaintiff waited at the crossing until after a train had passed, he then went through the small gate and on the crossing and was struck by a train coming in the opposite direction. The crossing in question was unlit and was unmanned, and, on the evidence of the plaintiff, there was no light on the train which struck him and he heard no warning whistle.

Held: (Cockburn, C.J., and Cleasby, B., dissenting) there was insufficient evidence of negligence on the part of the defendants to go to a jury.

Cliff v. *Midland Rail. Co.* (1) (1870), L.R. 5 Q.B. 258, considered.

Notes. Explained: *Clarke* v. *Midland Rail. Co.* (1880), 43 L.T. 381. Referred to: *Woodley* v. *Metropolitan District Rail. Co.* (1877), ante p. 125; *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Knight* v. *Great Western Rail. Co.*, [1942] 2 All E.R. 286; *Liddiatt* v. *Great Western Rail. Co.*, [1946] 1 All E.R. 731.

As to withdrawal of negligence cases from the jury, see 28 Halsbury's Laws (3rd Edn.) 107; and for cases see 36 Digest (Repl.) 128, 129. As to obligations of railway undertakers, see 31 Halsbury's Laws (3rd Edn.) 508–600; and for cases see 38 Digest (Repl.) 358 et seq.

Case referred to:

(1) *Cliff* v. *Midland Rail. Co.* (1870), L.R. 5 Q.B. 258; 22 L.T. 382; 34 J.P. 357; 18 W.R. 456; 38 Digest (Repl.) 357, *383*.

Also referred to in argument:

Bilbee v. *London, Brighton and South Coast Rail. Co.* (1865), 18 C.B.N.S. 584; 6 New Rep. 174; 34 L.J.C.P. 182; 13 L.T. 146; 11 Jur.N.S. 745; 13 W.R. 779; 144 E.R. 571; 38 Digest (Repl.) 357, *382*.

Wyatt v. *Great Western Rail. Co.* (1865), 6 B. & S. 709; 6 New Rep. 259; 34 L.J.Q.B. 204; 12 L.T. 568; 29 J.P. 630; 11 Jur.N.S. 825; 13 W.R. 837; 122 E.R. 1356; 38 Digest (Repl.) 356, *376*.

James v. *Great Western Rail. Co.* (1867), L.R. 2 C.P. 634, n.; 36 L.J.C.P. 255, n.; 38 Digest (Repl.) 358, *387*.

Stubley v. *London and North Western Rail. Co.* (1865), L.R. 1 Exch. 13; 4 H. & C. 83; 35 L.J.Ex. 3; 13 L.T. 376; 29 J.P. 808; 14 W.R. 133; sub nom. *Stubley* v. *Lancashire and Yorkshire Rail. Co.*, 11 Jur.N.S. 956; 38 Digest (Repl.) 357, *381*.

Stapley v. *London, Brighton and South Coast Rail. Co.* (1865), L.R. 1 Exch. 21; 4 H. & C. 93; 35 L.J.Ex. 7; 13 L.T. 406; 29 J.P. 824; 11 Jur.N.S. 954; 14 W.R. 132; 38 Digest (Repl.) 356, *378*.

Skelton v. *London and North Western Rail. Co.* (1867), L.R. 2 C.P. 631; 36 L.J.C.P. 249; 16 L.T. 563; 15 W.R. 295; 38 Digest (Repl.) 355, *372*.

Wanless v. *North Eastern Rail. Co.* (1871), L.R. 6 Q.B. 481; 25 L.T. 104; affirmed sub nom. *North Eastern Rail. Co.* (*Directors, Etc.*) v. *Wanless* (1874), L.R. 7 H.L. 12; 43 L.J.Q.B. 185; 30 L.T. 275; 38 J.P. 420; 22 W.R. 561, H.L.; 38 Digest (Repl.) 357, *380*.

Bill of exceptions to the ruling of GROVE, J., at the Staffordshire Summer Assizes, 1873, that there was evidence to go to the jury in an action by the plaintiff against the defendants for negligence in the management of a certain level crossing.

Between 9 and 10 o'clock on the evening of Sunday, Dec. 17, 1872, the plaintiff had occasion to use a level crossing over the defendants' railway which ran between Dudley and Wolverhampton. When he came to the crossing, the plaintiff heard a train coming from Dudley and he waited until it had passed, he then went straight to go over the crossing and about half-way across he was struck by a train which was coming from the opposite direction. The plaintiff did not see the second train until it was quite close to him and he did not hear it; the plaintiff said further that he saw no light on the train and he heard no warning whistle. The crossing in question was used frequently on weekdays but not so often on Sundays and the crossing was attended by a servant of the defendants, a pointsman, on weekdays. The gates of the crossing were closed at night at about 6 or 7 o'clock but there were swing gates for foot passengers which were not shut. Evidence was given that the line was straight at the point of the crossing, and in daylight a person on the crossing could see about half a mile towards Dudley and a little over a quarter of a mile towards Wolverhampton.

At the close of the plaintiff's case counsel for the defendants submitted that the plaintiff ought to be nonsuited, or that the learned judge ought to direct a verdict for the defendants, on the ground that there was no evidence to go to the jury of negligence in the defendants, and even if there were, the plaintiff had been guilty of such negligence as disentitled him to recover against the defendants. The learned judge ruled that there was evidence to go to the jury of negligence in the defendants, and that the question of contributory negligence was for the jury. The case for the defendants having been heard, the jury found for the plaintiff. Certain points as to misreception of evidence being abandoned in argument, the question for the court was, whether or not there was evidence to the jury in support of the plaintiff's case, as the learned judge had ruled.

Manisty, Q.C., with him *J. O. Griffits*, for the defendants.
Matthews, Q.C., *G. Browne* with him, for the plaintiff.

Cur. adv. vult.

June 24, 1874. The following judgments were read.

COCKBURN, C.J. I regret in this case to be obliged to differ from the majority of my learned brothers, but I cannot bring myself to think that there was not a case made out on the part of the plaintiff, which the learned judge at the trial could not have withdrawn from the jury. The case must be considered by us quite irrespectively of the evidence given on the part of the defendants. There may have been abundant evidence adduced by the defendants to entitle them to the verdict, but the jury might disbelieve such evidence, and if, independently of such evidence, there was, on the plaintiff's evidence, a case which called for an answer, it was not competent to the judge to withdraw the case from the jury.

[HIS LORDSHIP stated the facts, and continued:] Assuming that the train by which the plaintiff was knocked down had not the usual lights, and that no indication of danger was given by sounding the whistle when the train was coming to where the level crossing was, I am of opinion that it was a question for the jury whether the absence of lights and the omission to sound the whistle did not amount to negligence on the part of the company, in the omission to take reasonable precaution to prevent accident to a person crossing the railway. The law was, I think, laid down quite correctly by MELLOR, J., in *Cliff* v. *Midland Rail. Co.* (1), which arose upon an accident in crossing a level, where he says (L.R. 5 Q.B. at p. 261):

"When Parliament authorises a company to construct a railway, and to work it, it is implied in that that the company are to work it in a reasonably

proper manner, in the usual way in which railways are worked; and in crossing a footway on a level the company are bound, as to the mode of working their railway, as the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway."

I entirely agree in the law as thus laid down, and I think there is no analogy to be derived from the case of ordinary cross-roads or the like. The case must be looked at with reference to the great additional danger to the foot passengers from the velocity of trains, and the fatal consequences of a collision when produced by a train. If, therefore, there was here an absence of the ordinary lights, or an omission to sound the whistle, with which a train is always provided, on approaching the crossing, there was, as I have said, a case for the consideration of the jury.

But it is said that the presence of lights, or the sounding of the whistle, is not sufficiently negatived by the plaintiff, who only said he did not see the one or hear the other. But it is, in the first place, to be observed that there was a total omission of any cross-examination of the plaintiff, with a view to elicit from him that there might have been lights which he did not observe, or that the whistle might have been sounded without his hearing it; and though it is possible that he might, by neglecting to look up and down the line, have failed to see the lights of the approaching train, though there were such lights, it is difficult to suppose that a man, not being afflicted with deafness, could have failed to hear the whistle, if the whistle had been properly sounded on the approach of the train. I, therefore, think that, prima facie, the statement of the plaintiff that he heard no whistle was some evidence to go to the jury that the whistle was not sounded. It is unnecessary to express my own opinion that, as a matter of reasonable precaution, with a view to the public safety, it is the duty of a railway company to cause the whistle to be sounded when a train is approaching a level crossing; it is enough to say, that is a question for the jury, whether such is their duty, and whether the omission does not amount to negligence. I am of opinion that that question is one which should be left to a jury; and I am further of opinion that the statement of the plaintiff amounted to prima facie evidence of such an omission, and that, consequently, the learned judge was right in not withdrawing the case from the jury.

BRAMWELL, B.—I am of opinion there should be a venire de novo in this case. I think there was no evidence to go to the jury. In my judgment, the road being straight, things on it visible for a quarter of a mile in one, and half a mile in the other direction, and there being nothing to impede the view, or make a difficulty for the foot passengers crossing the line, nothing was necessary to be done by the defendants. The sight and sound of the approaching trains were enough warning. If not, I cannot see why it should not be held that, where a carriage on a common road crosses a footpath, the driver is bound to blow a horn or stop, or have somebody at the crossing to warn the foot passengers. Further, I think that proper precautions are not negatived here by the evidence. I think it is shown by the defendants' evidence that they did not whistle. But it is not shown that warning was not given. The witness who says he gave warning is displaced if the contradiction is believed. But that only proves that there is no evidence that warning was given, not that there is no evidence that it was not. The only thing relied on for that purpose is the statement of the plaintiff that he did not hear it; that is no evidence it was not done. It is consistent with two things, one that it was not given, the other that, though given, it was not heard. Where testimony is equally consistent with two things, it proves neither. This may seem a subtlety, but it is not. We all know what is done at nisi prius on such occasions. The question is, "Had he called out, should you have heard?" If the answer is, "I can't say," then there is no evidence: if, "Yes," there is. But "I did not hear"

is no evidence; the witness did not and could not say, "I should have heard the warning," else, why should he not have heard the train? That, perhaps, is why the question was not asked.

MELLOR, J.—I think that there must be a venire de novo in this case, as I cannot see in the bill of exceptions any evidence set forth which was proper and sufficient to submit to the jury to sustain an action against the defendants on the ground of negligent management of the trains on the night in question. I do not desire to withdraw or qualify anything which I am reported to have said in *Cliff* v. *Midland Rail. Co.* (1). I think that the opinion which I expressed was strictly correct as applicable to the circumstances of that case, in which the engine which caused the injury was not the engine of any regular train, but was employed in shunting trucks after the regular train had passed. It was, in fact, an unusual train of trucks, which came without notice across the footway; and I think that whistling, as the train approached the footway, was obviously so reasonable a precaution that the omission, under the circumstances, might be evidence of negligence.

In the present case there was nothing unusual in the management of the traffic on the night in question. The trains were the usual and accustomed trains, passing at the usual and accustomed times, as was admitted by the counsel for the plaintiff. It is not enough, in order to make out a case to go to the jury, that the party injured did not see a light or hear a whistle. He must give evidence which ought to satisfy a jury that there was something negligent or unusual in the conduct of business on that night. It is, I think, apparent from the evidence that the traffic had been conducted for a long time in the same manner as it was on that night; and I think it must be taken that the plaintiff, who stated that he had lived near the spot for thirty years, and crossed at the crossing once or twice a week, was aware that trains coming in opposite directions passed that spot about the same time every night, and I think that the true inference from the evidence on the part of the plaintiff was, that the accident was due entirely to his own want of ordinary care.

CLEASBY, B.—In this case the question arises upon a bill of exceptions. If it arose upon a point reserved by consent, the court is entitled by the consent to decide to a certain extent with the facts, and in that case they may consider whether there was sufficient to justify, in their opinion, a verdict for the plaintiff; but upon a bill of exceptions it is otherwise. A judge may make a mistake in a matter of law when he sums the case up to the jury, and in that case a bill of exceptions would properly raise the question. But where the question raised is one of neglect of duty, and to a considerable extent not matter of law, but for the jury, I cannot satisfy myself that the learned judge who tried the cause took so erroneous a view of the effect of the evidence as to justify me in coming to the conclusion that there was no evidence whatever which could possibly be left to the jury. I, therefore, come to the same conclusion as the Lord Chief Justice, and am for affirming the judgment.

POLLOCK and **AMPHLETT, BB.**, stated that they concurred in the judgment of Mellor, J., and Bramwell, B.

Solicitors: *Harper, Broad & Battock*; *Young, Maples & Pierce.*

[*Reported by* J. M. Lely, Esq., *Barrister-at-Law.*]

A

BATHURST BOROUGH *v.* MACPHERSON

[PRIVY COUNCIL (Sir James Colvile, Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier), February 1, 4, 5, March 11, 1879]

B [Reported 4 App. Cas. 256; 48 L.J.P.C. 61; 41 L.T. 778; 43 J.P. 827]

Highway—Nuisance—Liability of local authority—Broken drain—Failure to repair.

The defendant borough, a municipality having under its Act of incorporation "the care, construction and management of public roads" within its district, constructed in one of its streets a barrel drain into which ran an open drain. C The brickwork of the latter having broken away and not having been repaired, a large hole had formed where the rain had worn away the soil. The plaintiff's horse, carrying the plaintiff, fell into this hole and the plaintiff was injured. In an action for damages for negligence, the judge having directed the jury that under the incorporating Act the defendants were not bound to repair or keep in repair, the jury returned a verdict for the defendants. On an appeal D by the defendants against an order for a new trial,

Held: (i) the defendants by their construction of a drain and their neglect to repair it had caused a nuisance on the highway for which they were liable to an indictment and to an action at the suit of anyone who had sustained injury from their breach of duty, and there should be a new trial; (ii) there was no principle on which a distinction in this respect between nonfeasance and mis- E feasance could be supported.

Notes. By s. 1 (1) of the Highways (Miscellaneous Provisions) Act, 1961, the rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is abrogated: see 41 HALSBURY'S STATUTES (2nd Edn.) 453. This section comes into force on August 3, 1964, and F does not apply to damage resulting from an event which occurred before that date: see s. 1 (8).

Applied: *Kent* v. *Worthing Local Board* (1882), 10 Q.B.D. 118. Distinguished: *Picton Municipality* v. *Geldert*, [1893] A.C. 524. Considered: *Thompson* v. *Brighton Corpn.*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q.B. 332; *Sydney Municipal Council* v. *Bourke*, [1895] A.C. 433. Explained: *Lambert* v. *Lowestoft* G *Corpn.*, [1901] 1 K.B. 590. Considered: *Skilton* v. *Epsom and Ewell Urban District Council*, [1936] 2 All E.R. 50; *Newsome* v. *Darton Urban District Council*, [1938] 1 All E.R. 79. Referred to: *Moore* v. *Lambeth Waterworks Co.* (1886), 17 Q.B.D. 462; *Goodson* v. *Sunbury Gas Consumer's Co.* (1896), 75 L.T. 251; *Short* v. *Hammersmith Corpn.* (1910), 104 L.T. 70; *Papworth* v. *Battersea Borough Council* (1914), p. 105.

H As to powers and liabilities of individuals to repair highways, see 19 HALSBURY'S LAWS (3rd Edn.) 123 et seq.; as to duty to repair and maintain, see ibid. 315–316. As to negligence in relation to statutory functions, see 28 HALSBURY'S LAWS (3rd Edn.) 6–7. For cases see 26 DIGEST (Repl.) 401 et seq., 428 et seq.

Cases referred to:

I (1) *Whitehouse* v. *Fellowes* (1861), 10 C.B.N.S. 765; 30 L.J.C.P. 305; 4 L.T. 177; 26 J.P. 40; 9 W.R. 557; 142 E.R. 654; 38 Digest (Repl.) 33, *169*.

(2) *White* v. *Hindley Local Board* (1875), L.R. 10 Q.B. 219; 44 L.J.Q.B. 114; 32 L.T. 460; 23 W.R. 651; sub nom. *White* v. *Wigan Local Board*, 39 J.P. 533, D.C.; 26 Digest (Repl.) 532, *2077*.

(3) *Henly* v. *Lyme Corpn.* (1828), 5 Bing. 91; 3 Moo. & P. 278; 6 L.J.O.S.C.P. 222; 130 E.R. 995; in error sub nom. *Lyme Regis Corpn.* v. *Henley* (1831), 3 B. & Ad. 77; affirmed (1834), 1 Bing.N.C. 222; 8 Bli.N.S. 690; 2 Cl. & Fin. 331; 1 Scott, 29; 131 E.R. 1103, H.L.; 38 Digest (Repl.) 24, *119*.

(4) *M'Kinnon* v. *Penson* (1853), 8 Exch. 319; 22 L.J.M.C. 57; 21 L.T.O.S. 35; 17 J.P. 153; on appeal (1854), 9 Exch. 609; 23 L.J.M.C. 97; 22 L.T.O.S. 318; 18 J.P. 164; 18 Jur. 513; 2 W.R. 262; 156 E.R. 260, Ex. Ch.; 42 Digest 623, *246*.

(5) *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 25 W.R. 794, C.A.; 38 Digest (Repl.) 51, *263*.

(6) *Russell* v. *Men of Devon* (1788), 2 Term. Rep. 667; 100 E.R. 359; 26 Digest (Repl.) 654, *2993*.

(7) *Harris* v. *Baker* (1815), 4 M. & S. 27; 105 E.R. 745; 26 Digest (Repl.) 456, *1513*.

(8) *Parsons* v. *St. Mathew, Bethnal Green* (1867), L.R. 3 C.P. 56; 37 L.J.C.P. 62; 17 L.T. 211; 32 J.P. 55; 16 W.R. 85; 26 Digest (Repl.) 419, *1283*.

(9) *Hartnall* v. *Ryde Comrs.* (1863), 4 B. & S. 361; 2 New Rep. 424; 33 L.J.Q.B. 39; 8 L.T. 574; 27 J.P. 599; 10 Jur.N.S. 257; 11 W.R. 963; 122 E.R. 494; 26 Digest (Repl.) 418, *1281*.

Also referred to in argument:

Young v. *Davis* (1863), 2 H. & C. 197; 2 New Rep. 205; 9 L.T. 145; 10 Jur.N.S. 79; 11 W.R. 735; 159 E.R. 82, Ex. Ch.; 26 Digest (Repl.) 418, *1280*.

Wilson v. *Halifax Corpn.* (1868), L.R. 3 Exch. 114; 37 L.J.Ex. 44; 17 L.T. 660; 32 J.P. 230; 16 W.R. 707; 38 Digest (Repl.) 25, *129*.

Gibson v. *Preston Corpn.* (1870), L.R. 5 Q.B. 218; 10 B. & S. 942; 39 L.J.Q.B. 131; 22 L.T. 293; 34 J.P. 342; 18 W.R. 689; 26 Digest (Repl.) 390, *975*.

Foreman v. *Canterbury Corpn.* (1871), L.R. 6 Q.B. 214; 40 L.J.Q.B. 138; 24 L.T. 385; 35 J.P. 629; 19 W.R. 719; 26 Digest (Repl.) 435, *1340*.

Winch v. *Thames Conservators* (1872), L.R. 7 C.P. 458; 41 L.J.C.P. 241; 27 L.T. 95; 36 J.P. 646; 20 W.R. 949; affirmed (1874), L.R. 9 C.P. 378; 43 L.J.C.P. 167; 31 L.T. 128; 22 W.R. 879, Ex. Ch.; 26 Digest (Repl.) 273, *37*.

Cornwell v. *Metropolitan Sewers Comrs.* (1855), 10 Exch. 771; 3 C.L.R. 417; 19 J.P. 313; sub nom. *Cornwell* v. *Metropolitan Sewers Comrs.*, *Jauncey* v. *Metropolitan Sewers Comrs.*, 24 L.T.O.S. 244; 41 Digest 52, *377*.

Mersey Docks Trustees v. *Gibbs* (1866), L.R. 1 H.L. 93; 11 H.L.Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur.N.S. 571; 14 W.R. 872; 2 Mar.L.C. 353; 11 E.R. 1500, H.L.; 38 Digest (Repl.) 26, *136*.

Taylor v. *Greenhalgh* (1874), L.R. 9 Q.B. 487; 43 L.J.Q.B. 168; 31 L.T. 184; 38 J.P. 599; 23 W.R. 4; reversed (1876), 24 W.R. 311, C.A.; 26 Digest (Repl.) 436, *1348*.

Appeal by the defendants from a decision of the Supreme Court of New South Wales setting aside the verdict of a jury and ordering a new trial in an action brought by the plaintiff to recover damages for injuries sustained by the plaintiff through the negligence of the defendants in not properly making, repairing and keeping in repair one of the streets of the borough of Bathurst called Durham Street.

The borough of Bathurst was a municipality incorporated by the Municipalities Act, 1858, and the New South Wales Act, No. 12 of 1867. By s. 117 of the latter Act it was provided that

> "the council shall within the boundaries of the municipality, have the care, construction and management of public roads. . . ."

The plaintiff was a resident of Hill End, a town some distance from Bathurst. Between 2 and 3 a.m. on Mar. 26, 1876, he was riding on his way home down a street within the municipality of Bathurst called Durham Street, the morning being dark and showery. On arriving at that part of Durham Street which was intersected by Hope Street the plaintiff's horse fell into a hole, carrying the plaintiff with him and crushing the plaintiff's leg against one side of the hole, causing a compound fracture of the leg. Durham Street was originally constructed by the defendants and as constructed was a well-made street a mile and a quarter long and 99 feet broad including the footpath; the roadway was 75 feet wide. The

A end of Durham Street where the hole was, was not and had never been kerbed or guttered but the pathway was formed. The hole into which the plaintiff's horse fell was an open drain where the gutter should have been, nearly perpendicular at the side of the pathway running down Durham Street to Hope Street and emptying itself into a barrel drain underneath the street. The heading of the barrel drain was covered over. Fifty yards from Hope Street, at its commence-
B ment, the drain was 2 feet deep but deepened as it approached Hope Street until at the intersection of the two streets it was 4 feet deep. The drain was 5 feet wide and unfenced. The hole had been caused by the brickwork of the drain having broken away and not having been repaired; the rain had worn away the soil and caused the earth to work away.

The plaintiff commenced an action against the defendants in the Supreme
C Court of New South Wales by issuing a writ to recover damages for his injury. His declaration, filed on Dec. 19, 1876, claimed damages on two counts only: by the first count he claimed damages against them for negligence in constructing the street and by the second count damages for negligence in keeping and maintaining the street and not repairing the drain, gutter or sewer in the street. The defendants pleaded to the whole of the declaration and the issue was joined. The
D action come on for trial before MARTIN, C.J., and a jury. At the trial evidence was adduced by the plaintiff in support of his case and the facts set out above were proved. In his summing-up the Chief Justice directed the jury that the defendants under their Act of incorporation were not liable for any mere non-feasance; that if they constructed a sewer negligently they were liable for the result of that misfeasance, but that if they constructed a sewer properly and it became defective
E they were not bound to repair it. The jury thereupon returned a verdict for the defendants.

On June 4, 1877, a rule nisi to set aside the verdict and for a new trial was granted by the Supreme Court (MARTIN, C.J., HARGREAVE and MANNING, J.), on ground that the ruling and direction of the Chief Justice that the plaintiff could not recover on the second count, on the ground that the defendants were not
F bound to repair or keep in repair was erroneous. On June 29 the rule nisi was heard by the same court and the following order was made (MARTIN, C.J., dissenting):

> "It is ordered that the said rule be, and the same is hereby made absolute, and the verdict obtained herein set aside, and a new trial be had between the parties on all the issues."

G

The defendants appealed.

Benjamin, *Q.C.*, and *Boddam* for the appellants.
Willis, *Q.C.*, and *E. Thomas* for the respondent.

Mar. 11, 1879. **SIR BARNES PEACOCK** stated the facts and having remarked
H that it was clear that the hole in the street was caused by artificial work, continued: This being the state of the facts, their Lordships do not think it necessary to decide whether it was the intention of the legislature to throw upon the municipality the obligation of keeping in general good repair the roads and streets placed under its management. The question upon these facts is, whether the municipality, having constructed the barrel drain, was not bound to keep it in a state of repair
I which would prevent its causing a dangerous hole to be formed in the highway. Having under the statute the care, construction, and management of the roads and streets, the construction of the barrel drain by the appellants was lawful; and the care and management of the roads being vested in them, the drain was in their control, and they had full power to repair or otherwise deal with it. Their Lordships are of opinion that under these circumstances the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which, but for such artificial construction, would not have existed; or, at least, of protecting the public

against the danger when it arose, either by filling up the hole or fencing it. Supposing the top of the barrel drain across Hope Street had fallen in, leaving a dangerous hole in the middle of that street, it would surely have been the duty of the appellants to take steps to prevent persons falling into the trench which they had originally dug; and there would seem to be no substantial difference in the liability between a hole which had been directly made by them, and one which is the indirect but natural consequence of the artificial work they had created and had not properly kept.

In *Whitehouse* v. *Fellowes* (1), which was an action against the trustees of a turnpike road, the defendants had converted an open drain in the road into a covered one, the effect of which was that flood water would be thrown on the adjacent lands, unless certain catchpits, which were at the same time made to prevent this mischief, had been properly constructed, and afterwards kept in proper order. The landowner having brought an action and recovered damages for the injury arising from an overflow, it was held that the learned judge at the trial had rightly directed the jury to find for the plaintiff if they thought the catchpits were insufficiently constructed, or were kept in an insufficient and improper manner. In that case the trustees were held liable for an injury which was the indirect but natural consequence of their own artificial work, which they had not taken proper means to avert.

In a recent case, *White* v. *Hindley Local Board* (2), the facts were these: The plaintiff was riding along a highway under which was a sewer; his horse trod on a grid or grating put there to drain the surface water from the road into the sewer; the grid, being in a defective state for want of repair, gave way, and the horse's leg was injured. It was held that the defendants were liable to the plaintiff for the injury done to the horse. The court in sustaining the action assumed that the placing of the grid over the opening of the sewer was done with two objects—the one to prevent the hole from being dangerous to those using the road, and the other to prevent stones and other matters from passing into the sewer; and without saying that the defendants would be liable as surveyors of highways, the court held that, as the sewers were vested in them, they were liable "at all events in their capacity of owners of the sewers."

In the present case the barrel drain, even if the property in it did not belong to the appellants, was not only made by them, but the sole control and management of it were, by the statute, vested in them; and in their Lordships' view these circumstances threw upon them a duty of a similar kind to that which was held to exist in the case just cited. Their Lordships are, therefore, of opinion that the appellants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed which was left open and unfenced, caused a nuisance in the highway, for which they were liable to an indictment. This being so, their Lordships are of opinion that the appellants are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty.

In *Lyme Regis Corpn.* v. *Henley* (3) the rule was clearly laid down by Lord Tenterden. He said (3 B. & Ad. at pp. 92, 93):

> "We think the obligation to repair the banks and sea shores is one which concerns the public, in consequence of which an indictment might have been maintained against the corporation for their general default; whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the case of a nuisance in a highway by a stranger digging a trench, etc., or by the act or default of a person bound to repair ratione tenuræ. An indictment may be sustained for the general injury to the public, and an action on the case for a special or particular injury to an individual."

The general rule was also enunciated by Pollock, C.B., in *M'Kinnon* v. *Penson* (4). He said (8 Exch. at p. 327):

"There is no doubt of the truth of the general rule that where an indictment can be maintained against an individual or corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual."

In their Lordships' opinion there is no principle upon which a distinction in this respect between nonfeasance and misfeasance can be supported. In *Henley* v. *Lyme Corpn.* (3), BEST, C.J., with reference to the liability of the corporation for the non-repair of the sea-wall, said (5 Bing. at p. 107):

"I take it to be perfectly clear that if a public officer abuses his office, either by an omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous that it would be a waste of time to refer to them."

It is scarcely necessary to remark that, where a duty is created for the benefit of the public by Act of Parliament, and a specific remedy is thereby provided for a breach of the duty, it must be a question of construction whether the specific remedy was intended to be substituted for, or to be provided in addition to, the common law remedy by an indictment for the public, or by action for an individual who sustains a special or particular injury: see *Atkinson* v. *Newcastle Waterworks* (5).

The principal objection taken by the Chief Justice in New South Wales, and by counsel for the appellants here, to the maintenance of the action was founded upon the nature of the supposed obligation, viz., a liability to repair public roads, and upon the authority of *Russell* v. *Men of Devon* (6), and of some others in pari materia. In those cases the principal objection to the maintenance of the action was that the inhabitants of the county or parish, as the case might be, were not a corporation capable of being sued as such. There are, no doubt, dicta to the effect of the inconvenience that might result from the multiplicity of actions and increase of litigation if it were held that every individual aggrieved by the non-repair of a public road might sue either the county or parish, or individual members of it; but such inconvenience was never admitted as a reason why an action should not be maintainable.

Another class of cases relied upon consists of those in which, as in *M'Kinnon* v. *Penson* (4), *Harris* v. *Baker* (7), and *Parsons* v. *St. Matthew, Bethnal Green* (8), it was held that such an action could not be brought against a surveyor of highways appointed under the Bridges Act, 1803, or a vestry appointed under the Metropolis Local Management Act, 1855. But the ruling principle of all these last decisions seems to be that it was not the intention of the legislature to create by the particular statute a new liability, but merely to transfer existing powers; and consequently that, if an action would not lie against the county, or parish, or other superior body, it would not lie against the surveyor, functionary, or other creature of that statute.

Without going at length through the numerous cases that have been cited on either side, their Lordships think it sufficient to say that this municipality has original, and not merely transferred powers, and, therefore, does not fall within the class of cases referred to. It more nearly resembles the public body held liable to an action in *Hartnall* v. *Ryde Comrs.* (9), a decision which has been recognised as sound law in several later cases. It was there held that the statute creating the commissioners having expressly imposed upon them the obligation of repairing the roads, they were liable not only to be indicted for a breach of that duty, but to be sued by anybody who could show that by reason of such breach of duty he had sustained particular and special damage. In their Lordships' opinion no substantial distinction can be taken between that case and the present, in which the duty, for the reasons above stated, has been found to exist, though not expressly imposed by statute.

For the above reasons their Lordships are of opinion that the majority of the judges were correct in holding that the rule for a new trial ought to be made absolute. They will, therefore, humbly advise Her Majesty to affirm the order of the court below, and to dismiss the appeal. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Wilde, Berger, Moore & Wilde*; *Webster & Graham.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re SAWERS. Ex Parte BLAIN

[Court of Appeal (James, Brett and Cotton, L.JJ.), July 31, August 1, 1879]

[Reported 12 Ch.D. 522; 41 L.T. 46; 28 W.R. 334]

Bankruptcy—Jurisdiction—Foreign debtors, resident abroad, trading in England. Partnership—Act of bankruptcy—Capacity of partnership firm to commit. Statute—Application—Application to foreigner resident abroad.

A bankruptcy petition was presented against the members of a partnership firm which traded in England. Two of the partners were Chilean subjects, were domiciled and resident in Chile, and had never been in England. The act of bankruptcy alleged was the levy by seizure and sale of goods of the firm in England under an execution in respect of a judgment for a sum of more than £50 which had been recovered against the firm for a debt contracted by them in England.

Held: as all legislation was prima facie territorial and bound only the subjects of the legislating power or those who for the time being brought themselves within the allegiance of the legislating power, the provisions of the Bankruptcy Act, 1869, did not apply to foreigners who had never been within the jurisdiction of the English Court of Bankruptcy.

Per Brett, L.J.: A partnership firm as such cannot commit an act of bankruptcy. An act of bankruptcy must be the personal act or personal default of the person who is to be made a bankrupt.

A man cannot commit an act of bankruptcy by a particular act of his agent, which particular act he has not authorised and of which he has had no cognizance.

Notes. Section 6 of the Bankruptcy Act, 1869, has been replaced by s. 1 of the Bankruptcy Act, 1914.

Considered: *Re Pearson, Ex parte Pearson*, [1891–4] All E.R.Rep. 1066. Distinguished: *Re Clark, Ex parte Beyer, Peacock & Co.*, [1896] 2 Q.B. 476. Considered: *Re A.B.*, [1900] 1 Q.B. 541; *Cooke* v. *Charles A. Vogeler Co.*, [1900–3] All E.R.Rep. 660; *Re Debtor* (*No. 335 of 1947*) *Ex parte R.* v. *Debtor*, [1948] 2 All E.R. 533; *Theophile* v. *Solicitor-General*, [1950] All E.R.Rep. 405; Re *Dulles Settlement Trusts*, *Dulles* v. *Vidler*, [1950] 2 All E.R. 1013. Referred to: *Re Clarke, Ex parte Schultze* (1897), 4 Mans. 231.

As to foreigners liability to bankruptcy proceedings in England, see 2 Halsbury's Laws (3rd Edn.) 255–256; and for cases see 4 Digest (Repl.) 25–26. For the Bankruptcy Act, 1914, s. 1, see 2 Halsbury's Statutes (2nd Edn.) 324.

A Case referred to:

(1) *Re Crispin, Ex parte Crispin* (1873), 8 Ch. App. 374; 42 L.J.Bcy. 65; 28 L.T. 483; 37 J.P. 391; 21 W.R. 491, L.C. & L.J.; 4 Digest (Repl.) 24, *202*.

Also referred to in argument:

Re Mortimer, Ex parte Pearson (1873), 8 Ch. App. 667; 42 L.J.Bcy. 44; 28 L.T. 796; 21 W.R. 688, L.JJ.; 4 Digest (Repl.) 88, *795*.

B

Appeal by the petitioning creditor from a decision of Mr. Registrar PEPYS, sitting as Chief Judge in Bankruptcy.

James Sawers, of Liverpool, and six other persons carried on business in partnership as merchants at Liverpool and in London, under the firm of James Sawers & Co., and at Valparaiso and other places in South America under the firm of Sawers, C Woodgate & Co. Two of the partners were Chilean subjects, domiciled and resident in Chile, and they had never been in England. William Blain, a merchant in Liverpool, on Dec. 16, 1878, commenced an action in the Queen's Bench Division against the firm of James Sawers & Co. for £2,500. The writ was served personally on James Sawers at the principal place of business of the firm at Liverpool. The defendants did not appear to the writ, and on Jan. 24, 1879, judgment was entered D against them for £2,500 and costs. Execution was issued on the judgment, and the goods of the firm were seized and sold on Jan. 29. On the same day Blain presented a bankruptcy petition in the London Court against the members of the firm of James Sawers & Co., alleging the levy of the execution as an act of bankruptcy. An order was made for the service of the petition on the two Chilean partners. They afterwards appeared under protest, and asked that the order for E service might be discharged, on the ground that the court had no jurisdiction over them. The registrar held that the order must be discharged. The petitioning creditor appealed from his decision.

By the Bankruptcy Act, 1869, s. 6:

> "A single creditor, or two or more creditors if the debt due to such single creditor, or the aggregate amount of debts due to such several creditors, from F any debtor, amount to a sum of not less than fifty pounds, may present a petition to the court, praying that the debtor be adjudged a bankrupt, and alleging as the ground for such adjudication any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression 'acts of bankruptcy': . . . (5) That execution issued against the debtor on any G legal process for the purpose of obtaining payment of not less than fifty pounds has in the case of a trader been levied by seizure and sale of his goods . . . "

De Gex, Q.C., and *Cohen, Q.C.* (with them *Yate Lee*), for the petitioning creditor. *Benjamin, Q.C.*, *Winslow, Q.C.*, and *Everitt* for the respondents, were not called on to argue.

H **JAMES, L.J.**—It appears to me that the registrar's order in this case was perfectly right. The respondents come here under protest, as they have a perfect right to do, to stay an order which was made in this country by a court of this country. They say, "This is an order which improperly emanated, and we ask to have the order discharged so that we may never be embarrassed or be liable to be embarrassed by the fact of such an order being issued."

I It appears to me that the whole question is to be governed by the broad, general, universal principle that English legislation or British legislation is—unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to take cognisance of it—that British legislation is applicable only to British subjects or to foreigners who by coming into this country, whether for a long or for a short time, have made themselves during that time British subjects. Every foreigner who comes into this country, for however a limited a time, is, during his residence in this country, within the allegiance of the sovereign, entitled to the protection of the sovereign, and subject to all the laws of the sovereign.

But if a foreigner remains abroad and has never come into this country it seems to me impossible to imagine that the English legislature ever intended to make that man subject to particular English legislation.

English legislation has said that if a debtor allows his goods to be taken in execution then certain consequences shall follow. English legislation has a right to say that with regard to an English subject, but what right has it to say that with regard to a Chilean? No doubt it has a right to say to a Chilean or to anybody else, "If you make a contract in England, or commit a breach of a contract in England, under a particular Act of Parliament particular procedure may be had by which we can effectually try the question as to that contract and that breach, and with regard to any property you may have in this country we may give execution against that property." But that is because the property is within the protection and subject to the powers of the English law. To what extent the decision of such a question would be recognised abroad remains to be considered, and will be determined by the tribunals abroad. If a foreigner, being served under the Judicature Acts, did not choose to appear, and the legislature said, "If you do not appear, default is committed in that way, and we will give judgment against you," whether that judgment would be recognised under those circumstances by a foreign tribunal as being consistent with international law and the general principles of justice, is a matter that will be determined by them.

But we have to consider not merely a matter of British legislation, but of English legislation, because this is a part of the Act which is confined to that part of the British dominions called England, and does not extend to Scotland or Ireland, except in certain manner mentioned, and I believe it does not extend to the colonies, at least I should think not; and we have to deal with the case of a Chilean who says, "I am a Chilean subject and I wish to be a Chilean. I never did make myself subject to English legislation or English tribunals. I do not choose to come here to be made a bankrupt." It seems to me that he has a right to say that. As I happen to know, there is in the Hawaiian Islands a very complete and a very good code of bankruptcy, which was introduced by that celebrated sovereign, Kamehameha II, and I think it would be monstrous if an English merchant of Liverpool, having business transactions in the Sandwich or Hawaiian Islands, were summoned by the court there to appear in a bankruptcy proceeding at Honolulu. It is not consistent with ordinary principles of justice or the comity of nations that one legislature should call on the subject of another country to come and appear at their tribunals when that person has never made himself liable. If the man has once come into this country and committed an act of bankruptcy or anything of that kind, he is liable to the consequences of what he has done; but in the absence of express legislative provision which compels me to say that the legislature has done that which, in my opinion, would be a violation of international law, I respectfully decline to hold that it has done so.

I, therefore, entirely agree with the decision at which the registrar has arrived in this case, that the order for service ought to be discharged. The other ground on which he put it would, I think, be sufficient independently of what I have mentioned, viz., that the whole of the bankruptcy law proceeds on some act or default. The Bankruptcy Act, 1869, says, that certain acts or defaults shall constitute an act of bankruptcy, and the registrar was of opinion that it would be impossible to say that these Chileans had been guilty of any default. I do not at all differ from the registrar in the conclusion at which he has arrived.

BRETT, L.J.—In this case the English Court of Bankruptcy made an order that notice of a petition should be served on Chilean subjects abroad, and those Chilean subjects appeared here under protest, and took the objection that the English Court of Bankruptcy had no jurisdiction as against them to make such an order. If the English Court of Bankruptcy had no jurisdiction at all over these Chilean subjects, it follows that it has no jurisdiction to make the order to serve a notice of this petition.

A It is said that the case is within the literal words of the Bankruptcy Act, 1869, s. 6, and so it is. But does it follow that, because a case is within the literal words of the statute of any country, therefore, the case is within the jurisdiction of that country? Certainly not. The governing principle is, that all legislation is prima facie territorial, that is to say, that the legislation of any country binds its own subjects and binds the subjects of other countries who for the time bring B themselves within the allegiance of the legislating power. The English legislature has a right to make a statute of bankruptcy which shall bind all its own subjects, and which shall bind any foreigner who for a time is in England, and does something which the statute forbids. As long as he is in England he is under the allegiance of the English Queen and in the power of the English legislature. Therefore, it has been held that, if a foreigner, though not domiciled nor perma- C nently resident in this country, comes into England, and does some act, or omits to do some act, which the English legislature by a Bankruptcy Act has declared to be an act of bankruptcy, then, by reason of that act of bankruptcy, done or suffered in England, he may be made a bankrupt in England. But all the authorities, upon the ground of the limited power of the Crown of England to legislate, have always held that it requires that the act of bankruptcy should be committed D in England if the person against whom the statute is invoked is a foreigner who is not domiciled in England.

Counsel for the petitioning creditor admits that the act of bankruptcy must be in England, but then he says that in this case there was an act of bankruptcy committed in England. The act of bankruptcy on which he relies is that the firm of which these Chilean subjects are members does trade in England, and that an E action was brought against that firm, and that under the authority of the Judicature Acts a writ was served upon one member of the firm, or the manager of the business of the firm, in England, and that thereupon an action ensued and was carried through and judgment was obtained against the firm and execution, and he says, that by the English bankruptcy law that is an act of bankruptcy. He says it is an act of bankruptcy by the firm. He is met and challenged by being asked F whether a firm as such can commit an act of bankruptcy. He assumes it could. I beg leave to doubt it. Nay more, I am of opinion that a partnership firm as such cannot commit an act of bankruptcy. An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt.

It is said that service by reason of the Judicature Act upon the firm is to be service of the writ upon these foreigners. For the purposes of the judgment it may G be so, and under the Judicature Act it is possible that that may be so. But does it follow that, because that is true under the Judicature Act, that is to cause a larger jurisdiction under the Bankruptcy Act? It seems to me, certainly not.

It was said, that a person may commit an act of bankruptcy by his agent, and that the partner or manager in England was the agent of these foreigners abroad, and that, therefore, they committed an act of bankruptcy by their agent in England, H that is to say, that the act of bankruptcy is the allowing the execution to go without satisfying the judgment, and that that being done by their agent, they are to be held liable to be made bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorised the particular act or not. That seems to me to be equally wrong. It seems to me that a man cannot commit an act of bankruptcy by a particular act of his agent, which I particular act he has not authorised, and of which act he has no cognizance. The truth is, that the argument comes to be this, that it would be admitted that at the time of the passing of the Bankruptcy Act, 1869, and between that time and the Judicature Act, this would not have been an act of bankruptcy by these Chileans; but that the Judicature Act, which is an Act of mere procedure, has by enactments as to procedure extended the jurisdiction of the Bankruptcy Act beyond its former jurisdiction, so as to involve foreigners who otherwise would not be subject to the English bankruptcy law. It seems to me that that is a view of legislation which is wholly untenable, and that this case comes within the well-recognised law that these

people cannot be made subject to the English Bankruptcy Act, being foreigners not domiciled here and not present in the country, that they would not be made subject to the English bankruptcy laws unless they committed an act of bankruptcy in England. It is an act of bankruptcy which gives the Bankruptcy Court jurisdiction, and unless that act be done in England, if the person is a foreigner and not domiciled in England, the court has no jurisdiction over him. This case is within the cases which have been referred to, *Re Crispin* (1) and other cases, and it seems to me that there was no jurisdiction in the Bankruptcy Court over these persons, and that, therefore, the court had no jurisdiction to make the order, and that the order was properly set aside.

COTTON, L.J.—It has been contended in this case that, even although we should hold that on the true construction of the Bankruptcy Act, 1869, there was no jurisdiction to make an order for adjudication, yet we ought to discharge the registrar's order, which, in fact, was an order discharging a previous order for service out of the jurisdiction, the service being mere notice, and that we ought to let the matter go to a further stage for the purpose of allowing the court hereafter to decide whether or not there is jurisdiction to make the order. In my opinion that would be quite wrong. The parties against whom the order for service has been made appear here under protest, and they ask that the order for service on them out of the jurisdiction may be discharged, thus raising at once the question of jurisdiction, and declining to litigate any matter in the Court of Bankruptcy. In my opinion the Court of Bankruptcy has no jurisdiction. It is the duty of the court at once to discharge the order, and not to say it will give the parties an opportunity of coming here and raising the case, and saying, if they like, that it is a mistake. In my opinion they have a right to come here at once and raise the question of jurisdiction. If the court thinks there is no jurisdiction, it ought not to do anything to sanction persons being brought before it on a petition as to which it has no jurisdiction to make an order for adjudication.

We come to the question whether or not against these parties who move there is any jurisdiction under the Bankruptcy Act, 1869. They are foreign subjects, and they have never been in England. The question to my mind comes to be the simple one, whether or not they are persons who are debtors within s. 6 of the Bankruptcy Act, because a creditor may present a petition praying that the debtor be adjudicated a bankrupt, and the court may make the adjudication if the debtor has done some of the various things, or has suffered some of the various things, or to put it more fully, if, as regards the debtor, some one of the things mentioned in the subsections have happened. When one looks at those subsections I think it must be obvious, notwithstanding the argument of counsel for the petitioning creditor, that the word "debtor" must receive some qualification, because we find in sub-s. (2):

> "If the debtor has, in England or elsewhere, made a fraudulent conveyance or transfer of his property."

That shows that the act there to be relied on as giving the court a right as against a person to adjudicate him a bankrupt may have been done not in England but elsewhere, and unless one is to put some limit on the word debtor it will come to this, that any one who has never been here, a subject of a foreign state, can be made bankrupt here in England, because in a foreign state he has done something. The argument of counsel for the petitioning creditor did not go to that extent, but that is the result of it.

Let us see what the case is here. We are not dealing with such a question as might arise if an English Act of Parliament had said that as against a Chilean subject, or any other alien who has never been here, the court should, on certain facts being proved, entertain a petition or make an adjudication. In such a case it might be the duty of the court, acting in the execution of that English Act of Parliament, whatever the consequences might be, and whatever foreign nations

might say, to say, "This is the English Act of Parliament, and we act on it, and the question which you the foreigner raise, is one we are bound to disregard." I do not say that is so, because, if the Act had proceeded clearly in a manner beyond the power of the English legislature, there might be a question. But that is not so here. All we have to do is to interpret an Act of Parliament which uses a general word, and we have to say how are you to limit that when necessarily there must be some limitation. I take it, it is this: that all laws of the English Parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them, and they also bind all aliens who come here, and who, during the time they are here, do any act which on a fair interpretation of the statute as regards them comes within the provisions of the Act of Parliament. It is not necessary of course that a person to be subject to the British Act should be domiciled here, but, if he is resident here temporarily, and does an act which comes within the intent and purview of the Act of Parliament, he, as regards this Act of Parliament, as every alien does as regards all laws of this realm, submits himself to the law and statute and must be dealt with accordingly.

As regards an Englishman a subject of the British Crown, it is not necessary he should be here if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act in consequence of his being a British subject, though of course in the case of a British subject not resident here it may be a question of the construction of the Act of Parliament whether what, if he had been resident here, would be an act coming within the Act of Parliament is so when he is not resident here. For instance, a man going abroad, or various other things might be mentioned, but as regards a British subject, whether here or not, he can be made a bankrupt if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt, but as regards foreigners there is no right to bind prima facie those not here unless they are subject to the Acts of the British legislature in consequence of owing allegiance to the Crown.

I think it is obvious that the true interpretation that we must put on the general word "debtor" in the Bankruptcy Act, 1869, is, a debtor subject to the English bankruptcy law. I say to the English bankruptcy law, and not to the English law generally for this reason, that we are dealing with a question of bankruptcy, and it may be that there are statutes of the English realm which give to our courts power to deal with foreigners not here as regards matters which, according to all principles, ought to be adjudicated upon by our courts, such as for instance real property situate in England. Of course it is right that questions of title to such property should be adjudicated upon here, and there may well be statutes of the English legislature giving to our courts power to deal with suits relating to the title of that property as regards aliens, and for the purpose of serving them. But that is a very different thing from saying that you shall deal with a person who has never been here, and never submitted himself to the English Act of Parliament by English law in a special subject of bankruptcy which this Act of Parliament refers to. In my opinion we are not justified in giving the interpretation to that word "debtor" which we are asked to do, simply because there is some convenience which would arise from so doing, or some inconvenience which would arise from not taking that course. What we have to consider is the fair interpretation of the Act, and we must have regard to the general principles of the law in this country, and not give to these general words an interpretation which would violate, in my opinion, the principles of law admitted and recognised in all countries.

JAMES, L.J.—The appeal will be dismissed with costs. There may be some difficulty with regard to R.S.C., 1875, Ord. 16, r. 10 [now R.S.C. (Revision), 1962, Ord. 81, rr. 1, 2] enabling a firm to be sued by its firm name, because we have not introduced into our law that the firm is a persona. What I mean is this, that supposing there to have been an entire change, and that the firm at the time

of suit, although the firm's name continued, consisted of totally different people from what it consisted of at the time of the contract—if A., B., and C. were partners at the time of the suit, and E., F., and G. at the time of the contract.

BRETT, L.J.—I quite agree. It may be that under those circumstances you cannot serve the firm.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffes & Rawle*; *Clarke, Rawlins & Clarke.*

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

CROSTHWAITE *v.* DEAN

[Chancery Division (Fry, J.), May 9, 1879]

[Reported 40 L.T. 837]

Will—Vesting—Gift to niece of interest on stock so long as she continued unmarried—Gift over to niece's brothers and sisters or their children on her marriage or death unmarried—Death of niece unmarried—Sister and one of her two children dying in the niece's lifetime—Children taking as tenants in common.

A testator by his will gave the interest on a sum of stock to his niece, J.L., so long as she continued unmarried; in case she married or died unmarried, he declared that the stock was then "to be divided between the brothers and sisters of the said J.L. or their children." J.L. had six brothers and sisters living at the testator's death, one of whom, E.M., died in the lifetime of J.L., leaving two children, one of whom died in the lifetime of J.L. J.L. died unmarried.

Held: (i) on the death of E.M. her two children took vested interests in one-sixth of the fund subject to the life interest of J.L.; (ii) the term "divide" applied not only to the brothers and sisters, but also to the children of the brothers and sisters who, therefore, took as tenants in common.

Notes. Applied: *Re Froy*, *Froy* v. *Froy*, [1938] 2 All E.R. 316. Referred to: *Re Brooke's Will Trusts*, *Jubber* v. *Brooke*, [1953] 1 All E.R. 668.

As to whether an alternative gift is original or substituted, see 39 Halsbury's Laws (3rd Edn.) 1048–1050; and for cases see 44 Digest 789–790. As to what words create a tenancy in common, see 39 Halsbury's Laws (3rd Edn.) 1102–1105; and for cases see 44 Digest 977–991.

Case referred to:

(1) *Martin* v. *Holgate* (1866), L.R. 1 H.L. 175; 35 L.J.Ch. 789; 15 W.R. 135, H.L.; 44 Digest 858, *7127*.

Also referred to in argument:

Penny v. *Clarke* (1860), 1 De G.F. & J. 425; 29 L.J.Ch. 370; 1 L.T. 537; 6 Jur.N.S. 307; 8 W.R. 286; 45 E.R. 423, L.JJ.; 44 Digest 778, *6359*.

Re Sibley's Trusts (1877), 5 Ch.D. 494; 46 L.J.Ch. 387; 37 L.T. 180; 44 Digest 799, *6545*.

Hobgen v. *Neale* (1870), L.R. 11 Eq. 48; 40 L.J.Ch. 36; 23 L.T. 681; 19 W.R. 144; 44 Digest 791, *6487*.

Timins v. *Stackhouse* (1858), 27 Beav. 434; 54 E.R. 170; 44 Digest 1000, *8577*.

Petition presented for payment out of three-sixths of a fund remaining in court, to Henry Masters, George Dean, and Mary Ann Wright, Henry Masters claiming the one-sixth which would have gone to his mother had she lived, to the exclusion

of Mary Ann Masters, his brother's executrix, who was the respondent to the petition.

James Lee, by his will dated July 18, 1849, gave the following legacy:

"I give and bequeath to my niece Jane Lee the yearly interest of £1,000 Bank Stock, free of legacy duty, only so long as she continues unmarried; but, in case she marry or die unmarried, then the said sum of £1,000 Bank Stock is to be divided between the brothers and sisters of the said Jane Lee or their children."

The testator died on Dec. 23, 1850, and his will was proved on Jan. 3, 1851.

On July 24, 1856, a bill was filed for the administration of the testator's estate and the execution of the trusts of his will, under the direction of the Court of Chancery; and on Dec. 5, 1856, a decree was made directing certain accounts and inquiries, in answer to which the chief clerk made his certificate, dated July 1, 1857, from which it appeared that the person the testator meant by the description of his niece, Jane Lee, was Jane Dean, otherwise Lee, the daughter of Henry Lee, the testator's brother, who had assumed the name of Dean instead of that of Lee; that Jane Dean had never been married; that Henry Dean died in June, 1851; that he had seven children, of whom one named Hannah died in the testator's lifetime, without having been married, and the remaining six—Henry, George, Ann, Mary Ann Wright (widow), Elizabeth Masters (wife of William Masters), and Edward—survived the testator; that Henry, the younger, died on Feb. 11, 1854, leaving one child only, Henry George Dean, his personal representative.

By an order made on further consideration on June 18, 1858, it was ordered that £1,000 New Three per Cent. Annuities, part of a larger sum of like annuities standing in the name of the accountant-general in trust in the cause, should be carried over to a separate account, and that the income thereof should be paid to Jane Dean during her life, so long as she should continue unmarried. Jane Dean died, without having been married, on June 16, 1878, having received the income up to a short time before her death. The remainder of such income was paid out on petition to her administratrix, and three-sixths of the fund in court were in January, 1879, transferred out of court to Henry George Dean, Ann Dean, and Edward Dean. Elizabeth Masters, who was entitled to one-sixth part of the £1,000 Three per Cent. Annuities in court, subject to Jane Dean's life interest, died in January, 1864, leaving two children only, Henry Masters and Thomas Masters. Thomas Masters died on Feb. 20, 1878, having by his will appointed Mary Ann Masters his executrix.

H. M. Mills for the petitioner, Henry Masters.
William Barber for the respondent.

FRY, J., read the clause in the will, stated the facts, and continued: The question is, Who is entitled to the sixth share of Elizabeth Masters in the original fund paid into court? Does it go among her children equally, or was it necessary that Thomas Masters should survive Jane Lee or Dean in order that he might participate in the share of Elizabeth Masters? I think it was not. *Martin* v. *Holgate* (1) is not a direct authority on the point, the gift there being to nephews and nieces, or their issue—not, as in this case, to brothers and sisters, or their children; but it is indirectly an authority, for "issue" in that case was held to mean children, and a trust to divide among the issue of the nephews and nieces was held to be an original gift to the children, and to extend to a daughter of one of the nephews who had died in the lifetime of the tenant for life, although such daughter had also died before the tenant for life. I think that on the death of Elizabeth Masters her two children took a vested interest in one-sixth of the fund, subject to the life interest of Jane Lee.

The second question is whether the children of Elizabeth Masters—viz., Henry and Thomas Masters—take as joint tenants or as tenants in common. I am of

opinion that the term "divide" applies not only to the brothers and sisters, but to the children of brothers and sisters, and that Henry and Thomas Masters took as tenants in common. One-third, therefore, of the funds remaining in court will be transferred to Henry Masters and Mary Ann Masters, another third will be transferred to the account of George Dean or his children, and the remaining third will be transferred to the account of Mary Ann Wright or her children.

Solicitors: *Monckton, Long & Co.*

[*Reported by* Frank Evans, Esq., *Barrister-at-Law.*]

HUSSEY *v.* HORNE-PAYNE AND WIFE

[House of Lords (Earl Cairns, L.C., Lord Selborne and Lord Gordon), May 1, 1879]

[Reported 4 App. Cas. 311; 48 L.J.Ch. 846; 41 L.T. 1; 43 J.P. 814; 27 W.R. 585]

Sale of Land—Contract—Memorandum—Sufficiency—Letters containing contractual terms—Variation of terms in subsequent letters and conversations.

The respondent by letter offered to sell an estate to the appellant and the appellant accepted this offer by letter "subject to the title being approved by my solicitor." Subsequently, the appellant wrote to say that he must abandon the purchase unless he was permitted to pay by instalments, to which the respondent consented. Soon afterwards the appellant's solicitor brought to the respondent's solicitor a paper headed: "Proposal by T.H. for purchase of the M. estate" and containing the terms of payment. The last sentence of this proposal was "Upon contract being signed the said T.H. is to be let into possession of the property." The respondent's solicitor orally agreed to these terms and arranged to instruct counsel to draft an agreement on the basis of them, but no such agreement was in fact drafted. The respondent afterwards refused to complete and the appellant brought an action for specific performance.

Held: although the first two letters of the correspondence seemed to constitute a complete contract and to satisfy the formal requirements of the Statute of Frauds, looking at the whole of what had passed in letters and conversation no concluded and complete contract had been established.

Per Lord Selborne: The Statute of Frauds is a weapon of defence and not of offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties.

Semble per Earl Cairns, L.C., that the addition of the provision "the title to be approved by our solicitors" to a contract for the sale of land only means that the title will not be accepted without investigation, and does not affect a contract otherwise complete.

Notes. That part of s. 4 of the Statute of Frauds relating to contracts for the sale of land has been re-enacted in s. 40 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 500).

Distinguished: *Wilcox* v. *Redhead* (1880), 49 L.J.Ch. 539. Considered: *Williams* v. *Brisco* (1882), 22 Ch.D. 441. Applied: *Eadie* v. *Addison* (1882), 52 L.J.Ch. 80. Distinguished: *Wood* v. *Aylward* (1887), 57 L.T. 54. Considered: *Wylson* v. *Dunn* (1887), 34 Ch.D. 569; *Tennent* v. *Welch* (1888), 58 L.T. 368.

A Distinguished: *Bolton Partners* v. *Lambert* (1889), 41 Ch.D. 295. *Bellamy* v. *Debenham* (1890), 45 Ch.D. 481. Applied: *Bristol, Cardiff and Swansea Aërated Bread Co.* v. *Maggs* (1890), 44 Ch.D. 616. Considered: *Page* v. *Norfolk* (1894), 70 L.T. 781. Applied: *Chipperfield* v. *Carter* (1895), 72 L.T. 487; *Lever* v. *Koffler*, [1901] 1 Ch. 543. Distinguished: *Perry* v. *Suffields*, [1916] 2 Ch. 187. Considered: *Curtis Moffat* v. *Wheeler*, [1929] 2 Ch. 224. Referred to: *May* v. *Thom-*
B *son* (1882), 20 Ch.D. 705; *Mason* v. *Von Buch* (1899), 15 T.L.R. 430; *Haegerstrand* v. *Anne Thomas Steamship Co.* (1905), 10 Com. Cas. 67; *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors, Ltd.*, [1908–10] All E.R.Rep. 113; *Brooks* v. *Knowles* (1911), 5 B.W.C.C. 15; *Von Hatzfeldt-Wildenburg* v. *Alexander*, [1911–13] All E.R.Rep. 148; *Morrell* v. *Studd and Millington*, [1913] 2 Ch. 648; *Love and Stewart* v. *Instone* (1917), 33 T.L.R. 475; *Caney* v. *Leith*, [1937] 2 All E.R. 532.

C As to the necessity for a memorandum in writing of a contract for the sale of land see 34 Halsbury's Laws (3rd Edn.) 207–210; and for cases see 40 Digest (Repl.) 21 et seq. As to qualified acceptance in contract see 8 Halsbury's Laws (3rd Edn.) 75–76; and for cases see 12 Digest (Repl.) 79–84 and 40 Digest (Repl.) 13–14.

Cases referred to:

D (1) *Gordon* v. *Mahony* (1850), 13 I.Eq.R. 383; 40 Digest (Repl.) 122, **505.*

(2) *Jervis* v. *Berridge* (1873), 8 Ch. App. 351; 42 L.J.Ch. 518; 28 L.T. 481; 21 W.R. 395, L.C. & L.JJ.; 12 Digest (Repl.) 182, *1243.*

Also referred to in argument:

Hudson v. *Buck* (1877), 7 Ch.D. 683; 47 L.J.Ch. 247; 38 L.T. 56; 26 W.R. 190; 12 Digest (Repl.) 469, *3504.*

E *Duddell* v. *Simpson* (1866), 2 Ch. App. 102; 36 L.J.Ch. 70; 15 L.T. 305; 12 Jur.N.S. 969; 15 W.R. 115, L.JJ.; 40 Digest (Repl.) 101, *763.*

Robinson v. *Page* (1826), 3 Russ. 114.

Noble v. *Ward* (1866), L.R. 1 Exch. 117; 35 L.J.Ex. 81; 13 L.T. 639; 14 W.R. 397; affirmed (1867), L.R. 2 Exch. 135; 36 L.J.Ex. 91; 15 L.T. 672; 15 W.R. 520, Ex. Ch.; 12 Digest (Repl.) 401, *3108.*

F *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865, H.L.; 12 Digest (Repl.) 95, *548.*

Appeal by the plaintiff from a decision of the Court of Appeal (Sir George Jessel, M.R., Cotton and Thesiger, L.JJ.), reported 8 Ch.D. 670, reversing on a different ground, a decision of Malins, V.-C.

G The bill was filed by the appellant, Thomas Hussey, for the specific performance of a contract for the sale of certain freehold land at Fulham belonging to the respondent, Mrs. G. M. Horne-Payne. The respondents John Horne-Payne and his wife, Mrs. G. M. Horne-Payne, demurred on the ground that no subsisting agreement was alleged in the statement of claim, and that there was no memorandum in writing signed by either of the defendants within the Statute of Frauds.

H By s. 4 of the Statute of Frauds (1677), so far as material:

> "No action shall be brought . . . upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

I *J. Pearson, Q.C.*, and *H. R. M. Pope* for the appellant.

H. F. Bristowe, Q.C., *Benjamin, Q.C.*, and *F. W. Bush* for the respondents.

EARL CAIRNS, L.C.—I will not refer, in the first instance, to the grounds upon which this case was decided by Malins, V.-C., and the Court of Appeal, but I will ask your Lordships to observe what the facts of the case are upon which you have now to form an opinion. At the outset I must say that I recognise the great convenience of having a case stated fairly and frankly, as this case has been upon the claim, and thereby enabling the court, without the parties being put to

any greater expense, to decide upon the claim, upon a demurrer being put in, whether the plaintiff has a case in respect of which he is entitled to relief.

This is an action for specific performance of a contract. It is a contract for the sale of land, and the appellant must show two things: he must show that there is a contract concluded between the parties, and that there is a note or memorandum in writing of the contract sufficient to satisfy the Statute of Frauds. The second requisite in this case he proposes to supply through the medium of letters which passed between the parties, and it is one of the first principles applicable to a case of the kind that where you have to find your contract or your note or memorandum of the terms of the contract in letters you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, "We will look at the letters up to this point, and find in them a contract or not, but we will look at nothing beyond." In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them.

The first two letters in this case are dated Oct. 4 and 6. In the first of them Mrs. Horne-Payne, who appears to have been entitled to freehold property for her separate use, stated that she was willing to "divide the difference" between an offer which had been made to her and the price she had asked, and to accept the sum of £37,500 for the freehold property, mentioning the name of the property. The answer was in these words:

> "Oct. 6, 1876. I beg to acknowledge the receipt of your letter of the 4th inst. stating that you are willing to accept the sum of £37,500 for the whole of your freehold land at North End (including the Mornington House Estate), and I hereby, on behalf of Mr. Thomas Hussey, of 96, Kensington High Street, accept your terms as above, and agree to pay you the said sum of £37,500 for your land as aforesaid extending from Hammersmith Road to the Hammersmith railway, subject to the title being approved by our solicitors."

I put aside these last words for separate observation, and I should say that, putting them aside, if these two letters were the only information which your Lordships had upon the subject, if the matter had ended here as it began with these letters, I should have been disposed to say that there was undoubtedly evidence of a concluded contract sufficient to satisfy the Statute of Frauds. There is a property named, there is a price to be paid, and there are the names of the vendor and of the purchaser. And, of course, stopping there again, the words which I have read would imply that the purchase-money was to be paid in the usual way, namely, as soon as the title to the land could be produced by the vendor and a conveyance offered.

But the case does not stop there, and we are told, partly by statements of the appellant and partly by further letters which have passed, very much more, which must be imported into the case, and must be taken along with the letters which I have read. The first thing we are told by the appellant himself is this: that

> "in the course of the negotiations the [respondent Mrs. Horne-Payne] had suggested that it would be for the mutual convenience of herself and the [appellant] that the purchase money should be paid by instalments, and the [appellant] acquiesced."

That is alleged to be a statement of a term of the agreement arranged outside what was written, but omitted to be mentioned in what was written. I look upon this more as a statement that it had been agreed between them that there should be a settlement as to the instalments in which the purchase-money was to be paid; that it should be paid by way of instalments and not in one sum, but that it should be a subject of settlement what were to be the instalments in which the money should be paid.

That seems also to be the view of the appellant, because he continues,

A "Pursuant to this suggestion, she, shortly after the receipt of the letter of Oct. 6, 1876, viz., on Oct. 11, 1876, wrote to William Weaver, the agent of the [appellant], requesting him to meet her at the office of Mr. Crowdy, her solicitor, on the following day, to discuss the terms of payment, etc.,"

that is to say, to discuss the subject of a payment to be made by way of instalments, and not in one gross sum, as I understand it, to arrange the instalments in which B the payment was to be made. Then the appellant continues:

"Accordingly on Oct. 12, 1876, the [appellant] and his solicitor, and Mr. Weaver, called upon Mr. Crowdy. The [respondent], however, failed to keep her appointment, and Mr. Crowdy, alleging that he knew of no agreement to take the purchase-money by instalments, stated that nothing less than the C immediate payment of £10 per cent. of the purchase money by way of deposit, and the payment of the residue thereof in a few months would be accepted."

That is to say, Mr. Crowdy stood upon what was written in the two letters; those, he said, constitute an agreement upon which we may rely; we hold you to them, and you must pay the purchase money in one sum, putting aside the deposit, and on the usual terms.

D But was that the view of the appellant? Certainly not; because he says:

"Meanwhile the [appellant], on the faith of the understanding that the purchase money would be paid by instalments, had allowed certain arrangements which he had made for providing the purchase money at once to fall through. Shortly after the last interview, therefore, in the belief that he had been unfairly treated in this respect by the [respondent, Mrs. Horne-Payne], he E directed his solicitors to write, and they on Oct. 24 wrote to Mr. Crowdy that, as he stated that he could make no other arrangement for payment of the purchase money except £10 per cent. down as a deposit, and the balance in a few months time, Mr. Hussey had no alternative but to decline the matter, and as soon as Mr. Crowdy's client should be prepared to treat upon the footing of payment by instalments extending over about three years, they F would be prepared to negotiate again on Mr. Hussey's behalf."

I can conceive nothing clearer than the result of the statement which the appellant thus makes. There were two letters, no doubt, but, as he says, both I and the vendor were at one that there was to be a payment of the purchase money by way of instalments, we had not agreed what those instalments should be. I was ready to settle them. Your solicitor repudiated the idea that there G were to be instalments, and required immediate payment of the purchase money. Thereupon I said that that was unfair, and I was not ready to be bound by any claim of that kind, and that I would "decline the matter," which must be taken to mean decline the arrangement for the purchase, and would be ready to "negotiate again" as soon as Mr. Crowdy "should be prepared to treat upon the footing of payment by instalments." This is not a matter of controversy upon H the demurrer; this is the attitude which the appellant assumed at the time, and it must be taken, as against him, that that was the correct view of the facts of the case at that moment.

How, then, did the case proceed? Weaver, the appellant's agent, saw Mrs. Payne, and she wrote to him. He having reminded her of the understanding about the instalments, she at once admitted it, and on Oct. 25, 1876, wrote to Mr. I Weaver:

"I have this moment seen Mr. Crowdy, and have given him positive instructions to accept Mr. Hussey's offer of payment by instalments in three years, and the deposit down."

If this could be taken as a memorandum of that part of the agreement which, up to that time, never had been settled; if this could be taken as a statement of what was wanting, and a memorandum in writing of the manner in which it was to be supplied, then the desideratum, the thing which was omitted in the two original

letters, might be taken as supplied. But this, after all, is merely a statement referring the appellant to the solicitor of the respondent, and a statement of what she had desired the solicitor to do. Therefore, we must look at what the solicitor did under those instructions.

What he did was this. He wrote to the solicitor for the appellant,

> "We have had some further communication with our clients hereon, and are authorised to state to you that they will be willing to carry out this sale on the following terms."

Then he gives three terms with regard to the instalments. He says:

> "This, we believe, is all that relates to the money payments, the other details of the contract we can settle. Let us hear if you are instructed to the above effect. We should add that this only binds our client on acceptance by yours."

Here again, if this had been then accepted you would have had this added to what had already been put in writing, and you would have had the agreement completed in the way required to complete it. But was this accepted? On the contrary, a week or thereabouts, a fortnight I think, passes over. Then the agent of the appellant calls on the solicitor for the respondent, and in place of accepting the terms which had been put in writing, puts in a counter proposal, headed "Proposal by Mr. Thomas Hussey for the purchase of the freehold property known as the Mornington Estate," treating it again as still a matter of proposal. He proposes instalments to be paid in a different way, and to be accompanied with certain provisions for partial conveyance as each instalment was paid. The details are not material. He says, "Mr. Crowdy, on behalf of the defendant, went carefully through the same and agreed thereto verbally." But, even if that had been so, a verbal agreement is insufficient; there was no writing to bind Mr. Crowdy or his client to it.

But a few days after that Mr. Crowdy writes, and, in place of expressing agreement with the paper, he demurs to one or two provisions in the counter proposal, and speaks of one serious error which in his ill state of health he had omitted to notice. He points out that they would not have the effect which he would desire, and he requires a change in the proposal to be made. There was no completed contract. Crowdy was seized with illness; he afterwards died, and nothing was done in the way of supplying what was wanting.

The conclusion I draw from that is that we have here the appellant himself, telling us that the two original letters, which if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they amounted to and represented a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that those efforts did not result in a settlement of these other terms. The consequence, therefore, of the whole is, that it appears to me not only that there is no note in writing, according to the Statute of Frauds, of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties.

I said I would refer to the grounds upon which the case was decided in the courts below. MALINS, V.-C., was of opinion that the two letters constituted a completed agreement, and then he looked to see if there was any rescission of that agreement, and he was of opinion that there was not. As to that, I can only say that if I could arrive at the conclusion at which he arrived, that the two original letters constituted a completed agreement, I should be disposed to agree with him and say—at all events I should be unwilling to decide in an opposite sense—that there was no rescission standing upon a memorandum of equal authority with the letters. But from what I have said your Lordships will understand that I cannot find that there was originally in those two letters a completed agreement.

The Court of Appeal reversed the decision of MALINS, V.-C., and dismissed the action, but upon a different ground. They held that the letter of Oct. 6 introduced in the last words of it a new term, by stipulating that the sale was to be subject to the title being approved by the solicitors of the purchaser. The court were of opinion that that constituted the solicitors the arbiters of whether the title was a good one or not, and that the vendor had not agreed to that term, making the solicitors of the purchaser the arbiters of that question. I rather infer from the judgments of the learned judges of the Court of Appeal that they were disposed to look with doubt upon the question of whether, even without this, there was a completed agreement, or would turn out to be a completed agreement between the parties; but they were of opinion that this difficulty was sufficient to decide the case against the appellant.

I have not desired to put the opinion which I have offered to your Lordships upon that ground, and I should doubt very much myself if it were necessary to decide it, whether the opinion of the Court of Appeal in this respect could be maintained. I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement, but it would leave the purchaser perfectly free. He might appoint any solicitor he pleased, he might change his solicitor from time to time. There is no directio personarum; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitors, at liberty to say from caprice at any moment, we do not like the title, we do not approve the title, and, therefore, the agreement goes for nothing. I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them—and *Gordon* v. *Mahony* (1) which was cited from Ireland would be authority, if authority were needed, for that view—I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact that the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to.

Therefore, though I arrive at the conclusion at which the Court of Appeal arrived. I desire to say that I am unable to arrive at that conclusion upon the same grounds, but I think it would be much more satisfactory to look at the case upon the broader ground. I think that there was here no concluded agreement between the appellant and the vendor, and, therefore, I submit to your Lordships that this appeal should be dismissed with costs.

LORD SELBORNE.—I am of the same opinion, and for the same reasons.

I cannot agree with what appeared to be suggested by part of the appellants' argument, that because two letters were written by which the conditions required by the Statute of Frauds would have been satisfied, if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a court of equity ought specifically to perform, without regard to what preceded or what followed. The observation has often been made that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear upon the facts that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement. I adhere to what I said in *Jervis* v. *Berridge* (2)

(8 Ch. App. at p. 360) that the Statute of Frauds "is a weapon of defence, not offence," and "does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties"; and, I think it especially important to keep that principle in view when, as in the present case, it is attempted to draw a line at one point of a negotiation, conducted partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations, which to my mind plainly shows that terms of the intended agreement, which were of great practical importance, and were so regarded on both sides, then remained unsettled and were still the subject of negotiations between them.

LORD GORDON concurred.

Appeal dismissed.

Solicitors: *Kynaston & Gasquet*; *J. Crowdy & Son.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

LEASK *v.* SCOTT BROTHERS

[Court of Appeal (Lord Coleridge, C.J., Bramwell and Brett, L.JJ.), April 16, 17, May 5, 1877]

[Reported 2 Q.B.D. 376; 46 L.J.Q.B. 576; 36 L.T. 784; 25 W.R. 654; 3 Asp.M.L.C. 469]

Shipping—Carriage of goods by sea—Stoppage in transitu—Defeat of unpaid vendor's right of stoppage—Transfer of bill of lading—Transferee taking bona fide and for value.

The transfer of a bill of lading to a transferee who takes bona fide and for value defeats the unpaid vendor's right of stoppage in transitu, notwithstanding that the consideration is past and does not arise out of any part of the bill of lading.

G. & Co. were consignees of goods from the defendant abroad payable by acceptance of a bill of exchange at three months on exchange of the ship's documents. On Jan. 1, 1876, G. & Co. who were already indebted to the plaintiff obtained a further loan for £2,000 on condition that they would find cover for the whole amount due, but no particular security was named. On Jan. 4, 1876, G. & Co. received the bill of lading, endorsed in blank, for the goods consigned to them by the defendants, and gave a bill of exchange payable at three months for their value. On Jan. 5, 1876, G. & Co. delivered the bill of lading, with other securities, to the plaintiff as cover for the loan. G. & Co. became insolvent before the arrival of the goods consigned, whereupon the defendant, as unpaid vendor, exercised the right of stoppage in transitu. In an action to determine the property in the goods as between the plaintiff and the defendant,

Held: it was not necessary that consideration for the transfer of the bill of lading should be obtained by means of the bill itself and there was no difference between a past and present consideration, accordingly, therefore, the defendant was not entitled to stop the goods in transitu, and the plaintiff had the property in the goods.

Notes. Referred to: *Venn* v. *Tedesco*, [1926] 2 K.B. 227; *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337.

A As to transfer by buyer of documents to title of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 138; and for cases see 39 DIGEST 633 et seq.

Cases referred to:

(1) *Rodger* v. *Comptoir d'Escompte de Paris* (1869), L.R. 2 P.C. 393; 5 Moo.P.C.C.N.S. 538; 38 L.J.P.C. 30; 21 L.T. 33; 17 W.R. 468; 3 Mar.L.C. 271; 16 E.R. 618, P.C.; 39 Digest 622, *2195.*

B (2) *Vertue* v. *Jewell* (1814), 4 Camp. 31; 171 E.R. 10, N.P.; 39 Digest 631, *2281.*

(3) *Mangles* v. *Dixon* (1852), 3 H.L.Cas. 702; 19 L.T.O.S. 260; 10 E.R. 278, H.L.; 21 Digest (Repl.) 459, *1585.*

(4) *Lickbarrow* v. *Mason* (1787), 2 Term Rep. 63; 100 E.R. 35; on appeal, sub nom. *Mason* v. *Lickbarrow* (1790), 1 Hy. Bl. 357, Ex. Ch.; sub nom. *Lickbarrow* v. *Mason* (1793), 4 Bro. Parl. Cas. 57; 6 East, 22, H.L.; 39 Digest 614, *2115.*

C

(5) *Alliance Bank, Ltd.* v. *Broom* (1864), 2 Drew. & Sm. 289; 5 New Rep. 69; 34 L.J.Ch. 256; 11 L.T. 332; 10 Jur.N.S. 1121; 13 W.R. 127; 62 E.R. 631; 12 Digest (Repl.) 216, *1556.*

Also referred to in argument:

D *Pease* v. *Gloahec, The Marie Joseph* (1866), L.R. 1 P.C. 219; Brown. & Lush. 449; 3 Moo.P.C.C.N.S. 556; 35 L.J.P.C. 66; 15 L.T. 6; 12 Jur.N.S. 677; 15 W.R. 201; 2 Mar.L.C. 394, P.C.; 39 Digest 634, *2307.*

Chartered Bank of India, Australia and China v. *Henderson* (1874), L.R. 5 P.C. 501; 30 L.T. 578, P.C.; 12 Digest (Repl.) 208, *1478.*

Hibbert v. *Carter* (1787), 1 Term Rep. 745; 99 E.R. 1355; 41 Digest 394, *2365.*

E *Lempriere* v. *Pasley* (1788), 2 Term Rep. 485; 100 E.R. 262; 39 Digest 532, *1444.*

Re Golden, Ex parte Norton (1873), L.R. 16 Eq. 397; 21 W.R. 402; 5 Digest (Repl.) 973, *7844.*

Holroyd v. *Marshall* (1862), 10 H.L.Cas. 191; 33 L.J.Ch. 193; 7 L.T. 172; 9 Jur.N.S. 213; 11 W.R. 171; 11 E.R. 999, H.L.; 39 Digest 678, *2642.*

Currie v. *Misa* (1875), L.R. 10 Exch. 153; 44 L.J.Ex. 94; 23 W.R. 450; affirmed sub nom. *Misa* v. *Currie* (1876), 1 App. Cas. 554; 45 L.J.Q.B. 852; 35 L.T. 414; 24 W.R. 1049, H.L.; 12 Digest (Repl.) 531, *4002.*

F

Spalding v. *Ruding* (1843), 6 Beav. 376; 12 L.J.Ch. 503; 1 L.T.O.S. 384; 7 Jur. 733; 49 E.R. 871; on appeal (1846), 15 L.J.Ch. 374, L.C.; 39 Digest 634, *2305.*

Re Westzinthus (1833), 5 B. & Ad. 817; 2 Nev. & M.K.B. 644; 3 L.J.K.B. 56; 110 E.R. 992; 39 Digest 633, *2304.*

G

Gurney v. *Behrend* (1854), 3 E. & B. 622; 23 L.J.Q.B. 265; 23 L.T.O.S. 89; 18 Jur. 856; 2 W.R. 425; 118 E.R. 1275; 39 Digest 635, *2314.*

Twyne's Case (1602), 3 Co. Rep. 80 b.; 76 E.R. 809; 12 Digest (Repl.) 196, *1352.*

Appeal by the plaintiff from a decision of FIELD, J., directing judgment to be entered for the defendant in an interpleader issue to determine, as between the H plaintiff and the defendant, the ownership of certain goods lying in the warehouses of the Docks and Harbour Board at Liverpool.

Watkin Williams, Q.C., and *Matthew* for the plaintiff.
Murphy, Q.C., and *Webster* for the defendant.

Cur. adv. vult.

I May 5, 1877. **BRAMWELL, L.J.,** read the following judgment of the court.—The defendant has stopped in transitu the goods the subject of this proceeding. He has done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such a stoppage. Whether he has is the question. The facts are few, and as follows. Geen & Co., the consignees of the goods, were indebted to the plaintiff. On Saturday, Jan. 1, 1876, they applied to the plaintiff for a further advance, which he agreed to make on being first covered. Geen & Co. promised to give him cover, not naming anything in particular, and the plaintiff advanced them a further sum of £2,000, the plaintiff being content with

their promise. On the following Tuesday the bill of lading of the goods in question consigned by the defendant to Geen & Co. came to the possession of the latter, who on the following day, Wednesday, deposited it and other property with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favour of the plaintiff.

This being so, the plaintiff contended that he was a bona fide holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof, and of the goods mentioned in it. This was not denied by the defendant. His contention was that, though the plaintiff was such holder effectually as against Geen & Co. and their assignees if they had become bankrupt, or anyone claiming through or against them except him, the defendant, yet he, the defendant, had not lost his right to stop in transitu; that the right of stoppage in transitu is available and is effectual against everyone except against the assignees of a bill of lading for valuable consideration, and against them too unless the valuable consideration has been got by means of the bill of lading; that, if the consideration was past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage in transitu; that such right was only defeated where there was a transfer for present consideration; that it was so in such a case, because the consignor or stopper in transitu had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where the consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage in transitu should be lost.

It was first argued for the defendant that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But on its being pointed out that the title of the transferee was legal, the argument was changed to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The distinction between the two propositions is material.

In support of this argument, *Rodger* v. *Comptoir d'Escompte de Paris* (1), before the Judicial Committee of the Privy Council, was cited. We think that case justifies the argument, and is in point. There may be differences in the facts of the two cases, but the ratio decidendi was clearly founded on the principle which is advanced for the defendant in the present case. We are not bound by its authority, but need hardly say that we should treat any decision of the Privy Council with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace of any such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way. But wherever the rule is laid down, it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a bona fide transferee defeats the right of stoppage in transitu. It is true, no doubt, that opinions must be taken secundum subjectam materiam, but it is strange that no judge, no counsel, no writer, ever guarded himself against appearing to lay down the rule too widely, by mentioning this qualification if he thought it existed. We cannot help saying then, that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all previous judges and writers who have dealt with the subject.

More than that, in *Vertue* v. *Jewell* (2), where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee for valuable consideration so as to defeat the right of stoppage, he puts it, not on the ground that the consideration was past, as was the fact, but on the ground that the transferees had notice of the transferor's insolvency. Further, it is noticeable, that this point does not seem to have been mentioned in *Rodger* v. *Comptoir d'Escompte de Paris* (1)

till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of bona fides. Still further, with all respect, the reason given in the judgment is not satisfactory. It is said (L.R. 2 P.C. at p. 405):

> "The general rule so clearly stated and explained by LORD ST. LEONARDS in the case of *Mangles* v. *Dixon* (3), is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it."

No doubt. But that rule does not apply here. LORD ST. LEONARDS said that in reference to a case where the title was to a chose in action, an equitable title only, or, dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger* v. *Comptoir d'Escompte de Paris* (1), a title to property in ownership, and, to use the old expression, a legal right.

If, besides dealing with the authorities, we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by BULLER, J., in *Lickbarrow* v. *Mason* (4) (2 Term Rep. at p. 75) apply to such a case as the one before us. Practically, such a past consideration as is now under discussion, has always a present operation, for it stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the defendant, or not, was no doubt such an understanding, that if the plaintiff had taken proceedings against the defendant the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out and out, and paid part of his debt with the price, the consideration would have sufficed if the transaction was not colourable. If the plaintiff had said "I cannot take this bill of lading safely, as the consideration would be past, do it with the broker next door and give me his cheque," that would have been valid. Is it then desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to consider whether specific performance would be decreed as to this document, which was not specified to the plaintiff; but *Alliance Bank, Ltd.* v. *Broom* (5) shows that a general performance would be decreed, and certainly an action would lie for not covering. Therefore the assignor for such a consideration as this always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen & Co. in this particular case had said that this bill of lading was coming forward, and that they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so also if they had said generally that they had securities coming forward and would deposit them; and what is the difference between a promise with such a statement and a promise without it? In the analogous cases of goods obtained under a fraudulent contract, where the vendor loses his title if there is a transfer for value, there is no case to show that a past value is not sufficient.

On these grounds we are unable to concur in the opinion of the judicial committee in *Rodger* v. *Comptoir d'Escompte de Paris* (1), nor with the argument for the defendant. As to the judgment of FIELD, J., it is enough to say that it proceeds wholly on that case and in deference to it. We are of opinion that judgment should be reversed and ours given for the plaintiff.

Appeal allowed.

Solicitors: *Hollams, Son & Coward*; *Lowless & Co.*

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

A

RAWLEY *v.* RAWLEY

[Court of Appeal (Sir George Jessel, M.R., Kelly, C.B., Mellish, L.J., Denman, J., and Pollock, B.), May 1, 2, 1876]

[Reported 1 Q.B.D. 460; 45 L.J.Q.B. 675; 35 L.T. 191; 24 W.R. 995]

B

Set-off—Debt—Debt to be set off—Need for debt to be one for which an action could be maintained.

The plaintiff brought an action to recover money which he alleged to be owing to him by the defendant for the sale of his business, and the defendant sought to set-off the amount due on a promissory note given him by the plaintiff during infancy for debts incurred and claimed by the plaintiff to have been ratified verbally after he had attained full age.

C

Held: to sustain a plea to set-off a debt it must be shown that the debt was one for which an action could be maintained; s. 5 of the Statute of Frauds Amendment Act, 1828, applied to set-off and there was no ratification as required therein; and, therefore, no action could have been maintained on the promissory note and the plea was bad.

D

Notes. By s. 2 of the Infants Relief Act, 1874, no action is now to be brought on ratification of an infant's contract; see 12 Halsbury's Statutes (2nd Edn.) 942.

Referred to: *R.* v. *Leon*, [1945] 1 All E.R. 14.

As to ratification after full age of contracts made during infancy, see 21 Halsbury's Laws (3rd Edn.) 141; and for cases see 28 Digest (Repl.) 504 et seq. As to the modern right of set-off, see 34 Halsbury's Laws (3rd Edn.) 402; and for cases see 40 Digest (Repl.) 409 et seq.

E

Cases referred to:

(1) *Francis* v. *Dodsworth* (1847), 4 C.B. 202; 17 L.J.C.P. 185; 8 L.T.O.S. 391.

(2) *Brown* v. *Tibbits* (1862), 11 C.B.N.S. 855; 31 L.J.C.P. 206; 6 L.T. 385; 10 W.R. 465; 142 E.R. 1031; 40 Digest (Repl.) 417, *114*.

F

(3) *Remington* v. *Stevens* (1747), 2 Stra. 1271; 93 E.R. 1175; 1 Digest (Repl.) 8, *48*.

Also referred to in argument:

Harrison v. *Turner* (1847), 10 Q.B. 482; 16 L.J.Q.B. 295; 11 Jur. 817; 116 E.R. 184; 1 Digest (Repl.) 8, *50*.

G

Lester v. *Lazarus* (1835), 2 Cr.M. & R. 665; 5 L.J.Ex. 13.

Gee v. *Liddell* (*No. 2*) (1866), 35 Beav. 629; 12 Jur.N.S. 541; 14 W.R. 853; 55 E.R. 1041; 40 Digest (Repl.) 432, *239*.

Hammersmith and City Rail. Co. v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 11 Digest (Repl.) 106, *29*.

H

Appeal by the defendant from an order of the Queen's Bench Division (Cockburn, C.J., Mellor and Field, JJ.), making a rule absolute to enter judgment for the plaintiff in an action, tried by Field, J., for money owed to plaintiff by the defendant, when judgment was entered for the defendant on the ground that a set-off (a promissory note given by the plaintiff during infancy) had been duly ratified by the plaintiff, with leave to the plaintiff to move judgment to be entered for himself on the ground that there had been no sufficient ratification.

I

The plaintiff and defendant were brothers, the sons of an oilman who carried on business at Notting Hill, London. The father started the plaintiff, then an infant, in the business of a greengrocer at Kensington, and in this business he failed in 1872. At that time the plaintiff borrowed several small sums from the defendant on IOUs, and subsequently borrowed money of a Mr. Cayley, to prevent the shop being shut up, the defendant giving security for the amount, whereupon the plaintiff gave the defendant a promissory note for £43, which was to cover money paid to Cayley, and also various small sums lent by the defendant to the

plaintiff. In 1872 the father died, and in February, 1874, the defendant agreed to purchase the plaintiff's interest in the business carried on at Notting Hill. The amount to be paid for the share of the business was to be referred, and an award was made, under which the plaintiff now claimed £60. In December, 1873, shortly after he came of age, the plaintiff called with the defendant at the offices of Mr. Tatton, his solicitor, and there, according to the defendant's evidence, verbally agreed to pay the amount he owed to defendant on the promissory note.

Sir H. Giffard, Q.C., and *Francis Turner* for the defendant.
Philbrick, Q.C., and *R. T. Reid* for the plaintiff.

SIR GEORGE JESSEL, M.R.—The question we have to decide is simply one of law—whether in an action for debt where the defendant pleads a set-off, to which plea there is a replication that the plaintiff was an infant when he contracted the debt, with a rejoinder of ratification, the defendant can avail himself of that ratification although it is not in writing. It is argued that although no action could have been brought upon this ratification, still s. 5 of the Statute of Frauds Amendment Act, 1828 [repealed], as to ratification does not apply to set-off when pleaded against an infant.

In the first place, when we look for the meaning of the Act we find its principal object stated in the title,

> "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements";

and s. 5 of the Act provides:

> "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

When the legislature decides that to make an infant's promise valid it must be in writing, it would be a most singular result if we were to decide that this set-off were good. But it is also clear that set-off is founded upon statute, and the only meaning of that statute is to prevent cross actions. It was not intended to give any new rights to a defendant; all that it did was to enable him to avail himself of the rights he had in the same action in which he was defendant. When the Act says that mutual debts may be set against each other, it means such claims as can be enforced. A debt capable of being set-off, therefore, must be one for which an action can be maintained; and that would be sufficient for us in this case.

But in addition to that, we see that the words of s. 5 are that "No action shall be maintained," . . . and these words are not so difficult to interpret as the words of s. 3 of the Limitation Act, 1623, [now s. 2 (2) of Limitation Act, 1939] which provides: "All actions of account, . . . shall be commenced within six years next after the cause of such action." This merely limits the time within which an action may be brought, and this has been held equally to bar a plea of set-off. It is quite true the Statute of Frauds Amendment Act, 1828, does not alter the words of this law, but what s. 4 of that Act says is, that the recited Acts and this Act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise. No action can be brought after a given time still, and I don't see how this clause can apply to set-off in this Act, unless it be pleaded in an action of this kind.

Thirdly, we are bound to follow the literal construction of the Act of Parliament where that is clear and unmistakable, and here it distinctly says this Act shall be deemed to apply to set-off. We must, therefore, treat set-off as if it were for the purposes of this Act equivalent to an action, and so in s. 5 we must take the word action to mean, or at all events to include "set-off." On all these grounds the judgment of the court below must be affirmed.

KELLY, C.B.—It was extremely desirable that this appeal should be brought before us, as it involves a question of great and general importance, and I am of opinion that on two grounds this demand is altogether barred. In the first place, we must consider the words of s. 5 of the Statute of Frauds Amendment Act, 1828, itself; they are undoubtedly that

> "No action shall be maintained whereby to charge any person upon any ratification of a contract made during infancy unless such ratification be in writing."

I take the substantial meaning of that section to be that such a verbal promise or revival shall not only be insufficient to maintain an action, but that it shall be of no legal effect whatever. The question is not whether an action shall be maintained, but whether such promise constitutes a revival of the contract. The words that "no action can be maintained" are equivalent to saying that it is not a debt which in any way or under any form or circumstances can be enforced. In the Attorneys and Solicitors Act, 1728 (2 Geo. 2, c. 22), s. 13 [repealed], the words are "mutual debts." Is this a debt at all—it certainly was not one during the infancy—has it become one by ratification? And can it be the subject of set-off if not of an action? On both these points s. 4 of the Act of 1828 aids us: "This Act shall be deemed to apply to any set-off;" that applies to the whole, and, therefore, to s. 5. The question must be determined on the literal construction of the statute, and the provisions of the Act are conclusive on the point now before the court. The cases cited of the attorneys' bills are different, there is nothing to show that there the action could not have been maintained at some later period. They are analogous to an action on a bill of exchange not due, which can be put in in bankruptcy, although no action can be brought on it. But this case is a totally different one, and this alleged ratification has no legal effect whatever either to support an action or a plea of set-off.

MELLISH, L.J.—I am of the same opinion. The proper construction of the Attorneys and Solicitors Act, 1728 (2 Geo. 2, c. 22), s. 13, has been fully considered and laid down by WILDE, C.J., in *Francis* v. *Dodsworth* (1). He says (17 L.J.C.P. at p. 187):

> "The judicial construction of this section has been that no debts can be used by way of set-off under this statute except such as are recoverable by action; . . . It seems to me, therefore, that as the debt sought to be set-off by this plea is not, under the existing circumstances, a debt for which the defendant could have maintained an action, it cannot be availably used by way of set-off."

That applies directly to the case before us. In order that this should be a "mutual debt" it must be one on which an action could be brought, and this appears to me to be one on which no action can be brought. The only argument on the other side arises from the cases of the attorneys' bills. But they differ from this case —for in them the remedy is only postponed; but the Statute of Frauds Amendment Act, 1828, does not merely postpone debts contracted by an infant, it takes away the action altogether unless they are revived in writing. Therefore, the debt is a mere nullity without a written ratification. On these grounds, as well as on those that have been already mentioned, I think the appeal must be dismissed.

DENMAN, J.—It is difficult to distinguish *Brown* v. *Tibbitts* (2) from the present case, but upon full consideration I find grounds on which it may well be distinguished. That case was decided upon the words of s. 37 of the Solicitors Act, 1843, words extremely like those of s. 5 of the Statute of Frauds Amendment Act, 1828, which is under our consideration. It is, however, I think, a legitimate observation that the words were not precisely the same as in the present statute—moreover, the subject-matter was totally different. There WILLIAMS, J., based his decision very much on the ground of long-established practice, but that tells directly in the opposite way in this case. In *Francis* v. *Dodsworth* (1) the plea of set-off

A was held to be on the same footing as the commencement of an action. I am of opinion, therefore, that a verbal ratification in this case is insufficient.

POLLOCK, B.—I am of the same opinion. In my opinion the judgment of this court might be well based on the construction put on the Limitation Act, 1623, and the Attorneys and Solicitors Act, 1728. So far back as *Remington* v. *Stevens* B (3) this question has been settled so far as the Limitation Act, 1623, is concerned. That case is commented on in *Francis* v. *Dodsworth* (1). In the latter case it is quite clear that WILDE, C.J., speaks of a well understood construction, and I should prefer to rest my judgment on the authority of that case.

Appeal dismissed.

C Solicitors: *West & King*; *W. Tatton.*

[*Reported by* R. H. AMPHLETT, ESQ., *Barrister-at-Law.*]

D

PARRY *v.* SMITH

E [COMMON PLEAS DIVISION (Lopes, J.), April 4, May 30, 1879]

[Reported 4 C.P.D. 325; 48 L.J.Q.B. 731; 41 L.T. 93; 43 J.P. 801; 27 W.R. 801]

Negligence—Dangerous article—Negligence not amounting to public nuisance—Injury to plaintiff—Absence of privity between plaintiff and defendant.

F Where a party dealing with a highly dangerous article is negligent and thereby injures another, the party so injured has a right of action against the party whose negligence caused the injury, notwithstanding that there is no privity between them, there has been no misrepresentation or concealment, and the negligent act does not amount to a public nuisance.

A. was employed by M. as a housekeeper and B. was employed by M. as a G gas-fitter to repair the meter in a cellar belonging to M. on the premises where A. was employed. B. had to take the meter away for repair, and he left a temporary connection between the gas pipes. A. whose duty was to turn on and light the gas in the cellar went there to do this with a naked light, and on his opening the door in the cellar there was an immediate explosion which knocked him down and injured him. The jury found that B. was negligent in H doing his work and that the accident proceeded from B.'s negligence.

Held: a duty to exercise care arose whenever a person used or dealt with a dangerous article which was calculated to cause injury to bystanders unless managed with the greatest care, and, therefore, A. had a good cause of action against B.

Notes. Applied: *Whitby* v. *Brock* (1888), 4 T.L.R. 241. Explained: *Blacker* v. I *Lake and Elliot* (1912), 106 L.T. 533. Considered: *Bottomley* v. *Bannister*, [1931] All E.R.Rep. 99. Referred to: *Daniels* v. *Jones* (1880), De Colyar's County Court Cases, 146; *Cunnington* v. *Great Northern Rail. Co.* (1883), 49 L.T. 392; *Jackson* v. *Carshalton Gas Co.* (1888), 5 T.L.R. 69; *Clarke* v. *Army and Navy Co-operative Society* (1902), 72 L.J.K.B. 153; *Dominion Natural Gas Co.* v. *Collins*, *Same* v. *Perkins*, [1908–10] All E.R.Rep. 61; *Howard* v. *Furness Houlder Argentine, Ltd., and Brown, Ltd.*, [1936] 2 All E.R. 781; *Davis* v. *Foots*, [1939] 4 All E.R. 4; *Ball* v. *London County Council*, [1949] 1 All E.R. 1056; *Philco Radio and T.V. Corpn. of Great Britain, Ltd.* v. *J. Spurling, Ltd.*, [1949] 2 All E.R. 882.

As to negligence in relation to work involving dangerous operation, see 28 HALSBURY'S LAWS (3rd Edn.) 56 et seq.; and for cases see 34 DIGEST (Repl.) 236 et seq.

Cases referred to:

(1) *Collis* v. *Selden* (1868), L.R. 3 C.P. 495; 37 L.J.C.P. 233; 16 W.R. 1170; 29 Digest (Repl.) 12, *134*.

(2) *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; 11 L.J.Ex. 271; 6 Jur. 606; 152 E.R. 301; 34 Digest (Repl.) 196, *1377*.

Also referred to in argument:

Farrant v. *Barnes* (1862), 11 C.B.N.S. 553; 31 L.J.C.P. 137; 8 Jur.N.S. 868; 142 E.R. 912; 8 Digest (Repl.) 148, *937*.

Corby v. *Hill* (1858), 4 C.B.N.S. 556; 27 L.J.C.P. 318; 31 L.T.O.S. 181; 22 J.P. 386; 4 Jur.N.S. 512; 6 W.R. 575; 140 E.R. 1209; 36 Digest (Repl.) 67, *370*.

Gladwell v. *Steggall* (1839), 5 Bing.N.C. 733; 8 Scott, 60; 8 L.J.C.P. 361; 3 Jur. 535; 132 E.R. 1283; 33 Digest (Repl.) 530, *92*.

Martin v. *Great Indian Peninsular Rail. Co.* (1867), L.R. 3 Exch. 9; 37 L.J.Ex. 27; 17 L.T. 349; 8 Digest (Repl.) 67, *449*.

Marshall v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 34 Digest (Repl.) 239, *1759*.

George v. *Skivington* (1869), L.R. 5 Exch. 1; 39 L.J.Ex. 8; 21 L.T. 495; 18 W.R. 118; 39 Digest 441, *705*.

Winterbottom v. *Wright* (1842), 10 M. & W. 109; 11 L.J.Ex. 415; 152 E.R. 402; 34 Digest (Repl.) 237, *1744*.

Longmeid v. *Holliday* (1851), 6 Exch. 761; 20 L.J.Ex. 430; 17 L.T.O.S. 243; 155 E.R. 752; 39 Digest 458, *854*.

Southcote v. *Stanley* (1856), 1 H. & N. 247; 25 L.J.Ex. 339; 27 L.T.O.S. 173; 156 E.R. 1195; 34 Digest (Repl.) 275, *1948*.

Sullivan v. *Waters* (1864), 14 I.C.L.R. 460; 36 Digest (Repl.) 69, **366*.

Blakemore v. *Bristol and Exeter Rail. Co.* (1858), 8 E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore* v. *Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur.N.S. 657; 6 W.R. 336; 3 Digest (Repl.) 73, *122*.

Further Consideration in an action for damages for negligence tried before LOPES, J., and reserved by the judge.

Finlay and *Gore* for the plaintiff.

Waddy, Q.C., and *Oppenheim* for the defendant.

Cur. adv. vult.

May 30, 1879. **LOPES, J.**—This action was brought by the plaintiff against the defendant to recover damages under the following circumstances. The plaintiff was in the employ of Moses & Sons as one of their housekeepers; the defendant was a gas-fitter employed by Moses & Sons to repair a gas meter in a cellar belonging to Moses & Sons, on the premises where the plaintiff was employed. The defendant found it necessary to take away the meter to repair it, and replaced it by a temporary connection consisting of flexible tube, one end of which was pushed into the inlet pipe, and the other end into the pipe communicating with the house. The ends of both of the pipes were bound round with ragged string and puttied up, and a drawer was put under the curve of this tube so as to support it and take the weight off the fastening, and after the temporary connection had been so placed, the plaintiff, whose duty it was to turn on and light the gas in the cellar, went there for that purpose with a light. Directly the plaintiff opened the cellar door an explosion took place, and he was knocked down and seriously injured. There was a large body of evidence called on both sides; the plaintiff's evidence going to show that the mode of the connection was unsafe; the defendant's that it was safe. It was agreed that the damages if the plaintiff recovered should be £50. I left three questions to the jury: First, was the defendant negligent in doing his

work? Second, did the accident proceed entirely from the defendant's negligence? and, third, was the plaintiff also negligent, and was his negligence such that but for that negligence the accident would not have happened? I told the jury that if they answered both the first questions affirmatively, they need not consider the third. The jury answered these questions in the affirmative, and found a verdict for the plaintiff for £50. Counsel for the defendant, at the end of the plaintiff's evidence, had submitted that there was no case for the jury. I thought there was, and did not stop the case, but said I would reserve judgment and consider the points of law. I also consented to make any amendments which were necessary to raise the real questions between the parties. Subsequently the points of law were argued before me. Counsel for the defendant contended that there was no cause of action unless there was privity between the plaintiff and the defendant, or unless what was done by the defendant amounted to a public nuisance, or unless there had been on the part of the defendant fraud, misrepresentation, or concealment. It was contended by counsel for the plaintiff that the action would lie, because the defendant knew he was dealing with gas, a thing highly dangerous in itself, unless great care and caution was used in its management; that the plaintiff's right of action was founded not on contract, but on the duty which attaches to the use of or dealing with a thing in its nature highly dangerous, and likely to cause damage unless managed with great care and caution.

I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or is dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor need there be any misrepresentation or concealment, nor need what is done by the defendant amount to a public nuisance. It is a misfeasance independent of contract. It is strange there is no direct authority on this point. A large number of cases were cited, but none of them directly in point.

Collis v. *Selden* (1) was relied on by counsel for the defendant in argument. This was a demurrer to a declaration, and it was held that the declaration was bad, because it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action would lie. WILLES, J., in his judgment seems to have contemplated an action like the present, for he says (L.R. 3 C.P. at p. 497):

> "The declaration is not founded upon any duty of the occupier of the house to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known; but it is founded on alleged carelessness in doing an act, viz., hanging a chandelier. The chandelier is to be regarded as movable property; and the declaration should have shown either that it was a thing dangerous in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house."

Rapson v. *Cubitt* (2), cited by counsel for the plaintiff, is in point. There the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club house, including the preparation and fitting of gas fittings. He made a sub-contract with B., a gas-fitter, to execute part of the work. In the course of doing it the gas exploded, and injured the plaintiff, who was the butler of the club. It was held the defendant was not liable, on the ground that B. was not his servant, but an independent sub-contractor. It seems, however, to have been assumed that an action against B. would have been maintainable.

All the cases are distinguishable from the present case, and they are not cases where the alleged cause of action is in respect of a breach of duty in dealing with a thing in its nature dangerous, and likely to cause injury unless great care is used. There must be judgment for the plaintiff for £50 and costs.

Judgment for plaintiff.

Solicitors: *E. W. Parkes*; *Wild, Barber & Brown.*

[*Reported by* A. H. BITTLESTON, ESQ., *Barrister-at-Law.*]

IN THE GOODS OF HORSFORD

[Court of Probate (Sir James Hannen), November 10, December 2, 1874]

[Reported L.R. 3 P. & D. 211; 44 L.J.P. & M. 9; 31 L.T. 553; 23 W.R. 211]

Will—Execution—Signature—Position—Signature at top of separate sheet of paper—Signature and attestation clause on separate sheet fastened to codicil by string.

Will—Revocation—Dependent relative revocation—Intention of testator—Strips of paper pasted over parts of will and codicil—Obliteration of amounts of legacy and name of beneficiary.

The testator made a will dated April 1, 1868, on four pages of a sheet of foolscap paper and the first page of a second sheet. The attestation clause was at the foot of this page, together with the witnesses' signatures, and the testator's signature was at the top of the next page. A codicil to the will, dated July 1, 1874, was written on a sheet of foolscap, the signatures of the testator and the attesting witnesses being on a separate sheet attached to the codicil by a piece of string. Pieces of paper were pasted over certain parts of the will with writing on them indicating the names of beneficiaries. The original writing was thus obliterated. In the codicil the amount of a legacy was written on a piece of paper pasted over the original writing of the codicil, but the legatee's name was unaltered. The attesting witnesses could not remember whether the alterations had been there at the time of the execution of the will. On a motion for probate,

Held: (i) the execution of the will by the testator was valid, notwithstanding the position of his signature; (ii) according to the evidence the separate sheet attached by string to the codicil was attached at the time of attestation and the testator acknowledged his signature to the witnesses before attestation, and so the codicil also was duly executed; (iii) in the absence of evidence to the contrary the presumption was that the obliterations caused by the strips of paper pasted on the will and codicil were added after execution of the will, and probate must be granted of the will with the obliterated parts left blank; (iv) with regard to the codicil, however, where the amount of a legacy was obliterated, but the name of the legatee was left untouched, the inference was that the testator's intention was to revoke the parts of the codicil which were obliterated in the event of his having effectually substituted other bequests in their place, and, therefore, the doctrine of dependent relative revocation applied, and the court could have recourse to any means of legal proof to ascertain the original disposition, the strips of paper could be removed, and probate granted of the codicil in its unaltered condition.

Notes. Referred to: *In the Goods of Mann*, [1942] 2 All E.R. 193; *Re Itter, Redman* v. *Godfrey*, [1948] 2 All E.R. 1052.

As to requisites for the formal validity of a will, see 39 Halsbury's Laws (3rd Edn.) 875 et seq.; and for cases see 44 Digest 249 et seq. As to alterations and erasures in a will, see 39 Halsbury's Laws (3rd Edn.) 885 et seq.; and for cases see 44 Digest 305 et seq. As to dependent relative revocation, see 39 Halsbury's Laws (3rd Edn.) 899, 900; and for cases see 44 Digest 361 et seq.

Case referred to in argument:

In the goods of Puddephat (1870), L.R. 2 P. & D. 97; 39 L.J.P. & M. 84; 44 Digest (Repl.) 252, *796*.

Motion for probate of a will and codicil.

Nugent moved for probate.

Cur. adv. vult.

Dec. 2, 1874. **SIR JAMES HANNEN.**—The testator in the cause, George Fahie Horsford, deceased, made his will dated April 1, 1868. It covers four pages of a sheet of foolscap and is continued on a fifth page, being the first of a second sheet. At the bottom of that fifth page is a formal attestation clause, and the signatures of the witnesses are added below this clause. The signature of the testator appears at the top of the sixth page, preceded by these words:

> "To which will and testament I hereto annex my seal and signature—April 1, 1868."

The attesting witnesses stated that to the best of their recollection the testator showed and acknowledged to them his signature to the said will on the upper part of the sixth page of the said paper writing, and "we then signed the attestation thereof." I think that the execution of the will by the testator is valid, notwithstanding the position of his signature, by virtue of the Wills Act Amendment Act, 1852. There is also a codicil, dated July 1, 1874. The signature of the testator and attestation of the witnesses are on a separate sheet attached with string to the codicil. The memory of the attesting witnesses is not very clear as to what occurred at the time of execution, but I come to the conclusion that the separate sheet as it now appears was attached to the codicil at the time, and that the testator acknowledged his signature to the witnesses before their attestation.

A further question arises as to obliterations which appear upon the will and codicil, and of which the attesting witnesses are unable to give any account. Strips of paper have been pasted over portions of the will and the codicil, and on some of these strips words have been written by the testator by which he has sought to make bequests to several legatees. It is clear that the words so written on the strips of paper must follow the fate of ordinary alterations, and in the absence of evidence showing when they were made it must be presumed that they were added after the execution of the will. But ought I to treat the words over which the pieces of paper are pasted as effectually obliterated, and grant probate of the will with the hidden passages in blank, or ought I to endeavour to ascertain what words have been covered up, and include them in the probate?

As to the will, the answers to these questions depend on the construction to be put upon s. 21 of the Wills Act, 1837, by which it is enacted that

> "no obliteration or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, or unless such alteration shall be executed in the manner as is required for the execution of the will."

Soon after the passing of the Act Sir Herbert Jenner Fust ordered that the erasure in a will should be carefully examined in the Registry, with the help of glasses, by persons accustomed to writing, to ascertain whether it could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. Williams on Executors (6th Edn.), p. 139, note "h". But it has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were other than mere inspection by the aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think that it would be proper to adopt such means. I think that the true interpretation of the statute is indicated in Williams on Executors (6th Edn.), p. 139. The learned author thus comments on s. 21:

> "The words in this exception, 'shall not be apparent,' seem to mean apparent on an inspection of the instrument itself, and not capable of being made apparent by extrinsic evidence, and consequently it has been held that the court is not at liberty to resort to evidence aliunde—e.g., to refer to a draught copy or to the instructions for the will. It was the intention of the legislature in

this respect, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose, that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the Act of Parliament."

I think that the word "apparent" in s. 21 means apparent on the face of the instrument in the condition in which it was left by the testator, and that, if he has had recourse to extraordinary means to obliterate what he had written, the court is not bound to take any steps to undo what he had done. The statute does not draw any distinction between different modes of obliteration. The effacement of the original writing, as performed by this testator by pasting paper over it, is complete while it is left undisturbed and the original is no longer "apparent," and I can see no reason why the court should remove the paste and paper used as the instrument of obliteration rather than ink used for the same purpose. I shall, therefore, give no directions on the subject so far as the will is concerned, and, assuming that the words covered over cannot be ascertained by inspection the probate must go with these parts in blank.

But with regard to the obliterations in the codicil, the case is different. There the amount of a legacy has been obliterated, leaving the name of the legatee untouched. As to this I am in a position to infer that the testator's intention was only to revoke the parts of the codicil which are covered in the event of his having effectually substituted other bequests in their place, and thus the doctrine of dependent relative revocation becomes applicable: WILLIAMS ON EXECUTORS (6th Edn.), p. 141. As to these alterations the court is at liberty to have recourse to any means of legal proof by which to ascertain the original disposition, and among such means the removal of the strip of paper is the most obvious. I, therefore, direct that the strip of paper on which the word "ten" is written, as well as the strip on which is written the words "which will be found with my," to which the same remarks are applicable, be removed in the Registry from the codicil, and that probate be granted of that instrument in its unaltered condition.

Solicitor: *T. H. Strangways.*

A

HURDMAN *v.* NORTH EASTERN RAIL. CO.

[Court of Appeal (Bramwell, Brett and Cotton, L.JJ.), February 8, 9, 11, March 1, 1878]

B [Reported 3 C.P.D. 168; 47 L.J.Q.B. 368; 38 L.T. 339; 26 W.R. 489]

Nuisance—Adjoining premises—Percolation of water causing damage to plaintiff's premises—Erection of artificial mound on defendant's land.

An owner or occupier of land who, as a result of an artificial erection placed on his land, causes water, even though arising from natural rainfall only, to C pass on to his neighbour's land so as substantially to interfere with that neighbour's enjoyment of his land, will be liable for any damage thus caused.

The defendants, owners of property adjoining the plaintiff's house, erected a mound of earth and rubbish on their land, thus raising the surface to a level above that of the land on which was built plaintiff's house. As a result rain water falling on the defendants' land percolated through the defendants' wall D into the plaintiff's house, causing damage.

Held: the plaintiff, as occupier of land, was entitled to reasonable enjoyment of it, and the defendants, having interfered with that enjoyment, were liable to him for any damage caused.

Broder v. *Saillard* (1) (1876), 2 Ch.D. 692, applied.

E **Notes.** Considered: *Whalley* v. *Lancashire and Yorkshire Rail. Co.* (1884), 13 Q.B.D. 131; *Gill* v. *Edouin* (1894), 71 L.T. 762; *Maxey Drainage Board* v. *Great Northern Rail. Co.* (1912), 106 L.T. 429. Distinguished: *Gerrard* v. *Crowe*, [1920] All E.R.Rep. 266; *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114. Considered: *Rouse* v. *Gravelworks, Ltd.*, [1940] 1 All E.R. 26; *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349; *Maberley* v. *Peabody & Co. of London, Ltd.*, [1946] 2 All E.R. 192. F Referred to: *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *Ilford Urban District Council* v. *Beal*, [1925] All E.R.Rep. 361.

As to nuisances between neighbouring properties, see 28 Halsbury's Laws (3rd Edn.) 131 et seq.; and for cases see 36 Digest (Repl.) 282 et seq.

Cases referred to:

G (1) *Broder* v. *Saillard* (1876), 2 Ch.D. 692; 45 L.J.Ch. 414; 40 J.P. 644; 24 W.R. 1011; 36 Digest (Repl.) 288, *360*.

(2) *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; 35 L.T. 639; 42 J.P. 116, H.L.; 33 Digest (Repl.) 867, *1154*.

(3) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

H Also referred to in argument:

Baird v. *Williamson* (1863), 15 C.B.N.S. 376; 3 New Rep. 86; 33 L.J.C.P. 101; 9 L.T. 412; 12 W.R. 150; 143 E.R. 831; sub nom. *Williamson* v. *Baird*, 10 Jur.N.S. 152; 33 Digest (Repl.) 866, *1146*.

Smith v. *Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 248, *8*.

I *Crompton* v. *Lea* (1874), L.R. 19 Eq. 115; 44 L.J.Ch. 69; 31 L.T. 469; 23 W.R. 53; 33 Digest (Repl.) 866, *1147*.

Smith v. *Fletcher* (1874), L.R. 9 Exch. 64; 43 L.J.Ex. 70; 31 L.T. 190, Ex. Ch.; affirmed sum nom. *Fletcher* v. *Smith* (1877), 2 App. Cas. 781; sub nom. *Smith* v. *Musgrave*, 47 L.J.Q.B. 4; sub nom. *Musgrave* v. *Smith*, 37 L.T. 367; 42 J.P. 260; 26 W.R. 83, H.L.; 33 Digest (Repl.) 867, *1155*.

Brine v. *Great Western Rail. Co.* (1862), 2 B. & S. 402; 31 L.J.Q.B. 101; 6 L.T. 50; 26 J.P. 516; 8 Jur.N.S. 410; 10 W.R. 341; 121 E.R. 1123; 38 Digest (Repl.) 395, *589*.

Appeal from a decision of MANISTY, J., giving judgment for the plaintiff on a demurrer.

The plaintiff was the occupier of a house known as No. 16, Lodge Terrace, Sunderland. The defendants were occupiers of a close of land adjoining the plaintiff's house.

The defendants placed large quantities of soil, clay, limestone, and other refuse, close to and adjoining the plaintiff's house, and thereby raised the surface of their land above the level of the land upon which the plaintiff's house was built.

The plaintiff alleged that the rain which fell upon the soil, clay, limestone, and other refuse so placed oozed and percolated through the wall of the defendants' into the plaintiff's house which thereby became wet, damp, unwholesome, and unhealthy, and less commodious for habitation; the walls of the house were injured, and the paper and plaster upon them destroyed.

In the alternative the plaintiff alleged that the defendants so negligently and improperly placed and deposited the soil, clay, limestone, and refuse upon their land, that the rain water falling thereon oozed and percolated through and into the plaintiff's house, whereby the plaintiff's house was damaged. He also alleged that the defendants were guilty of negligence in that the wall against which they placed the soil, clay, limestone, and refuse was not sufficiently and properly constructed and built so as to prevent the water falling upon the mound from oozing and percolating through the wall and into the plaintiff's house, and that the defendants were guilty of negligence in placing the mound against a wall which was insufficient to prevent the water from oozing and percolating through it and into the plaintiff's house.

The defendants put in a statement of defence dealing with the allegations in the amended statement of claim. They also demurred to the whole claim on the ground "that the acts, matters, and things alleged to have been done by the defendants do not give rise to any right of action on the part of the plaintiff." The plaintiff joined issue. On the argument of the demurrer MANISTY, J., gave judgment for the plaintiff and against the demurrer. The defendants appealed.

Herschell, Q.C., and *Gainsford Bruce* for the defendants.
Waddy, Q.C., and *J. Edge* for the plaintiff.

Cur. adv. vult.

March 1, 1878. **COTTON, L.J.**, read the following judgment of the court.—In this case the plaintiff has brought an action for injury alleged to have been caused to his house, which abuts on a wall of the defendants, by certain acts done by the defendants on their own land. The question is raised on demurrer to the statement of claim, and the question, therefore, is whether that alleges a good cause of action. For the purposes of our decision we must assume that the plaintiff has sustained substantial damage, and we must construe the statement as alleging that the surface of the defendants' land has been raised by earth and rubbish placed thereon, and that the consequence of this is that rain water falling on the defendants' land has made its way through the defendants' wall into the house of the plaintiff, and has caused the injury complained of.

The question is whether the defendants, admitting this statement to be true, are liable to the plaintiff? We are of opinion that they are. The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against anyone who allows any filth or other noxious thing produced by him on his own land to interfere with this enjoyment. We are further of opinion that, subject to a qualification to be hereafter mentioned, if any one by an artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him

who is so injured, and this view agrees with the opinion expressed by *Broder* v. *Saillard* (1) (2 Ch.D. at p. 701):

> "If there were no authority on the question I should have felt no difficulty about it, because I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling-house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it. It is no answer to say that the defendant is only making a reasonable use of his property, because there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which still cannot be allowed to be followed in the proximity of dwelling-houses, so as to interfere with the comfort of their inhabitants. I suppose a blacksmith's trade is as necessary as most trades in this kingdom; or I might take instances of many noisy and offensive trades, some of which are absolutely necessary, and some of which, no doubt, may not only be reasonably followed, but to which it is absolutely and indispensably necessary for the welfare of mankind that some houses and some pieces of land should be devoted; therefore, I think that is not the test. If a stable is built, as this stable is, not as stables usually are, at some distance from the dwelling-houses, but next to the wall of the plaintiff's dwelling-house, in such a position that the noise would actually prevent the neighbours sleeping, and would frighten them out of their sleep, and would prevent their ordinary and comfortable enjoyment of their dwelling-house; all I can say is, that it is not a proper place to keep horses in, although the horses may be ordinarily quiet."

I have limited this statement of liability to liability for allowing things in themselves offensive to pass into a neighbour's property, or for causing by artificial means things in themselves inoffensive to pass into a neighbour's property to the prejudice of his enjoyment thereof, because there are many things which when done on a man's land (as buildings so as to interfere with the prospect, or so as to obstruct lights not ancient) are not actionable even though they interfere with a neighbour's enjoyment of his property.

But it is urged that this is at variance with the decision that if, in consequence of a mineowner on the rise working out his minerals, water comes by natural gravitation into the mines of the owner on the deep, the latter mineowner cannot maintain any action for the loss which he thereby sustained. But excavating and raising the minerals is considered the natural use of mineral land, and these decisions are referable to this principle that the owner of land holds his right to the enjoyment thereof, subject to such annoyance as is the consequence of what is called the natural user by his neighbour of his land, and that when an interference with this enjoyment by something in the nature of nuisance (as distinguished from an interruption or disturbance of an easement or right of property in ancient lights, or the support for the surface to which every owner of property is entitled) is the cause of complaint, no action can be maintained if this is the result of the natural user by a neighbour of his land. That this is the principle of these cases appears from *Wilson* v. *Waddell* (2), and from what is said by LORD CAIRNS, L.C., in *Rylands* v. *Fletcher* (3). Moreover the cases referred to have laid down that a mineowner is exempt from liability for water which in consequence of his works flows by gravitation into an adjoining mine, only if his works are carried on with skill and in the usual manner, and in the present case it is stated that the defendants have conducted this operation negligently and improperly. The decisions, therefore, as regards the rights of adjoining mineowners do not enable the defendants to discharge themselves from liability.

It was also argued that a landowner, who by operations on his own land drains the water percolating underground in the property of his neighbour, is not liable to an action by the man whose land is thus deprived of its natural moisture, and

this, it was argued, was inconsistent with a judgment for the plaintiff on a statement alleging as a cause of action an alteration in the percolation of water. It is sufficient to say that no one can maintain an action unless there is some injury to something to which the law recognises his title, and the law does not recognise any title in a landowner to water percolating through his property underground, and in no definite channel. We are of opinion that the maxim "Sic utere tuo ut alienum non lædas applies to and governs the present case, and that, as the plaintiff by his statement of claim alleges that the defendants have by artificial erections on their land caused water to flow into the plaintiff's house in a manner in which it would not, but for such erections, have done, the defendants are answerable for the injury caused thereby to the plaintiff.

Appeal allowed.

Solicitors: *Wright & Pilley*; *Williamson, Hill & Co.*, for *Richardson, Gutch & Co.*, York.

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

TARRY *v.* ASHTON

[Queen's Bench Division (Blackburn, Quain and Lush, JJ.), January 24, 1876]

[Reported 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 24 W.R. 581].

Highway—Nuisance—Nuisance on premises adjoining highway—Danger to persons using highway—Overhanging lamp in bad state of repair—Employment of contractor to repair—Negligence of contractor—Liability of occupier of premises.

The duty of the occupier of a house abutting on the highway is to repair all known defects of the house and its appurtenances, the non-repair of which may result in danger to the passers by. That duty is not discharged by the employment of a contractor to repair such defects, and if damage results from the negligence of a contractor so employed the householder is liable.

Notes. Considered: *Bower* v. *Peate* (1876), post p. 905. Applied: *Silverton* v. *Marriott* (1888), 59 L.T. 61. Considered: *Barker* v. *Herbert*, [1911–13] All E.R.Rep. 509. Distinguished: *Pritchard* v. *Peto*, [1917] 2 K.B. 173; *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 1 K.B. 539; *Ilford Urban District Council* v. *Beal*, [1925] All E.R.Rep. 361; *Noble* v. *Harrison*, [1926] All E.R.Rep. 284. Considered: *Reigate Corpn.* v. *Surrey County Council*, [1928] All E.R.Rep. 592; *Wringe* v. *Cohen*, [1939] 4 All E.R. 241. Referred to: *Dalton* v. *Angus & Co.*, [1881–5] All E.R.Rep. 1; *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Hardaker* v. *Idle District Council*, [1895–9] All E.R.Rep. 311; *A.-G.* v. *Roe*, [1914–15] All E.R.Rep. 1190; *Cole* v. *De Trafford*, [1918–19] All E.R.Rep. 290; *Cunard* v. *Antifyre, Ltd.*, [1932] All E.R.Rep. 558; *Honeywill and Stein, Ltd.* v. *Larkin Brothers (London's Commercial Photographers), Ltd.*, [1933] All E.R.Rep. 77; *Stennett* v. *Hancock and Peters*, [1939] 2 All E.R. 578; *Cushing* v. *Walker and Son (Warrington and Burton), Ltd.*, [1941] 2 All E.R. 693; *Mint* v. *Good*, [1950] 2 All E.R. 1159; *Cassidy* v. *Minister of Health*, [1951] 1 All E.R. 574; *Balfour* v. *Barty-King*, [1956] 2 All E.R. 555; *Walsh* v. *Holst & Co., Ltd.*, [1958] 3 All E.R. 33.

As to nuisances on the highway by use of adjoining land, see 19 Halsbury's Laws (3rd Edn.) 276 et seq.; and for cases see 26 Digest (Repl.) 495.

A Case referred to:

(1) *R.* v. *Watts* (1703), 1 Salk. 357; 91 E.R. 311; sub nom. *R.* v. *Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, *1791.*

Also referred to in argument:

Quarman v. *Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest (Repl.) 20, *31.*

B *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34 Digest (Repl.) 203, *1425.*

Hole v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest (Repl.) 202, *1424.*

R. v. *Stephens* (1866), L.R. 1 Q.B. 702; 7 B. & S. 710; 35 L.J.Q.B. 251; 14 L.T. 593; 30 J.P. 822; 12 Jur.N.S. 961; 14 W.R. 859; 10 Cox, C.C. 340; 44 Digest

C 128, *1043.*

Barnes v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100.*

Rylands v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334.*

D *Hadley* v. *Taylor* (1865), L.R. 1 C.P. 53; 13 L.T. 368; 11 Jur.N.S. 979; 14 W.R. 59; 7 Digest (Repl.) 290, *152.*

Nichols v. *Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421.*

Francis v. *Cockerell* (1870), L.R. 5 Q.B. 184; 39 L.J.Q.B. 113; 22 L.T. 203; 18 W.R. 668; affirmed, L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291;

E 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest (Repl.) 208, *1460.*

Searle v. *Laverick* (1874), L.R. 9 Q.B. 122; 43 L.J.Q.B. 43; 30 L.T. 89; 38 J.P. 278; 22 W.R. 367; 3 Digest (Repl.) 77, *152.*

Rule Nisi obtained by the defendant for an order of nonsuit in an action in which the plaintiff claimed damages for injuries caused by the defendant's gas lamp

F falling on her.

The plaintiff was a barmaid residing in Dulwich, and the defendant a licensed victualler who kept the Hampshire Hog Inn in the Strand. The plaintiff was walking along the Strand at about 3.30 p.m. on Nov. 15, 1874. When opposite the defendant's house, one of the gas lamps hanging from the house over the pavement about 15 ft. fell and injured her in its fall. At the time of the accident the gas

G was out of order and the defendant had engaged a gas-fitter named Weaver to put it to rights. The gas-fitter had placed a ladder against the bracket of the lamp, and was just mounting the ladder for the purpose of reaching the lamp and blowing the water out of the gas pipes, when the bracket gave way from the weight of the ladder, and the lamp at once fell. In the preceding August the defendant had contracted with a gas-fitter named Chappell for the repair of all his lamps,

H including the one in question. Chappell had done certain repairs, for which the defendant had paid him.

In answer to questions put by the learned judge, the jury found (i) that there was no negligence on the part of the defendant; (ii) that there was no negligence on the part of Weaver; that there was negligence on the part of Chappell; (iii) that the immediate cause of the fall of the lamp was the fall of the ladder, and that

I the lamp was out of order through general decay, but not to the knowledge of the defendant. They assessed the damages at £40. The learned judge then directed a verdict to be entered for the plaintiff to that amount, reserving leave to move on behalf of the defendant. Accordingly a rule was obtained to set aside the above verdict and enter a verdict for the defendant or a nonsuit, on the ground that upon the ruling of the learned judge and the findings of the jury, he ought to have directed a nonsuit or a verdict for the defendant.

Collins and *Poulter* for the plaintiff showed cause.

McIntyre, Q.C., and *Darling* for the defendant, supported the rule.

BLACKBURN, J.—When we get at the exact facts of this case, to which I desire to confine myself, I have no doubt as to the law. The defendant occupied a building which abutted on the highway, and a lamp projected from that building over the highway. If the lamp had been always kept in a proper state, it would would have been harmless to the passers by, but by being in an improper state, it became dangerous. There is no doubt that knowingly to maintain such a thing in an improper state would be a nuisance to the highway. Thus much was decided in *R.* v. *Watson* (1). I do not decide how far the occupier would be liable in a case where the danger to the public arose from a latent defect in his house or the appurtenances of it. Take the case, for instance, of a wrongdoer digging out coals, and making the house unsafe by undermining it; in that case I by no means say that the householder would be liable in any event. But I do say that the householder would be responsible as soon as he knew of such a defect. I will go further, and say that a householder having that on his premises which is liable to fall into decay, and which he knows will ultimately fall into decay, has a duty cast upon him to investigate and repair. Whether he would be liable if the defect were latent, and he consequently failed to discover it, is a point of considerable doubt, which, as I said before, I do not decide. It is enough for the present case to say that if the defect be discovered, the householder is bound to repair. In August the plaintiff appears to have become aware, applying his common sense to the matter, that these lamps were going out of repair. Acting very properly, he proceeded to have them mended, and employed a contractor—for Chappell was not a servant—to do the work for him. It does not appear that he was careless in his selection of Chappell as contractor, but that does not affect the question. It comes to this : The defendant having a lamp, and it being his duty to investigate the state of it, employs Chappell to do that duty for him. Because Chappell failed in his duty to the defendant, the defendant's duty to investigate is not therefore discharged. Consequently the defendant is liable, and this rule must be discharged.

LUSH, J.—I am of the same opinion. The question is what is the duty of a person in the position of the defendant? Is it his duty to maintain his premises in good repair, or only to employ a competent person in the work of maintaining them? I think the mere statement of the case suggests its answer. A person who keeps a lamp of this kind puts the public in peril. He cannot get rid of his duty to put the public out of peril by employing another person to take the necessary steps for doing so.

QUAIN, J.—I am of the same opinion. The question is what was the duty of the defendant? He chooses to hang out a lamp from his house over the public street. I think that *R.* v. *Watson* (1) shows that it was his duty to repair the lamp and keep it in repair. It is plain that one of the public has received injury from the lamp being out of repair. This being so, can the defendant shift the responsibility from himself by showing that he had employed a contractor to do the repairs? I think not. None of the cases which have been cited bear out such a proposition. For these reasons I agree with the rest of the court that this rule ought to be discharged.

Rule discharged.

Solicitors : *L. W. Gregory*; *E. Froggart.*

BOX *v.* JUBB AND ANOTHER

[Exchequer Division (Kelly, C.B., and Pollock, B.), February 25, 1879]

[Reported 4 Ex.D. 76; 48 L.J.Q.B. 417; 41 L.T. 97; 27 W.R. 415]

Nuisance—Adjoining premises—Flooding—Water stored in reservoir—Overflow arising from circumstances beyond occupier's control—Liability for damage to adjoining premises.

Water—Flooding—Water stored in reservoir—Overflow on to adjoining premises caused by circumstances beyond occupier's control—Liability for damage to adjoining premises.

The defendants, mill owners, had a reservoir to supply water to their mill. This reservoir obtained water from a main drain or watercourse which the defendants had a right to use, but which did not belong to them and over which they had no control. The surplus water from the reservoir passed into the main drain or watercourse. The inlet and outlet to and from the drain and reservoir were furnished with doors or sluices for closing the communication between them when required, and these were found to be constructed and maintained in a proper manner so as to prevent the overflowing of the reservoir under all ordinary circumstances. The plaintiff's adjoining premises were flooded by the overflowing of the defendant's reservoir caused by the emptying of a large quantity of water from a reservoir belonging to a third party into the watercourse at a point above the defendants' premises and by an obstruction in the watercourse below the premises whereby the water from the watercourse was forced through the doors or sluices, which were shut at the time, into the defendants' reservoir. The obstruction was caused by circumstances beyond the defendants' control and without their knowledge. In an action for damages brought by the plaintiff,

Held: the overflow was caused by the act of a stranger, done without the knowledge of the defendants and over which they had no control, coupled with an obstruction in the watercourse which was also unknown to them and also beyond their control, and the defendants were, therefore, not liable.

Rylands v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, distinguished.

Nichols v. *Marsland* (2) (1876), 2 Ex.D. 1, applied.

Notes. Considered: *Rickards* v. *Lothian*, [1911–13] All E.R. Rep. 71; *A.-G.* v. *Cory*, *Kennard* v. *Cory* (1919), 88 L.J.Ch. 410. Applied: *Smith* v. *Great Western Rail. Co.*, [1926] All E.R.Rep. 242. Referred to: *Northwestern Utilities, Ltd.* v. *London Guarantee and Accident Co.*, [1936] A.C. 108; *Shiffman* v. *Venerable Order of the Hospital of St. John of Jerusalem*, [1936] 1 All E.R. 557; *Hale* v. *Jennings Brothers*, [1938] 1 All E.R. 579.

As to dangerous user of property, see 28 Halsbury's Laws (3rd Edn.) 145 et seq.; and for cases see 36 Digest (Repl.) 282 et seq.

Cases referred to:

(1) *Fletcher* v. *Rylands* (1865), 3 H. & C. 774; 34 L.J.Ex. 177; 13 L.T. 121; 13 W.R. 992; reversed (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 12 Jur.N.S. 603; 14 W.R. 799, Ex. Ch.; affirmed sub nom. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Nichols* v. *Marsland* (1875), L.R. 10 Exch. 255; 44 L.J.Ex. 134; 33 L.T. 265; 23 W.R. 693; affirmed (1876), 2 Ex.D. 1; 46 L.J.Q.B. 174; 35 L.T. 725; 41 J.P. 500; 25 W.R. 173, C.A.; 36 Digest (Repl.) 297, *421*.

(3) *Nugent* v. *Smith* (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697; 34 L.T. 827; 41 J.P. 4; 25 W.R. 117; 3 Asp.M.L.C. 198, C.A.; 2 Digest (Repl.) 365, *457*.

Also referred in argument:

Humphries v. *Cousins* (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; 25 W.R. 371; on appeal, 46 L.J.Q.B. at p. 442, C.A.; 36 Digest (Repl.) 288, *361.*

Carstairs v. *Taylor* (1871), L.R. 6 Exch. 217; 40 L.J.Ex. 129; 19 W.R. 723; 36 Digest (Repl.) 284, *337.*

Ross v. *Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 293, *393.*

Fletcher v. *Smith* (1877), 2 App. Cas. 781; sub nom. *Smith* v. *Musgrave*, 47 L.J.Q.B. 4; sub nom. *Musgrave* v. *Smith*, 37 L.T. 367; 42 J.P. 260; 26 W.R. 83, H.L.; 33 Digest (Repl.) 867, *1155.*

Bell v. *Twentyman* (1841), 1 Q.B. 766; 1 Gal. & Dav. 223; 10 L.J.Q.B. 278; 6 Jur. 366; 113 E.R. 1324; 36 Digest (Repl.) 320, *659.*

Case Stated in an action brought by the plaintiff, and tried by consent in the Yorkshire County Court held at Bradford, in which he sought to recover damages from the defendants in respect of the overflowing of his premises by a reservoir belonging to the defendants. The learned County Court judge gave judgment in favour of the plaintiff, and the defendants being desirous of appealing from his decision, a Special Case was stated.

The defendants were the owners and occupiers of a woollen cloth mill, situate at Batley, in Yorkshire, and for the necessary supply of water to their mill they owned a reservoir. The mill and reservoir had been constructed and used for many years. The plaintiff was the tenant of premises adjoining the reservoir, which was supplied with water from a main drain or watercourse, such supply of water entering the reservoir by a certain inlet. The surplus water from the reservoir passed through an outlet into the main drain or watercourse. The inlet and outlet were furnished with proper doors or sluices, so as to close the communication between the reservoirs and the main drain or watercourse when necessary.

The whole of the premises were within the borough of Batley, and the defendants had the right to use the main drain or watercourse by obtaining a supply of water therefrom and discharging their surplus water into it, but they had otherwise no control over the drain or watercourse, which did not belong to them.

In December, 1877, the plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir. Such overflowing was caused by the emptying of a large quantity of water from a reservoir, the property of a third party, into the main drain or watercourse at a point considerably above the defendants' premises, and to an obstruction in the main drain or watercourse below the defendants' premises, whereby the water from the main drain was forced through the doors or sluices (which were closed at the time) into the defendants' reservoir. The obstruction was caused by circumstances over which the defendants had no control, and without the knowledge of the defendants, and had it not been for such obstruction, the overflowing of their reservoir would not have happened. It was not disputed that the defendants' reservoir and the communication between it and the main drain or watercourse, and the doors or sluices, were constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances, and no negligence or wrongful act was attributable to either party.

The damages sustained by the plaintiff were agreed at £75. The county court judge was of opinion that under the circumstances the defendants were liable for the damage sustained by the plaintiff, and gave judgment accordingly in his favour against the defendants. The question for the opinion of the court, having regard to the facts set forth in the Case, was whether the defendants were liable for the damage sustained by the plaintiff by reason of the flooding of his premises, such flooding having been caused by water from a reservoir belonging to a third party, over which the defendants had no control, and without any knowledge or negligence on their part; and the overflowing having been occasioned by the act of a third

A party over whom the defendants had no control, and no wrongful act or negligence being attributable to the defendants, the direct cause of the damage being the obstruction in the main drain or watercourse, which was caused by circumstances over which the defendants had no control, and without their knowledge.

Gully, Q.C., Geo. C. Thompson and *R. O. B. Lane* for the defendants.

B *Bray* for the plaintiff.

KELLY, C.B.—This case has been ably argued on behalf of the plaintiff, but in reality the case is not arguable. The plaintiff is in use possession and occupation of premises which adjoin a reservoir belonging to the defendants, who are mill-owners and have a reservoir for the purpose of supplying water to their mill. C This reservoir is supplied with water by means of a main drain or watercourse, and the surplus water from the reservoir passes out into that same watercourse. The inlet and outlet to and from the drain and reservoir are furnished with doors or sluices for closing the communications between them when required. The defendants have been in possession of the reservoir, with its communications, and the doors or sluices thereto, and the water has flowed in the same way for many D years. The Case states that the reservoir and the communications and the doors or sluices are "constructed and maintained in a proper manner so as to prevent the overflowing of the reservoir under all ordinary circumstances." The Case states also that, although the defendants have the right to use the watercourse by obtaining water therefrom and discharging their surplus water thereinto, they have otherwise no control whatever over the watercourse.

E Such being the condition of things, the plaintiff's premises were flooded in December, 1877, by the overflow of the defendants' reservoir, and the plaintiff suffered damage to the amount of £75, for which sum he brings the present action. The question is, What was the cause of the overflow? Was it something for which the defendants are responsible; that is to say, was it an act or default of their own, or was it something for which they are not responsible? We find that F it is stated in the Case that no negligence or wrongful act is attributable to either party; and from this statement, as well as from other portions of the Case, it is clear that the overflow was not caused by any act or default of the defendants for which they are directly responsible. On the other hand, it is also stated that the overflowing was caused by the emptying of a large quantity of water from a reservoir belonging to a third party into the watercourse at a point considerably above the G defendants' premises, and by an obstruction in the watercourse below the defendants' premises, whereby the water from the watercourse was forced, through the doors or sluices already mentioned, which were closed at the time, into the defendants' reservoir. The Case properly states that "the obstruction was caused by circumstances over which the defendants had no control and without their knowledge, and had it not been for such obstruction the overflowing of the reservoirs H would not have happened."

It appears, therefore, that the overflow was occasioned by an act of a stranger, done without the knowledge of the defendants, over which they had no control, and at a place over which they had no control, coupled with an obstruction equally unknown to them and equally beyond their control; and consequently that the overflow was occasioned by what was entirely beyond their control.

I It is contended, however, on the part of the plaintiff, that the defendants were bound to render their reservoir secure against being caused to overflow by the pressure to which it was thus subjected. The question then is whether they were thus bound. I am of opinion that they were not; they could not be expected to anticipate that which did, in fact, occur. I need not refer to the authorities which have been cited. It is right for me to say that no case has ever decided that which we have been invited by counsel for the plaintiff in the present instance, to hold. Under these circumstances and for these reasons I am clearly of opinion that the defendants are entitled to our judgment.

POLLOCK, B.—I am also clearly of the same opinion. But I am far from saying that the Case was not, in my judgment, worthy of great consideration. From certain paragraphs in the Special Case it appears that the overflowing of the defendants' reservoir was caused by the discharge of a large quantity of water from a reservoir belonging to a third party, and by an obstruction in the watercourse; that the defendants had no control over the watercourse; that the obstruction was caused by circumstances over which they had no control and without their knowledge; and that their reservoir and its communications and sluices were constructed and maintained in a proper manner for all ordinary circumstances.

Apart from the decisions, what wrong can be charged against the defendants? They have an ordinary mill dam, well built, and it overflows under such circumstances as have been mentioned. What right of action can that give? As to the decisions, *Rylands* v. *Fletcher* (1) if read carefully, and applied logically, does not by any means bear out the contention of the present plaintiff. The House of Lords there concurred in the judgment of the Court of Exchequer Chamber, delivered by BLACKBURN, J.; and both LORD CAIRNS and LORD CRANWORTH, by adopting that judgment, and by their own expressions, relied upon the fact that the defendants in that case had collected the water. The decision in *Rylands* v. *Fletcher* (1) does not say, nor did anyone, who had judicially to consider that case, say that a millowner, having an ordinary mill dam well built, is liable for damage done by water which he did not collect, but which got into his mill dam by the act of a stranger.

Nichols v. *Marsland* (2), where the judgment was for the defendant, is more nearly in point. In that case the cause of the overflow was considered to be vis major. But the principles of that case apply to the present case. The Court of Exchequer, in their judgment, delivered by BRAMWELL, B., did not rest their decision upon the ground simply of vis major; they rested their judgment upon the broader ground that the cause of the overflow was "the act of an agent whom the defendant could not control," treating indeed the case of a human agent as still clearer than the case of a natural agent. What the court meant by impossibility of control is shown at the commencement of their judgment, where BRAMWELL, B., said (L.R. 10 Exch. at pp. 258, 259):

> "I understand the jury to have found . . . that the storm was of such violence as to be properly called the act of God, or vis major. . . . No doubt, not the act of God, or vis major, in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong or, if that would not do, ten times as strong and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community."

The Court of Appeal in effect rested their decision on similar principles. In delivering their judgment, MELLISH, L.J., said (2 Ex.D. at p. 5):

> "The wrongful act is, not in making or keeping a reservoir but, in allowing or causing the water to escape . . . a defendant cannot, in our opinion, be properly said to have caused or allowed water to escape, if the act of God or the Queen's enemies was the real cause of its escaping without any fault on the part of the defendant."

And upon the question whether the defendant made out that the escape of the water was owing to the act of God, the Court of Appeal, after saying,

> "The jury have distinctly found not only that there was no negligence in the construction or the maintenance of the reservoir, but that the flood was so great that it could not reasonably have been anticipated. although if it had been anticipated the effect might have been prevented,"

proceeded to say "this seems to us in substance a finding that the escape of the water was owing to the act of God;" and they further said (ibid. at p. 6):

> "In the late case of *Nugent* v. *Smith* (3) we held that a carrier might be protected from liability for a loss occasioned by the act of God if the loss by no reasonable precaution could have been prevented, although it was not absolutely impossible to have prevented it."

It appears to me, upon the authority of *Nichols* v. *Marsland* (2), as well as upon principle, that the defendants, as they could not by any reasonable precaution have anticipated and guarded against this overflowing of the reservoir, are not liable.

Reverting for a moment to *Rylands* v. *Fletcher* (1), and to its bearing generally upon the present case, it seems to me that that case is clearly distinguishable from the present one. In *Rylands* v. *Fletcher* (1) the cause of the mischief was the wrongful act of the defendants in making a reservoir under such circumstances that the collection of the water itself caused the flooding of the plaintiff's mine; whereas, in the present case, the water collected by the defendants was harmless; the water which overflowed, or which caused the overflow, was not collected by the defendants, but was added, or added itself, and not by the defendants, or by their means, to the water collected by the defendants.

Judgment for defendants.

Solicitors: *Torr, Janeway, Tagart & Gribble*, for *T. S. Wooler*, Batley; *Layton & Jacques*, for *Scholefield & Taylor*, Batley.

[*Reported by* H. LEIGH, ESQ., *Barrister-at-Law.*]

R. *v.* MILLEDGE AND OTHERS

[QUEEN'S BENCH DIVISION (Cockburn, C.J., Mellor and Lush, L.JJ.), May 15, 1879]

[Reported 4 Q.B.D. 332; 48 L.J.M.C. 139; 40 L.T. 748; 43 J.P. 606; 27 W.R. 659]

Magistrates—Bias—Subject-matter of dispute—Summons for nuisance—Members of urban sanitary authority sitting as justices.

A representation that the appellants had committed a nuisance having been made to a local board of health, the board communicated with the urban sanitary authority requiring them to abate the nuisance. The town council, as the sanitary authority, having passed a resolution that inquiry should be made into the alleged nuisance and a report made to them, took out a summons against the appellants on receipt of the report. When the summons was heard, three members of the council sat as justices. The appellants were convicted. On an application that a rule for a writ of certiorari to quash the conviction should be made absolute,

Held: the three justices being disqualified by their interest in the matter from sitting at the hearing, the conviction was bad, and the rule must be made absolute.

Notes. The Public Health Act, 1875, s. 258, has been repealed by the Public Health Act, 1936, except in so far as it is material for the purposes of any of the unrepealed provisions of the Act or of any Act directed to be construed with it.

The section has been amended by the Justices of the Peace Act, 1949, by the repeal of the words "by reason of his being a member of any local authority."

Applied: *R.* v. *Gibbon* (1880), 6 Q.B.D. 168. Distinguished: *R.* v. *Deal* (*Mayor and Justices*), *Ex parte Curling* (1881), 45 L.T. 439. Considered: *R.* v. *Handsley* (1881), 8 Q.B.D. 383; *R.* v. *Powell* (1884), 48 J.P. 740. Applied: *R.* v. *Gainsford*, [1892] 1 Q.B. 381. Considered: *R.* v. *Pwllheli Justices*, *Ex parte Soane*, [1948] 2 All E.R. 815. Referred to: *R.* v. *Lee* (1882), 30 W.R. 750; *R.* v. *Salford Assessment Committee*, [1937] 2 All E.R. 98.

As to disqualification for acting as justice, see 25 HALSBURY'S LAWS (3rd Edn.) 131 et seq.; and for cases see 33 DIGEST (Repl.) 150 et seq. For the Public Health Act, 1875, s. 258, see 19 HALSBURY'S STATUTES (2nd Edn.) 94.

Rule Nisi calling on justices for the borough of Weymouth to show cause why a writ of certiorari should not issue to bring up for the purpose of quashing it a conviction made by them sitting in petty sessions.

An alleged nuisance had been committed by the appellants with reference to certain timber pounds, and a representation with respect to this nuisance was made to the Local Government Board, and they in turn communicated with the local urban sanitary authority of Weymouth requiring them to abate the nuisance. A meeting of the town council as the local urban sanitary authority of the borough was convened, and they passed a resolution that an inquiry should be made into the alleged nuisance, and a report made to them. On the receipt of that report they took out a summons against the appellants. Three members of the town council were justices, and sat on the bench when the summons was heard.

By the Public Health Act, 1875, s. 258:

> "No justice of the peace shall be deemed incapable of acting in cases arising under this Act by reason of his being a member of any local authority, or by reason of his being as one of several ratepayers or as one of any other class of persons liable in common with the others to contribute to or be benefited by any rate or fund, out of which any expenses incurred by such authority are under this Act to be defrayed."

Pitt Lewis showed cause.
Channell in support of the rule.

COCKBURN, C.J.—In this case it appears that three of the magistrates, who adjudicated on the summons issued against the appellants and convicted them, were members of the town council of Weymouth, and, in virtue of that office, members of the local sanitary authority for that borough, and so parties to the resolution to prosecute the appellants. They, therefore, assumed the double role of prosecutors and judges in their own cause. Counsel showing cause urged on us that these gentlemen could not help prosecuting, but the answer to that plea is that they were not obliged to sit at the hearing of the case, and that there were plenty of magistrates whose services were available for the trial of the case without having recourse to those who had participated in bringing about the matter on which they were called on to pass their judgment. If the three gentlemen had not sat or taken any part in the hearing, it would have been otherwise. In that case, the provisions of the Public Health Act, 1875, would apply. That enactment certainly does not warrant a person sitting as a judge in a cause in which he is a prosecutor. Although it may be that a man sitting as judge in a prosecution which he has ordered and arranged may not consciously feel prejudiced, but may even bring his mind unprejudiced and unbiased, to consider the case impartially, yet the public inconvenience, questionable policy, and unseemliness of a prosecutor sitting as a judge in his own cause, and its opposedness to all our received notions of right and wrong, and of justice and injustice, make us hold that this conviction should be quashed. The gentlemen in question need not have sat on the Bench, or the urban sanitary authority might have allowed a private prosecution to have

issued, but the latter did not so think fit, and the former did not refrain from sitting. Therefore, for the reasons which I have adduced, I think this conviction bad, and the rule for a certiorari must be made absolute.

MELLOR and **LUSH, JJ.**, concurred.

Rule absolute.

Solicitors: *Combe & Wainwright*; *F. J. & G. F. Braikenridge.*

[*Reported by* A. H. POYSER, ESQ., *Barrister-at-Law.*]

CREEN *v.* WRIGHT

[COMMON PLEAS DIVISION (Lord Coleridge, C.J., Archibald and Lindley, JJ.), May 3, 10, 1876]

[Reported 1 C.P.D. 591; 35 L.T. 339; 3 Asp.M.L.C. 254]

Master and Servant—Contract of service—Termination—No provision in contract as to notice—Requirement of reasonable notice—Master of ship.

Ship—Master—Contract of service—Termination—No provision in contract of service as to notice—Requirement of reasonable notice.

In the absence of any express stipulation in the contract of service, the master of a ship is entitled to reasonable notice of dismissal from the shipowner.

Notes. The Contracts of Employment Act, 1963, requires a minimum period of notice to terminate employment and requires employers to give written particulars of terms of employment. Certain categories of employees, however, are or may be, excluded from all or some of the main provisions of the Act; see in particular s. 6 (2) of the Act (43 HALSBURY'S STATUTES (2nd Edn.) 282).

Considered: *Savage* v. *British India Steam Navigation Co.*, *Power* v. *Same* (1930), 46 T.L.R. 294. Referred to: *De Stempel* v. *Dunkels*, [1938] 1 All E.R. 238; *Vernon* v. *Findlay*, [1938] 4 All E.R. 311.

As to termination by notice of contract of hiring and employment, see 25 HALSBURY'S LAWS (3rd Edn.) 489; and for cases see 34 DIGEST (Repl.) 71 et seq. As to contract of service between shipowner and master, see 35 HALSBURY'S LAWS (3rd Edn.) 130; and for cases see 41 DIGEST 215 et seq.

Cases referred to:

(1) *Fairman* v. *Oakford* (1860), 5 H. & N. 635; 29 L.J.Ex. 459; 157 E.R. 1334; 34 Digest (Repl.) 62, *350*.

(2) *Hiscox* v. *Batchellor* (1867), 15 L.T. 543, N.P.; 34 Digest (Repl.) 73, *442*.

Also referred to in argument:

Foxall v. *International Land Credit Co.* (1867), 16 L.T. 637, N.P.; 34 Digest (Repl.) 60, *331*.

Appeal by the plaintiff in an action for wrongful dismissal of the plaintiff, master of a ship, against the defendant shipowner, tried before LUSH, J., at the Liverpool Assizes, and on judgment being directed to be entered for the defendant, a rule nisi was obtained for a new trial on the ground of the judge's misdirection in ruling that the plaintiff having agreed to the terms of engagement the engagement could be dismissed without notice.

The plaintiff had entered into an agreement with the defendant to act in his service as captain of the ship *City Camp*, at a salary of £180 a year; the wages to begin when the plaintiff joined the ship. The question was whether either

party could determine the agreement without notice, and the relevant clause in the agreement was as follows:

"Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners to have the option of paying or not paying his expenses travelling home."

The defendant dismissed the plaintiff without notice after the ship was partly loaded for an outward voyage.

T. H. James for the defendant.
Herschell, Q.C., and *M'Connell* for the plaintiff.

Cur. adv. vult.

May 10, 1876. **LORD COLERIDGE, C.J.,** read the following judgment of the court.—This was an action tried before LUSH, J., at Liverpool, in December, 1875, in which he directed a verdict to be entered for the defendant, and we have to determine whether that direction was correct.

The plaintiff had been the master of the ship *City Camp*, under a written contract dated Mar. 28, 1875, from that day until Aug. 10, 1875, when he was dismissed, not for misconduct, but without notice, the defendant contending that by the terms of the contract between the plaintiff and himself, the plaintiff was not entitled to any notice before dismissal. Other points arose in the case, but were not discussed before us. The action was brought for a dismissal, wrongful in being without notice, and the sole question argued was whether, under the contract, the plaintiff was entitled to notice before dismissal, and on this single point LUSH, J., directed the verdict for the defendant.

The contract, so far as material, was as follows:

"I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at and after the rate of £180 sterling per annum. . . . Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home. Wages to begin when captain joins the ship. Francis Creen, master *City Camp*."

It was contended for the plaintiff that under this contract he was entitled to a reasonable notice before dismissal, at any rate if dismissed in this country; and LUSH, J., held that he was not; but upon consideration we are of opinion that he was.

The relation of the master of a ship to his employer, the shipowner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making, the hiring a hiring for a year, or for any other definite time, nor the notice by which the service is to be determined certain. As to the hiring we adopt the language of POLLOCK, C.B., in delivering the judgment of the court in *Fairman* v. *Oakford* (1) (5 H. & N. at p. 636):

"There is no inflexible rule that an indefinite hiring is a hiring for a year. Each particular case must depend upon its own circumstances."

As to the notice we think the sound construction of the contract before us is that, except in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the shipowner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be, inflicted on the shipowner, without any remedy by such a construction of the contract, if acted on by the master, lead us to believe that such is not and could not be the meaning of the contract, nor the intention of the parties to it. The loss and inconvenience to the master following upon the construction contended for, though not positively

so great, may be relatively very great indeed; and this consideration points to the same conclusion.

The provision that the master's wages shall cease instantly upon dismissal abroad may well have been intended to prevent any question as to the shipowner being liable to the whole expense of bringing the master back to the United Kingdom; and does not appear to us to permit an argument for construing the contract so as to enable either party to put an end to it at any time without notice of any kind. Indeed, upon the construction of the contract contended for by the plaintiff, and if no notice before putting an end to it was required at any time on the part of either master or shipowner, it is not easy to assign a reason for the insertion of this particular provision into the contract. Nor was any satisfactory reason offered to us why the rule, Expressio unius est exclusio alterius, should not apply to it. We think, therefore, that under his contract, as the master could not, except under very unusual circumstances, be dismissed during the continuance of a voyage, and while the vessel was at sea, so he was entitled to some notice, and that is to reasonable notice, before dismissal in this country.

There is some authority for saying that as a proposition of general law reasonable notice is to be implied as a term of such a contract of hiring as this. SIR JOHN BYLES so laid down the law at nisi prius, in *Hiscox* v. *Batchellor* (2), and *Fairman* v. *Oakford* (1), already referred to, seems, if the facts of it be carefully considered, to be an authority to the same effect. For in the absence of stipulation for any notice, a month's notice was held reasonable to determine an indefinite hiring of a clerk, on the ground that the same clerk had accepted such a notice as sufficient to determine a former indefinite hiring, also without stipulation for notice of any kind. It is nowhere suggested that the absence of stipulation made no notice necessary in either of the hirings, which would have been a short and simple ground, if a sound one, for upholding the verdict in that case. But without intending to throw any doubt whatever upon these cases, we decide the one before us upon its own circumstances, and upon considerations especially applicable to the contract on which the dispute arose. And we think that the order must be absolute for a new trial.

Appeal allowed.

Solicitors: *Evans & Lockett*, Liverpool; *Gregory, Rowcliffes & Co.*, for *Hull, Stone & Fletcher*, Liverpool.

[*Reported by* P. B. HUTCHINS, ESQ., *Barrister-at-Law.*]

A

WARDEN *v.* TYE

[Common Pleas Division (Lord Coleridge, C.J., and Grove, J.), January 18, 1877]

[Reported 2 C.P.D. 74; 46 L.J.M.C. 111; 35 L.T. 852; 41 J.P. 120]

B

Licensing—Offence—Permitting drunkenness—Licensed person drunk on his own premises—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 13.

A licensed person cannot be convicted of permitting drunkenness on his premises under s. 13 of Licensing Act, 1872, by reason of himself being drunk on the premises.

C

Notes. The Licensing Act, 1872, s. 13, has been replaced by the Licensing Act, 1953, s. 136, itself replaced as from Jan. 1, 1965, by the Licensing Act, 1964, s. 172.

Considered: *Thompson* v. *McKenzie*, [1908–10] All E.R.Rep. 720; *Young* v. *Gentle*, [1914–15] All E.R.Rep. 1200. Applied: *Mattison* v. *Johnson* (1916), 85 L.J.K.B. 741. Referred to: *Blay* v. *Dadswell*, [1922] 1 K.B. 632.

As to drunkenness on licensed premises, see 22 Halsbury's Laws (3rd Edn.) 680 et seq.; and for cases see 30 Digest (Repl.) 94 et seq. For the Licensing Act, 1953, s. 136, see 33 Halsbury's Statutes (2nd Edn.) 266.

D

Case Stated by justices of Northamptonshire.

The appellant, a licensed innkeeper, was summarily convicted under s. 13 of the Licensing Act, 1872, of permitting drunkenness to take place on his licensed premises. The facts showed that he was found drunk by the respondent, a policeman, on his own licensed premises. He was fined £5 and costs, and the conviction was ordered to be endorsed on the licence.

E

Poland for the appellant.

LORD COLERIDGE, C.J.—I come to the conclusion that the case does not fall within s. 13 of the Licensing Act, 1872, under which the conviction has been made, and that it cannot be sustained. That Act is divided into heads, one of which, entitled "Offences against public order," consists of several sections, numbered 12 to 18 respectively, all except the first regulating the duty of licensed persons in relation to others. Except s. 12, every one of them is clear in this respect, and s. 13 in particular says that

F

> "If any licensed person permits drunkenness . . . on his premises, or sells any intoxicating liquor . . . he shall be liable to"

G

conviction. He cannot sell to himself in his own house. Part of the section, therefore, cannot apply to the licensed person, and, using a fair construction of the whole of the Act, I think that the rest of the section cannot. I come to the conclusion, therefore, reluctantly but clearly, that the words of s. 13 do not include the publican himself.

H

GROVE, J.—I am of the same opinion. Section 13 of the Licensing Act, 1872, clearly points to the conduct of the landlord with relation to others, but it does not relate to a licensed person himself getting drunk. There is another provision made for that case, s. 12, under which any person found drunk is liable to punishment. However much we may regret it, we cannot uphold this conviction. The court has only to construe an Act as it finds it, and, in my opinion, s. 13 was not intended to apply to this case.

I

Conviction quashed.

Solicitor: *J. J. Rae.*

[*Reported by* S. Hare, Esq., *Barrister-at-Law.*]

A

FREETH AND ANOTHER *v.* BURR AND ANOTHER

[Court of Common Pleas (Lord Coleridge, C.J., Denman and Keating, JJ.), January 14, 1874]

B [Reported L.R. 9 C.P. 208; 43 L.J.C.P. 91; 29 L.T. 773; 22 W.R. 370]

Contract—Repudiation—Sale by two instalments—Delay in first instalment—Refusal of purchaser to pay after delivery of first instalment—Demand for delivery of second instalment—Obligation of vendor to deliver.

C By a contract dated Nov. 28, 1871, the plaintiffs bought 250 tons of iron from the defendants. By the terms of the bought note the iron was to be delivered to the plaintiffs in two instalments, the delivery of the first 125 tons to take place in two weeks from the date of the contract and that of the second 125 tons in four weeks. No iron was delivered within the periods specified, but the time was extended by arrangement, and a quantity of iron D was delivered on different days between Feb. 19 and May 18, 1872, under constant pressure from the plaintiffs for a continuous delivery. On the last-mentioned day the delivery of the first parcel of 125 tons was completed, and fourteen days afterwards the defendants demanded payment for that parcel. No payment was, however, made, and when the plaintiffs requested further deliveries of iron, the defendants refused to deliver any more. The plaintiffs E subsequently paid the defendants for the first parcel. In an action for damages for non-delivery of the second parcel,

Held: the non-payment by the plaintiffs for the first parcel was not such an abandonment or refusal to perform their part of the contract as to free the defendants from their liability to deliver the rest of the iron.

Per Lord Coleridge, C.J.: In cases of this kind, where the question is F whether one party to a contract is set free from performance of it by the course of action of the other, the real point to be looked at is whether, under all the circumstances, the act or conduct of the party which is relied on as setting the other party free does or does not amount to an abandonment, or intention of abandonment, and altogether to a refusal to perform his part of the contract.

G **Notes.** Considered: *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.*, [1881–5] All E.R.Rep. 365; *General Bill Posting Co., Ltd.* v. *Atkinson*, [1908–10] All E.R.Rep. 619; *Dennis* v. *Tunnard and Moore* (1911), 56 Sol. Jo. 162. Applied: *James Shaffer, Ltd.* v. *Findlay, Durham and Brodie* (1952), 97 Sol. Jo. 26. Referred to: *Morgan* v. *Bain* (1874), L.R. 10 C.P. 15; *Rhymney Rail. Co.* v. *Brecon & Merthyr Tydfil Rail. Co.*, [1900–3] All E.R.Rep. 582; *Workman, Clark & Co.* v. H *Lloyd Brazileño*, [1908] 1 K.B. 968; *Newsum* v. *Bradley*, [1918] 1 K.B. 271; *Payzu, Ltd.* v. *Saunders*, [1919] 2 K.B. 581; *Pearl Mill Co., Ltd.* v. *Ivy Tannery Co., Ltd.*, [1918–19] All E.R.Rep. 702; *Maple Flock Co., Ltd.* v. *Universal Furniture Products (Wembley), Ltd.*, [1933] All E.R.Rep. 15; *De Jetley Marks* v. *Greenwood*, [1936] 1 All E.R. 863; *Compagnie Primera De Navagaziona Panama* v. *Compania Arrendataria De Monopolio De Petroleos S.A.*, [1939] 2 All E.R. 240; I *Heyman* v. *Darwins, Ltd.*, [1942] 1 All E.R. 337; *Household Machines, Ltd.* v. *Cosmos Exporters, Ltd.*, [1946] 2 All E.R. 622; *Thorpe* v. *Fasey*, [1949] 2 All E.R. 393; *Peter Dumenil & Co.* v. *James Ruddin, Ltd.*, [1953] 2 All E.R. 294.

As to rescission and repudiation of contracts, see 8 Halsbury's Laws (3rd Edn.) 173–175, 203–205; and for cases see 12 Digest (Repl.) 370 et seq.

Cases referred to:

(1) *Hoare* v. *Rennie* (1859), 5 H. & N. 19; 29 L.J.Ex. 73; 1 L.T. 104; 8 W.R. 80; 157 E.R. 1083; 39 Digest 572, *1766.*

(2) *Jonassohn* v. *Young* (1863), 4 B. & S. 296; 2 New Rep. 390; 32 L.J.Q.B. 385; 10 Jur.N.S. 43; 11 W.R. 962; 122 E.R. 470; 39 Digest 652, *2459*.

(3) *Simpson* v. *Crippen* (1872), L.R. 8 Q.B. 14; 42 L.J.Q.B. 28; 27 L.T. 546; 21 W.R. 141; 39 Digest 572, *1771*.

(4) *Withers* v. *Reynolds* (1831), 2 B. & Ald. 882; 1 L.J.K.B. 30; 109 E.R. 1370; 39 Digest 570, *1755*.

Also referred to in argument:

Bradford v. *Williams* (1872), L.R. 7 Exch. 259; 41 L.J.Ex. 164; 26 L.T. 641; 20 W.R. 782; 1 Asp.M.L.C. 313; 12 Digest (Repl.) 383, *2995*.

Rule Nisi calling on the plaintiffs to show cause why the verdict returned in an action for breach of contract tried by BRETT, J., should not be set aside on the grounds that by their refusal to perform their part of the contract the plaintiffs had exonerated the defendants from performance of the contract.

The contract sued upon was contained in the following bought note dated Nov. 28, 1871:

"Bought this day of Messrs. Burr & Co., 250 tons of pig iron, at 50s. a ton, alongside the wharf at Millwall, half to be delivered in two weeks, remainder in four weeks, payment net cash fourteen days after delivery of each parcel."

No iron was delivered on either Dec. 12 or 26, 1871, which were the periods fixed by the above contract; but the time was extended by mutual consent, and a quantity of iron was delivered by driblets on different days, commencing from Feb. 19, 1872, up to May 18, 1872, amounting in all to 126 tons, or the first parcel. During that time correspondence took place between the parties wherein the plaintiffs constantly pressed the defendants for delivery of the iron, and the latter made constant excuses for the non-delivery within the agreed time. At the expiration of fourteen days from May 18, 1872, on which the complete delivery of the first parcel was effected, a demand was made by the defendants for payment in respect of the 126 tons then delivered. No such payment was however made, but about June 12, 1872, an application was made by the plaintiffs for a continuous delivery of the residue of the iron, whereupon there was an absolute refusal on the part of the defendants to deliver any more, and the plaintiffs accordingly brought an action for the non-delivery of the second parcel, the defendants having first sued the plaintiffs and obtained payment for the first parcel.

The action was tried before BRETT, J., at Guildhall, who gave a verdict for the plaintiffs, with leave to move.

A rule was obtained calling on the plaintiffs to show cause why that verdict should not be set aside, and instead thereof a verdict be entered for the defendants, pursuant to leave reserved on the ground that the refusal of the plaintiffs to pay for the first parcel justified the defendants in breaking the contract, and exonerated the defendants from performance of the contract, and further, that the non-payment of the price of the first parcel was ground for assuming that the plaintiffs were unwilling to perform their contract altogether.

Watkin Williams, *Q.C.*, *E. Clarke* and *R. V. Williams* with him for the plaintiffs.
Garth, *Q.C.*, *Cock* with him for the defendants.

LORD COLERIDGE, C.J.—The question arises on a contract which is as follows [HIS LORDSHIP read the bought note, and continued:] The facts of the case are these: There was no delivery in the terms of the contract at either period named; delay took place, and the delivery of the first 125 tons, which had been stipulated to be delivered on Dec. 12, was, by mutual arrangement, extended, and did not really occur until May 18, 1872. During that time correspondence was going on, which may be substantially described as constant pressure being put by the plaintiffs on the defendants for delivery of the iron, and constant excuses, more or less valid, made by the defendants, for non-delivery within the agreed time; that

A the plaintiffs were anxious for the completion was plain from the tenor of the correspondence, and the fact that the market was rising, and they were anxious to have the agreement completed in a rising market. The first 125 tons were ultimately delivered altogether on May 18, and fourteen days after that there was a demand made for payment of what was due for those 125 tons. There was a neglect or refusal, or both, to pay for that 125 tons, and, therefore, on application B being made sometime about the month after May 12 for continuous delivery, there was an absolute refusal to deliver, and no more iron has been delivered, and the present action has been brought to recover damages for the non-delivery.

The question raised before us has been this, whether the undoubted fact of the refusal to pay what was due for 125 tons on May 18 was such an abandonment or refusal to comply with such part of the contract as lay on the plaintiff, to C perform, as to set free the defendants, and entitle the latter to treat the contract as non-existent and to decline to perform it. The matter was dealt with rather shortly at nisi prius, and we are not even now in full possession of all the facts. But certain it is, that there was an extension of time for delivery of the iron from December to May, but complaints on the part of the plaintiffs, with constant pressure and remonstrances. I mention this, because I think it important to express D my own view, and I believe also that of the court, that in cases of this kind, where the question is whether one party to a contract is set free from performance of it by the course of action of the other, the real point to be looked at is whether, under all the circumstances, the act or conduct of the party which is relied on as setting the other party free, does or does not amount to an abandonment, or intention of abandonment, and altogether to a refusal to perform his part of the E contract. I say this for the purpose of explaining the true ground on which I think the decisions of these cases must rest and the principle of the decisions. There have been cases apparently somewhat conflicting in principle brought before us in argument, but I think it can be gathered that the true question in all of them is as I have stated.

Non-performance or non-delivery may, under certain circumstances, or in par- F ticular cases, amount to such an act, or may be evidence of such conduct as would justify the judge in holding, or the jury in finding either that an act of non-delivery or non-payment was in its nature, and unqualified by the circumstances which took place, such an act as indicated an intention to refuse to perform the contract and to set the other party free from performing his part. That seems to me the principle on which *Hoare* v. *Rennie* (1) was decided, and without presuming G to say that the court who decided that case were right or wrong, the principle laid down was that where time was of the essence of the contract, as the Court of Exchequer said it was there, and there had been a failure to deliver part of the goods and the whole object of the contract was frustrated, the non-delivery under the circumstances was an act by which the party renounced all intention to perform his part of the contract, and thereby set free the other party. In the subsequent H case of *Jonassohn* v. *Young* (2) that case is expressly upheld by the great authority of CROMPTON, J. He does not express himself, as the judges of the Queen's Bench in *Simpson* v. *Crippen* (3), as dissatisfied with *Hoare* v. *Rennie* (1), but says it is to be supported on the ground that the breach was one which frustrated the whole contract, and released the other party. Then, I find, in *Withers* v. *Reynolds* (4), a case where the non-delivery of a particular portion of a quantity of hay I had put an end to the contract. But why? Because as PATTESON, J., says, non-payment for the particular contract was, under the circumstances, an intimation: "It is no use for you to go on, because I tell you that I do not mean to keep to the contract"; and, therefore, was an act which justified the other party in considering the contract to be at an end. That is the ground on which, in *Jonassohn* v. *Young* (2), when *Withers* v. *Reynolds* (4) was cited, WIGHTMAN, J., certainly, and PATTESON, J., by inference, upheld it. There have been subsequent cases which I do not stay to examine at length, because each stands on its own facts and circumstances.

I think it will be found that the true principle running through all is this: Is the act to be relied on as rescission an act which on the part of the person doing it amounts to an abandonment, or refusal by him to perform his part of the contract? That being the principle, and BRETT, J., considering that this single act of refusing to pay was not an act which, by itself, and unattended by other circumstances, to put another quality upon it, amounted to more than a refusal to do one particular thing, held that it did not put an end to the contract, but only gave a remedy by action, which remedy had been successfully pursued in this very case. I think the ruling of BRETT, J., was perfectly correct, and that the law is as I have laid it down. The rule, therefore, must be discharged.

KEATING, J.—I entirely agree with the judgment of the LORD CHIEF JUSTICE, and also with the principle on which he has based the refusal of the court to make the rule absolute in this case. It is not the mere omission, or even refusal of one party to do something which under the terms of the contract he was bound to do, which absolves the other party, but it must have been an absolute refusal to perform his part of the contract. No doubt the refusal to pay may be an element of consideration, to find how far he means to go on with the contract. But the circumstances here are the rising market, a non-delivery on the part of the defendants, a delivery, or rather a series of deliveries, long after the time as provided by the original contract had passed, and a refusal itself to pay, accompanied, not only with remonstrances as to the failure on the part of the defendants to deliver, but the requisition that they should fix the time for delivery, and should actually deliver a certain quantity of iron within that time. I think that cannot afford an intimation of an intention on their part not to perform their part of the contract. They ought to have paid, and did not pay, and rendered themselves liable to an action, which was successfully brought for the money was paid. But on the facts of this case it appears that there was not only no absolute refusal to perform the plaintiff's part of the contract, but no evidence whatever of any inability on their part to perform. I think the defendants had no right to treat the contract as rescinded, and the rule must be discharged.

DENMAN, J.—I am of the same opinion. The learned judge ruled that the refusal of the plaintiffs to pay for the first parcel did not put an end to the contract, or absolve the defendants from their liability to deliver the other parcel, and that on the defendants' refusal to deliver the other parcel, the plaintiffs were entitled to maintain this action, and he gave leave to the defendants to enter the verdict if the ruling were wrong in point of law. Then was that ruling wrong? What the learned judge held was that the refusal, which undoubtedly took place, did not absolve the defendants from liability to deliver the second parcel. I think that was quite right, on the authority of *Withers* v. *Reynolds* (4), if that case be good law. *Withers* v. *Reynolds* (4) did not expressly decide that a single act of non-payment might not be evidence of a refusal to perform the contract; there was no such ruling as that. It decides, to adopt the words of PATTESON, J. (2 B. & Ad. at p. 885):

> "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw; but the plaintiff here expressly refuses to pay for the loads so delivered. The defendant, therefore, is not liable for failing to perform his part of the contract."

What were the facts in that case?

> "After the straw had been supplied for some time, Withers refused to pay for the last load delivered, and insisted on always keeping one payment in arrear."

That was an express avowal of an intention not to perform his part of the contract, because the contract gave him no such power. Here there was nothing of the sort. I think after the way in which *Withers* v. *Reynolds* (4) has been dealt with

in subsequent cases, we are bound to hold it to be a correct statement of the law, unless or until it is overruled, and in applying it to this case I am of opinion that there was nothing which would warrant the learned judge in ruling that there was justification for the defendants acting as they did.

Rule discharged.

Solicitors: *Page & Nelson*; *Evans & Co.*

Re WRECK RECOVERY AND SALVAGE CO.

[COURT OF APPEAL (Sir George Jessel, M.R., Cotton and Thesiger, L.JJ.), June 30, 1880]

[Reported 15 Ch.D. 353; 43 L.T. 190; 29 W.R. 266]

Company—Winding-up—Liquidator—Power to "carry on the business of the company so far as it may be necessary for the beneficial winding-up of the same"—Need for carrying on to be necessary for winding-up, not for continuance of company.

By s. 95 of the Companies Act, 1862 [see now s. 245 (1) (b) of Companies Act, 1948], the liquidator of a company in liquidation "shall have power, with the sanction of the court, to carry on the business of the company, so far as it may be necessary for the beneficial winding-up of the same."

An order was made for the compulsory winding-up of a company which had been formed to exploit a new method of raising sunken ships. The liquidator obtained the sanction of the court to enter into an agreement with a shareholder of the company by which the shareholder should have the use of the company's ships and plant for two months at his own expense, in order to use the new method to raise two sunken ships. There was a recital in the agreement that the shareholder was desirous that the company should be resuscitated so that the shares might increase in value. Some creditors of the company and one shareholder objected to the agreement and sought an injunction to restrain the liquidator from acting upon it.

Held: the word "necessary" in s. 95 showed that the carrying on of the business must be with a view to the winding-up of the company, not with a view to its continuance; having regard to the agreement and the evidence there was nothing to show that what was proposed was necessary for the beneficial winding-up of the company since there was plainly a mere attempt to make the shares of the company of value; and, therefore, the case did not fall within s. 95.

Per THESIGER, L.J.: The word "necessary" is not to be treated as importing some absolutely compelling force, but it ought to be construed as importing that which has been sometimes called "a mercantile necessity"—i.e., a course which in the circumstances is highly expedient.

Notes. The Companies Act, 1862, has been repealed. Section 95 of the Act of 1862 corresponds with s. 245 of the Companies Act, 1948.

Referred to: *Bateman* v. *Ball* (1887), 56 L.J.Q.B. 291; *Re Great Eastern Electric Co.*, [1941] 1 All E.R. 409.

As to the power of the liquidator to carry on the company's business, see 6 HALSBURY'S LAWS (3rd Edn.) 651–652; and for cases see 10 DIGEST (Repl.) 969 et seq. For the Companies Act, 1948, s. 245, see 3 HALSBURY'S STATUTES (2nd Edn.) 655.

Appeal from an order of MALINS, V.-C., on a motion by some of the creditors and a shareholder of the Wrecks Recovery and Salvage Co. to restrain the liquidator of the company from acting upon a certain agreement made by him with a shareholder of the company called Leutner.

The company had been formed for working a method invented by Leutner for raising sunken vessels. Subsequently an order was made for the compulsory winding-up of the company. On April 9, 1880, MALINS, V.-C., sanctioned an agreement made between the liquidator and Leutner by which Leutner should have the use of the company's ships and plant for the purpose of raising two sunken ships called the *Alpha* and the *Harlingen* for two months from the date of the agreement, Leutner paying the costs of the experiment. The agreement also contained a recital that Leutner was desirous that the company should be resuscitated so that the shares might become of value. Some creditors and a shareholder of the company who objected to the agreement applied to the court for an injunction to restrain the liquidator from acting upon it, and for directions to the liquidator to sell and get in the assets of the company. The liquidator had made an affidavit, in which he stated that he had carefully considered the terms of Leutner's proposal, and he was of opinion, having regard to the fact that there were numerous shareholders anxious to resuscitate the company, and who before coming forward were only waiting to hear of a successful experiment having been made by means of the company's vessels and appliances, that the proposal was a beneficial one for the company, and also that, in the event of an ultimate sale of the company's plant, it would, of course, be more advantageous to the company to sell the plant as a going concern. MALINS, V.-C., refused the motion with costs.

J. Pearson, Q.C., and *Grosvenor Woods* for the applicants.
Higgins, Q.C., and *Everitt* for the official liquidator.

SIR GEORGE JESSEL, M.R.—This question is of some importance with regard to the jurisdiction of the court in winding-up matters, though probably it is of very little importance as regards this particular company. Of course the word "necessary" in s. 95 of the Companies Act, 1862 [repealed], shows that the carrying on of the business is not to be merely beneficial, but something more, though the necessity must be determined by the court, having regard to all the circumstances of the case. It does not mean that no other course is possible. It must be with a view to the winding-up of the company, not with a view to its continuance. The only point I mean to decide is, whether this agreement had the winding-up of the company in view at all. Looking at the agreement and the evidence, I cannot find anything to show that what was proposed was necessary for the beneficial winding-up of the company, or, indeed, for the winding-up at all. In my opinion it was plainly a mere attempt to make the shares of the company of value. It is admitted that it is a creditors' winding-up, and that there is not enough to pay the creditors in full. The object of the agreement was no doubt as stated, to experiment with a view of making the shares of value, so as, if possible, to resuscitate the company. The liquidator did not say he could not sell the plant at a good price. He gave a very cautious opinion. But, if the experiments were to fail, then the value of the plant would be diminished. That is, no doubt, the reason why the liquidator was so cautious in giving an opinion. Is it possible to say that the case comes within s. 95? Without saying whether in a proper case there is any limit to the power of the court as to entering into new contracts, or carrying on a business with a view to its sale as a growing concern, it appears to me that the present case is not within the purview of the Act. Therefore, in my opinion, the appeal ought to be allowed, and the order of the vice-chancellor must be discharged.

COTTON, L.J.—I am of the same opinion and for the same reasons.

THESIGER, L.J.—I am also of the same opinion. The vice-chancellors' order was evidently intended to be made under s. 95. I think that the construction to

be put on that section should be a wide and liberal one. I agree with the Master of the Rolls, that the word "necessary" is not to be treated as importing some absolutely compelling force, but that it ought to be construed as importing that which has been sometimes called "a mercantile necessity"—i.e., a course which in the circumstances is highly expedient. Adopting that view of the section, it appears to me that the evidence does not support the jurisdiction of the court in this case. The order does not come within the terms of s. 95 and it was open to any dissentient creditor to object to it.

Appeal allowed.

Solicitors: *Snell & Greenip*; *Lowless, Nelson & Co.*

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

ATKINSON *v.* NEWCASTLE WATERWORKS CO.

[COURT OF APPEAL (Lord Cairns, L.C., Cockburn, C.J., and Brett, L.J.), June 11, 12, 13, 1877]

[Reported 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 25 W.R. 794]

Statutory Duty—Breach—Competency of civil action at suit of injured person - Construction of statute—Provision of penalty—Waterworks Clauses Act, 1847 (10 & 11 *Vict.*, *c.* 17), *ss.* 42, 43.

By the Waterworks Clauses Act, 1847, s. 42, the undertakers are bound to keep their pipes charged with water at a specified pressure and to allow all persons to use such water for extinguishing fire. By s. 43 of the Act for a neglect of this duty they are liable to a penalty of £10.

The plaintiff's premises caught fire and owing to the pressure in the defendants' pipes being insufficient the fire could not be extinguished and the premises were burnt down. The plaintiff brought an action for damages against the defendants, alleging that the defendants were in breach of their statutory duty imposed by s. 42.

Held: the only remedy was the penalty imposed by the statute, and no action for damages lay for a breach of the provision.

Couch v. *Steel* (1) (1854), 3 E. & B. 402 doubted.

Notes. The Waterworks Clauses Act, 1847, has been repealed and the new provisions relating to waterworks are contained in the Water Act, 1945. Section 42 of the 1847 Act is now ss. 36, 39 (in part) of the Third Schedule to the 1945 Act; s. 43 of the 1847 Act corresponds to ss. 30, 38, 39 (in part) of the Third Schedule to the 1945 Act.

Considered: *Bathurst Borough* v. *Macpherson* (1879), 4 App. Cas. 256; *Great Northern Fishing Co.* v. *Edgehill* (1883), 11 Q.B.D. 225; *M'Colla* v. *Clacton-on-Sea Gas and Water Co.* (1889), 5 T.L.R. 690; *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345. Applied: *Saunders* v. *Holborn Board of Works*, [1895] 1 Q.B. 64. Considered: *Clegg, Parkinson & Co.* v. *Earby Gas Co.*, [1896] 1 Q.B. 592; *Goodson* v. *Sunbury Gas Consumers' Co.* (1896), 75 L.T. 251. Applied: *Groves* v. *Lord Wimborne*, [1895–9] All E.R.Rep. 147. Considered: *Gale* v. *Rhymney and Aber Valleys Gas and Water Co.* (1903), 89 L.T. 399; *Hartley* v. *Rochdale Corpn.*, [1908] 2 K.B. 594; *Dawson & Co.* v. *Bingley U.D.C.*, [1911–13] All E.R.Rep. 596; *Butler (or Black)* v. *Fife Coal Co.*, [1912] A.C. 149; *Price* v. *Webb*, [1913] 2 K.B. 367; *Neville* v. *London Express Newspaper*, [1918–19] All E.R.Rep. 61; *Phillips*

v. *Britannica Hygienic Laundry Co.*, [1923] All E.R.Rep. 127; *Scammell* v. *Attlee* (1928), 45 T.L.R. 75; *Read* v. *Croyden Corpn.*, [1938] 4 All E.R. 631; *Square* v. *Model Farm Dairies (Bournemouth), Ltd.*, [1939] 1 All E.R. 259. Referred to: *Vallance* v. *Falle*, [1881–5] All E.R.Rep. 519; *Melliss* v. *Shirley and Freemantle Local Board of Health* (1885), 54 L.J.Q.B. 408; *R.* v. *Hall*, [1891] 1 Q.B. 747; *Barry Rail. Co.* v. *Taff Vale Rail. Co.* (1894), 64 L.J.Ch. 230; *Patent Agents Institute* v. *Lockwood*, [1894] A.C. 347; *Johnston and Toronto Type Foundry Co.* v. *Toronto Consumers' Gas Co.*, [1898] A.C. 447; *Simpson* v. *South Oxfordshire Water and Gas Co.*, [1908] 1 K.B. 917; *R.* v. *Marshland Smeeth and Fen District Comrs.*, [1920] 1 K.B. 155; *Lochgelly Iron and Coal Co.* v. *McMullan*, [1934] A.C. 1; *Monk* v. *Warbey*, [1934] All E.R.Rep. 373; *George* v. *Mitchell and King*, [1943] 1 All E.R. 233; *Newman* v. *Francis* (1953), 117 J.P. 214; *Solomons* v. *Gertzenstein, Ltd.*, [1954] 2 All E.R. 625; *Watt* v. *Kesteven County Council*, [1954] 3 All E.R. 441.

As to an action for breach of a statutory provision, see 36 HALSBURY'S LAWS (3rd Edn.) 449 et seq.; and for cases see 42 DIGEST 748 et seq. For the Water Act, 1945, see 26 HALSBURY'S STATUTES (2nd Edn.) 786.

Case referred to:

(1) *Couch* v. *Steel* (1854), 3 E. & B. 402; 2 C.L.R. 940; 23 L.J.Q.B. 121; 22 L.T.O.S. 271; 18 Jur. 515; 2 W.R. 170; 118 E.R. 1193; 42 Digest 750, *1739a.*

Also referred to in argument:

Stevens v. *Jeacocks* (1848), 11 Q.B. 731; 17 L.J.Q.B. 163; 11 L.T.O.S. 101; 12 Jur. 477; 116 E.R. 647; 42 Digest 750, *1739.*

Gorris v. *Scott* (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 22 W.R. 575; 2 Asp.M.L.C. 282, Ex. Ch.; 42 Digest 759, *1853.*

Wolverhampton New Waterworks Co. v. *Hawkesford* (1859), 6 C.B.N.S. 336; 28 L.J.C.P. 242; 33 L.T.O.S. 366; 5 Jur.N.S. 1104; 7 W.R. 464; 141 E.R. 283; 42 Digest 752, *1768.*

Dundalk Western Rail. Co. v. *Tapster* (1841), 1 Q.B. 667; 2 Ry. & Can. Cas. 586; 1 Gal. & Dav. 657; 10 L.J.Q.B. 186; 5 Jur. 699; 113 E.R. 1287; 10 Digest (Repl.) 1226, *8610.*

Rowning v. *Goodchild* (1773), 2 Wm. Bl. 906; 3 Wils. 443; 5 Burr. 2716, n.; 96 E.R. 536; 38 Digest (Repl.) 60, *335.*

Appeal from an order of the Court of Exchequer in an action brought by the plaintiffs against the defendants for damages for breach of statutory duty.

The first count of the declaration alleged that by 26 Vict., c. xxxiv., incorporating the Waterworks Clauses Act, 1847, the defendants were incorporated with certain powers of taking land and supplying and maintaining waterworks, and the plaintiff was the owner and occupier of a dwelling-house, timber-yard, and saw-mills situate within the limits prescribed by the first-mentioned Act for the supply of water by the defendants, and was under the provisions of the said Act and the Waterworks Clauses Act, 1847, entitled, for reward to be paid by him to the defendants in that behalf, to a supply of water by the defendants, and had complied with all the provisions of the said Acts in order to entitle him to such supply for domestic and other purposes, and the defendants had laid down certain pipes near to the said dwelling-house, etc., of the plaintiff for the purpose of supplying water according to the said Acts, and had fixed to such pipes certain fire-plugs; nevertheless the defendants, neglecting their duty in that behalf, did not, at all times, and especially at the time of the breaking out on the said dwelling-house, etc., of plaintiff of the fire thereinafter mentioned, keep charged with water their said pipes to which fire-plugs had been and were then so fixed as aforesaid, under such pressure as by the said first-mentioned Act and the Waterworks Clauses Act, 1847, was required, although the defendants were not prevented from so doing by frost, unusual drought or other unavoidable cause or accident, or by the doing of necessary repairs; and during the time the said pipes with the said fire-plugs affixed thereto

were so laid as aforesaid, a fire broke out in the timber yard and saw-mills of the plaintiff, and by reason of the defendants not having kept charged the said last-mentioned pipes under such pressure as aforesaid, a proper supply of water could not be procured for the purpose of extinguishing the said fire, and in consequence thereof the timber yard and saw-mills were burnt down, and the plaintiff was greatly damaged.

The defendants demurred to this count, and the demurrer was argued on May 25, 1871, before Kelly, C.B., and Martin, Bramwell and Cleasby, BB., who gave judgment for the plaintiff. The case is only reported as to this count.

By the Waterworks Clauses Act, 1847, s. 42:

"The undertakers shall, at all times, keep charged with water under such pressure as aforesaid, all their pipes to which fire-plugs shall be fixed, unless prevented by frost, unusual drought, or other unavoidable cause or accident, or during necessary repairs, and shall allow all persons at all times to take and use such water for extinguishing fire without making compensation for the same."

By s. 43:

"If, except when prevented as aforesaid, the undertakers neglect or refuse to fix, maintain, or repair such fire-plugs, or to furnish to the town commissioners a sufficient supply of water for the public purposes aforesaid upon such terms as shall have been agreed on or settled as aforesaid, or if, except as aforesaid, they neglect to keep their pipes charged under such pressure as aforesaid, or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered they shall be liable to a penalty of £10, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate the sum of 40s. for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

C. Russell, *Q.C.* (*Gainsford Bruce* and *Shield* with him), for the plaintiff.

Sir John Holker, *Q.C.*, and *Herschell*, *Q.C.* (*Crompton* with them), for the defendants.

LORD CAIRNS, L.C.—In this case we have been very much assisted by the able arguments which have been addressed to us on both sides. We are called upon, after the expiration of six years, to review the decision of the Court of Exchequer on demurrer, and to review the proceedings which took place at the trial. [His Lordship referred to the pleadings.]

As to the first count, it proceeds on a breach of statutory duty, and refers to the local Act and the Waterworks Clauses Act, 1847, and avers that the defendants did not keep their pipes charged with water under the pressure by those Acts required, in consequence of which the plaintiff's premises were burnt down. As I pointed out before, we may neglect what relates to a supply of water for reward, because the breach complained of is the breach of a duty which is imposed irrespective of payment.

The statutory duty referred to arises under s. 42 of the Waterworks Clauses Act, 1847. The scheme of these clauses seems to be this: The undertakers apply to Parliament for powers to take land and construct works for the supply of water, and in consideration of the powers which they obtain they come under certain obligations. As to fire-plugs they are under an obligation to fix them at intervals along the streets, and, if requested, to fix them near premises used as manufactories, and to keep them charged up to the prescribed pressure, unless prevented by frost, drought, or other unavoidable cause or accident, and to allow all persons to take and use water for the purpose of extinguishing fire, without making compensation. They are willing to accept the Parliamentary obligation to keep the mains charged. That this creates a statutory duty no one can dispute; but does

it give a right of action to any individual who can aver, as the plaintiff does here, that his premises were near the pipes, that a fire broke out, that there was no water to extinguish it, and that his premises were burnt? He does not say that he was not allowed to take the water, but he complains of a failure in the duty to keep the mains charged.

The proposition a priori appears to be somewhat startling that a company supplying a town with water—although they are willing to be put under obligation to keep up the pressure, and to be subject to penalties if they fail to do so—should further be willing to assume, or that Parliament should think it necessary to subject them to liability to individual actions by any householder who could make out a case. In the one case they are merely under liability to penalties if they neglect to perform their duty, in the other case they are practically insurers, so far as water can produce safety from damage by fire. It is necessary to look at the provisions of s. 43. Four cases are there specified, which cover all the duty imposed by the former sections, and for neglect of any one of these duties, there is a penalty of £10. For neglect of two of them, viz., to furnish to the town commissioners a sufficient supply of water for public purposes, and to furnish a supply of water to the owner or occupier, there is a further penalty of 40s. a day, payable to every person who has paid or tendered the rate, for as long as such neglect or refusal continues after notice in writing has been given of the want of supply. It is not material to say, but it is possible that it might be held that neglect or refusal to fix fire-plugs would also subject the company to the 40s. penalty. If so that penalty would be applicable in three cases out of the four. We have to consider why in some cases the penalty should go into the pocket of the individuals injured, and not in others. In the case of the obligation to keep the pipes charged, and allow all persons to use the water for the purpose of extinguishing fires, the provision is for the benefit of the public, and not of any individual specially, and the guarantee for the performance of the obligation is the liability to the public penalty of £10.

Apart from authority, I should be of opinion that the scheme of the Act and its true construction was not to create a duty which should be the subject of an action by any individual who might be injured, not to give a right to an individual to bring an action, but to lay down a series of duties, and provide a guarantee for their performance by s. 43, which imposes penalties in case of neglect or refusal. Where it is convenient that it should be so, the penalty goes into the pocket of the injured party; otherwise they are public penalties, imposed by way of security that all the public duty will be performed. The contrary intention is that we ought to say that where the penalty goes into the pocket of an individual no action will lie, but that otherwise a right of action exists, that in the other cases an individual would have no right of action, but that any one of the public could bring an action if there was no water in the main, and he suffered damage in consequence. I think it is impossible to adopt this view. The scheme must be judged by ss. 42 and 43, taken as a whole. Where we find that in most cases a penalty is imposed which would stop the right of action, it seems to me that the same result would follow in the other case provided for by s. 43. That is my opinion, unless there is some authority to the contrary.

The authority which is said to lead to a different conclusion is *Couch* v. *Steel* (1). That was a case of some peculiarity. The plaintiff, who was a seaman, and had served on board the defendant's vessel, sued the defendant for not providing a proper supply of medicines for the voyage, which he was bound to do by 7 & 8 Vict., c. 112, s. 18, in consequence of which the plaintiff suffered from illness. In the declaration no claim was made on the Act of Parliament, but it was produced on the argument, and relied on in support of the plaintiff's case. With regard to that case and that Act of Parliament, if the decision were before us for review, I should desire further time for consideration; but that is not the case here, for the Act we have to deal with is widely different from the Act on which that case was decided. I must venture, with the greatest respect for the learned judges who took part in the decision, to express a doubt whether the authorities referred to by

A Lord Campbell in giving judgment justified the broad expressions which were used. It is not necessary to go through all the authorities which are there referred to, and which will be found collected in 3 E. & B., at p. 411, but it appears to me to be questionable whether they justify the broad general statement that wherever there is a statutory duty imposed, and any person is injured by the non-performance of that duty, an action can be maintained. It must depend on the particular B statute, and where it is like a private legislative bargain, into which the undertakers of the works have entered, it differs from the case where a general public duty is imposed. Therefore, I cannot look on *Couch* v. *Steel* (1) as an authority for the decision of the court below in the present case, and no other authority was cited which could govern it.

I have, therefore, come to the conclusion that on the first count of the declaration there is no cause of action, and the demurrer must be allowed.

COCKBURN, C.J.—The case must be looked at from two aspects, on the assumption that there was a contract and on the assumption that there was not. I will take the latter view first. If it were necessary to decide on the general principle as laid down in *Couch* v. *Steel* (1), I concur with the Lord Chancellor D that I should wish to take time to consider before acting on it. I think that case is open to very grave doubts, but it is unnecessary to decide the question because the present case is distinguishable. That case turned upon an Act of Parliament which was applicable to all persons carrying on the business of shipowners, and, therefore, might affect all her Majesty's subjects, while here we are dealing with obligations which the legislature has imposed on a private company as conditions, E subject to which the Parliamentary powers conferred upon them are to be exercised, and therefore the interpretation ought to be more strict and limited. I agree with the Lord Chancellor as to the conclusions at which he has arrived, and as to the grounds on which his judgment is based. The statute does not give to anyone who has ground to complain any greater remedy than he would have had before, except that which is expressly provided; he must have recourse to the F statutory remedy. After the elaborate and conclusive arguments brought forward by the Lord Chancellor, I need not go over the same ground again.

BRETT, L.J.—I agree on the construction of the statute that the only remedy is the penalty, and there is no action for damages. Therefore, the first count is bad, as not disclosing any cause of action. It is unnecessary to decide as to *Couch* v. *Steel* (1), but I have the greatest possible doubt as to the correctness of the judg- G ment. If it is said that where a duty is created by statute, and a penalty, however small, is imposed, which is given to the person injured, no action will lie, but where a similar duty is established and a similar penalty imposed, which is not to go to the person injured, an action will lie, I doubt very much whether such a proposition can be supported.

H *Judgment for defendants on both appeals.*

Solicitors: *Walters & Gush*, for *Chartres & Youll*, Newcastle-upon-Tyne; *Williamson, Hill & Co.*, for *R. P. & H. Philipson*, Newcastle-upon-Tyne.

A

LAW *v.* GARRETT AND OTHERS

[COURT OF APPEAL (James, Baggallay and Thesiger, L.JJ.), January 12, 14, February 15, 1878]

[Reported 8 Ch.D. 26; 38 L.T. 3; 26 W.R. 426]

B

Arbitration—Stay of legal proceedings—Agreement to refer dispute to foreign tribunal—Power of court to appoint receiver—Common Law Procedure Act, 1854 (17 & 18 *Vict., c.* 125).

In 1876, A., B., C., and D., who were all British subjects, entered into a partnership agreement to trade in Russia. The agreement, which was written in Russian, provided that during the first year B. and C. should have the right to demand back their capital, and, if their demand was not satisfied within one month, without further delay the firm must proceed to liquidation. It was further provided in cl. 16 of the agreement that: "In case of any disputes arising between the parties to this agreement or their executors, such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg Commercial Court, or to any court which may have taken its place; the decision of such court shall be final." During the first year B., and C., demanded back their capital, and, as payment of this was not made within one month, they commenced proceedings in the St. Petersburg Commercial Court to wind-up the partnership and a liquidator and receiver was appointed. In an action in the Chancery Division against B., C., and D., A. sought the appointment of a receiver, an injunction, and a declaration that he was entitled to a sum of £3,000 from the defendants, under an agreement for the transfer of his business to the partnership. The defendants claimed that they were entitled to a stay of proceedings pending the decision of the St. Petersburg Commercial Court.

C

D

E

Held: (i) since the passing of the Common Law Procedure Act, 1854 [repealed], if the parties choose to determine for themselves that they would have a forum of their own selection instead of resorting to the ordinary courts, a prima facie duty was cast upon the courts to act upon that agreement; no case for an injunction was made out by the evidence; and, therefore, there was nothing to rebut the prima facie case arising out of cl. 16 of the agreement, and the proceedings should be stayed pending the decision of the St. Petersburg Commercial Court.

F

Dictum of LORD SELBORNE, L.C., in *Willesford* v. *Watson* (1) (1873), 8 Ch. App. 373, applied.

G

(ii) it would not be proper by the appointment of a receiver to impede the general liquidation of the partnership in the manner in which the partners had themselves decided that it should be liquidated unless it could be shown that no adequate relief in respect of the rights claimed by A. could be obtained by him in the course of the proceedings in Russia and this A. had not been able to show.

H

Per BAGGALLAY, L.J.: If a case for an injunction was made by the evidence that would probably be a sufficient reason for refusing to send the matter to arbitration.

I

Notes. The Common Law Procedure Act, 1854, has been repealed. The Arbitration Act, 1950, consolidates all the earlier statutes relating to arbitration.

Applied: *Halsey* v. *Windham*, [1882] W.N. 108. Considered: *Compagnie Du Senegal* v. *Wood* (1883), 53 L.J.Ch. 166; *Kirchner & Co.* v. *Gruban*, [1908–10] All E.R.Rep. 242. Followed: *The Cap Blanco*, [1911–13] All E.R.Rep. 365. Referred to: *Racecourse Betting Control Board* v. *Secretary of State for Air*, [1944] 1 All E.R. 60.

As to state of proceedings for reference to arbitration in general, see 2 HALSBURY'S LAWS (3rd Edn.) 21 et seq.; and for cases see 2 DIGEST (Repl.) 477 et seq.

Cases referred to:

(1) *Willesford* v. *Watson* (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 21 W.R. 350, L.C. & L.JJ.; 2 Digest (Repl.) 452, *190 a.*

(2) *Cooke* v. *Cooke* (1867), L.R. 4 Eq. 77; L.J.Ch. 480; 16 L.T. 313; 14 W.R. 981; 2 Digest (Repl.) 467, *303.*

Also referred to in argument:

Plews v. *Baker* (1873), L.R. 16 Eq. 564; 43 L.J.Ch. 212; 36 Digest (Repl.) 614, *1743.*

Gillett v. *Thornton* (1875), L.R. 19 Eq. 599; 44 L.J.Ch. 398; 23 W.R. 437; 2 Digest (Repl.) 443, *159.*

Thomson v. *Anderson* (1870), L.R. 9 Eq. 523; 39 L.J.Ch. 468; 22 L.T. 570; 34 J.P. 500; 18 W.R. 445; 2 Digest (Repl.) 430, *67.*

Re Durham County Permanent Benefit Building Society, Ex parte Wilson (1871), 7 Ch. App. 45; 41 L.J.Ch. 164; 2 Digest (Repl.) 428, *55.*

Appeal from orders of BACON, V.-C., in an action brought by the plaintiff for the winding-up of a partnership between the plaintiff and the defendants. By one of the orders the learned judge refused an application by the plaintiff for the appointment of a receiver and by the other order, upon the application of the defendants, he stayed all proceedings in the action until further order, reserving liberty to any of the parties to apply.

Hemming, Q.C., and *Crossley* for the plaintiff.

Sir Henry Jackson, Q.C., and *J. Armstrong* for the defendants.

Cur. adv. vult.

Feb. 15, 1878. **BAGGALLAY, L.J.,** read the following judgment of the court.—In this case the plaintiff appeals from two orders made by BACON, V.-C., on Nov. 22 last, in an action for winding-up the affairs of a partnership between the plaintiff and the defendants. By one of such orders the vice-chancellor refused an application of the plaintiff for the appointment of a receiver; and by the other, upon the application of the defendants, he stayed all proceedings in the action until further order, reserving liberty to any of the parties to apply. Both orders were based upon the circumstances that the articles by which the partnership was regulated contained provisions for the reference of all matters in dispute to arbitration.

The partnership was entered into in 1876 for the purpose of carrying on the business of engineers and merchants in St. Petersburg. The articles, which bear date Aug. 3, 1876, are in the Russian language; they were executed in Russia, and were registered in that country in accordance with the requisitions of Russian law. Provision for the reference of disputes to arbitration was made by art. 16, of which the following is a translation:

> "In case of any disputes arising between the parties to this agreement or their executors, such disputes, no matter how or where they may arise, shall be referred to the St. Petersburg Commercial Court, or to any court which may have taken its place; the decision of such court shall be final."

Under art. 11, the defendants Garrett and New were entitled within the first year to demand payment of their capital, and if the demand was not complied with within a month, the firm were to proceed to liquidation. On June 21, 1877, being within a year from the commencement of the partnership, the defendants Garrett and New gave notice demanding payment of their capital, and such payment was not made within a month. It is the common case of the plaintiff and the defendants that the partnership was dissolved by that notice. Steps were accordingly taken by the defendants Garrett and New, in St. Petersburg, to wind-up the affairs of the partnership, and the defendant Froom was appointed liquidator and receiver for that purpose. The plaintiff thereupon commenced the present action, and on Oct. 4, 1877, served the defendants with notice of motion for the appointment

of a receiver, and on Oct. 11 the defendants served a counter notice on the plaintiff for a stay of proceedings in the action, and a reference of all matters in dispute to the St. Petersburg Commercial Court.

If there had been no other material facts in the case than those just stated, the orders made by the vice-chancellor could hardly have been resisted; it would have been a case for the exercise of the discretion conferred upon the vice-chancellor by s. 11 of the Common Law Procedure Act, 1854 [repealed], and such discretion could hardly have been exercised otherwise than in the way in which it has been exercised by him. In the course of the argument on the part of the plaintiff, some reliance was placed upon *Cooke* v. *Cooke* (2). In that case the question was raised by plea, and all that WOOD, V.-C., decided was that the jurisdiction of the superior courts was not ousted by the provisions of the Common Law Procedure Act. That such jurisdiction was not ousted is clear from the terms of the Act itself, which merely confers upon the court applied to the power to order a stay of proceedings upon being satisfied that no sufficient reason exists why the matters cannot or ought not to be referred to arbitration according to the agreement. We entirely concur in the views expressed by LORD SELBORNE, L.C., in *Willesford* v. *Watson* (1) to the effect that if, since the passing of the Common Law Procedure Act [repealed], parties choose to determine for themselves that they will have a forum of their own selection, instead of resorting to the ordinary courts, a prima facie duty is cast upon the courts to act upon such agreement. Is there anything in the present case to rebut the prima facie case arising out of art. 16? It is true that the plaintiff prays for an injunction, and if a case for an injunction was made by the evidence that would probably be a sufficient reason for refusing to send the matter to arbitration, but no such case is made; indeed it is somewhat difficult to make out from the pleadings or the evidence in respect of what the injunction is asked.

A claim is also made for the appointment of a receiver, but with the exception of the circumstance to which we are about to allude, no case whatever is made which could call for such an appointment. By para. 4 of what may be called the prayer of the claim, the plaintiff asks for a declaration that in the events which have happened the defendants Garrett and New have become jointly and severally liable to pay the sum of £3,000. This claim rises in the following way. It appears that before and down to the month of June, 1876, the plaintiff was engaged in business on his own account as a merchant at Moscow, and during the negotiations for the partnership arrangements were made for the transfer of this business to the new firm, and for this purpose two memoranda of agreement were prepared. Both bear date July 10 and 22, 1876. One provided for the discontinuance by Mr. Law of his business at Moscow, and for the transfer of such business to the new firm; and by the other which purported to be made between the plaintiff and the defendants Garrett and New only, but as to the execution of which by those defendants there appears to be a question, provision was made that in the event of the partnership being liquidated or dissolved within one year by reason of the exercise by the defendants, Garrett and New, of certain powers conferred or to be conferred upon them by the articles of partnership, the plaintiff should be compensated by the making over to him of the firm's business at Moscow and of goods of the estimated value of £3,000.

Under these circumstances it has been contended, on the part of the plaintiff, that his right to this sum of £3,000 cannot be enforced in the Russian court; and that for his protection in respect of it a receiver ought to be appointed, if not of all the assets of the firm, at any rate of such moneys or other assets as may be brought to this country. We are by no means satisfied that his rights in respect of this sum, if he has any, as to which we express no opinion, cannot be properly adjudicated upon and enforced in the Russian court; but, however this may be, we are of opinion that until it is shown that no adequate relief in respect of such rights can be obtained by him in the course of the proceedings, in Russia it would not be proper by the appointment of a receiver to impede the general liquidation of the partnership in the manner in which the partners have themselves decided

that it shall be liquidated. Should it appear, in the course of the liquidation, that the plaintiff's rights and interests are not adequately protected, an immediate application can be made to the vice-chancellor under the reservation contained in his order which, it is to be observed, is not an absolute order for the stay of proceedings, but one which merely stays proceedings in the action until the result of the proceedings before the St. Petersburg Commercial Court shall be known, or until further order shall be made by the vice-chancellor; and any of the parties have liberty to apply as to continuing the action, and generally on the result of the proceedings in the St. Petersburg court. Both appeals must be dismissed with costs.

Appeals dismissed.

Solicitors: *Carr, Bannister & Co.*; *F. T. Dubois*, for *S. Leech*, Derby.

[*Reported by* H. PEAT, ESQ., *Barrister-at-Law.*]

ROURKE *v.* WHITE MOSS COLLIERY CO., LTD.

[COURT OF APPEAL (Cockburn, C.J., Mellish, L.J., Baggallay, J.A., and Bramwell, J.A.), January 25, 26, 1877]

[Reported 2 C.P.D. 205; 46 L.J.Q.B. 283; 36 L.T. 49; 41 J.P. 580; 25 W.R. 263]

Master and Servant—Liability of master for act of servant—Temporary employer—Servant in temporary employ of contractor—Engineman supplied by agreement to contractor for sinking shaft in colliery.

W. contracted with the defendants to sink a shaft in the defendants' colliery. The defendants were to supply an engine at the mouth of the colliery and also two enginemen who were paid by the defendants. The plaintiff was employed by W. to work at the bottom of the shaft, and, owing to the negligence of one of the enginemen, he was injured. In an action by him against the defendants for damages for negligence,

Held: in the circumstances the engineman was the servant of W. and not of the defendants so as to make them liable to the plaintiff, and, therefore, the action failed.

Notes. The doctrine of common employment has been abolished by s. 1 (1) of the Law Reform (Personal Injuries) Act, 1948: see 25 HALSBURY'S STATUTES (2nd Edn.) 364.

Distinguished: *Jones* v. *Liverpool Corpn.* (1885), 14 Q.B.D. 890. Considered: *Moore* v. *Palmer* (1886), 51 J.P. 196. Applied: *Donovan* v. *Laing, Wharton and Down Construction Syndicate*, [1891–4] All E.R.Rep. 216; *Jones* v. *Scullard*, [1898] 2 Q.B. 565. Distinguished: *Waldock* v. *Winfield*, [1901] 2 K.B. 596. Considered: *Dewar* v. *Tasker* (1906), 95 L.T. 87. Applied: *Perkins* v. *Stead* (1907), 23 T.L.R. 433. Considered: *Bull* v. *West African Shipping, etc., Co.*, [1927] A.C. 686. Referred to: *Swainson* v. *North Eastern Rail. Co.* (1878), 3 Ex.D. 341; *Roberts* v. *Tottenham Lager Beer Brewery and Ice Factory* (1889), 6 T.L.R. 4; *Johnson* v. *Lindsay*, [1891] A.C. 371; *Dewar* v. *Tasker* (1907), 23 T.L.R. 259; *Hill* v. *Beckett* (1914), 84 L.J.K.B. 458; *Poulson* v. *Jarvis* (1919), 89 L.J.K.B. 305; *Dowd* v. *W. H. Boase & Co., McFarlane* v. *Coggins and Griffiths (Liverpool), Ltd.*, [1945] 1 All E.R. 605; *Mersey Docks and Harbour Board* v. *Coggins and Griffiths (Liverpool), Ltd.*, [1946] 2 All E.R. 345.

As to the employment of contractors and the onus of proving the temporary employer in the position of master, see 25 HALSBURY'S LAWS (3rd Edn.) 502 et seq.; and for cases see 34 DIGEST (Repl.) 19 et seq.

Cases referred to:

(1) *Wiggett* v. *Fox* (1856), 11 Exch. 832; 25 L.J.Ex. 188; 26 L.T.O.S. 309; 2 Jur.N.S. 955; 4 W.R. 254; 156 E.R. 1069; 34 Digest (Repl.) 32, *99*.

(2) *Purnell* v. *Great Western Rail. Co.* (1876), 1 Q.B.D. 636; 45 L.J.Q.B. 687; 35 L.T. 605; 36 Digest (Repl.) 126, *636*.

Also referred to in argument:

Warburton v. *Great Western Rail. Co.* (1866), 4 H.C. 695; L.R. 2 Ex. 30; 36 L.J.Ex. 9; 15 L.T. 361; 15 W.R. 108.

Abraham v. *Reynolds* (1860), 5 H. & N. 143; 1 L.T. 330; 24 J.P. 327; 6 Jur.N.S. 53; 8 W.R. 181; 157 E.R. 1133; 34 Digest (Repl.) 285, *2033*.

Murray v. *Currie* (1870), L.R. 6 C.P. 24; 40 L.J.C.P. 26; 23 L.T. 557; 19 W.R. 104; 3 Mar.L.C. 497; 34 Digest (Repl.) 23, *48*.

Bartonshill Coal Co. v. *Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur.N.S. 767; sub nom. *Bartonshill Coal Co.* v. *Clark*, 6 W.R. 664, H.L.; 34 Digest (Repl.) 158, *1101*.

Dalyell v. *Tyrer* (1858), E.B. & E. 899; 28 L.J.Q.B. 52; 31 L.T.O.S. 214; 5 Jur.N.S. 335; 6 W.R. 684; 120 E.R. 744; 34 Digest (Repl.) 22, *44*.

Morgan v. *Vale of Neath Rail. Co.* (1865), L.R. 1 Q.B. 149; 5 B. & S. 736; 35 L.J.Q.B. 23; 13 L.T. 564; 30 J.P. 36; 14 W.R. 144; 122 E.R. 1004, Ex. Ch.; 34 Digest (Repl.) 281, *2005*.

Appeal by the plaintiff from a decision of the Common Pleas Division (LORD COLERIDGE, C.J., ARCHBOLD and LINDLEY, JJ.), reported 1 C.P.D. 556, entering judgment for the defendants in an action for damages for negligence caused by the servant of the defendants by which the plaintiff suffered personal injury. At the trial before LUSH, J., at the Liverpool Assizes, the jury assessed the damages at £300 and a verdict was entered for the plaintiff accordingly, with leave to the defendants to move before the Common Pleas Division to have judgment entered for the defendants.

The defendants were colliery owners and had entered into an agreement with Whittle, by which Whittle undertook to sink a shaft which had been commenced by the defendants. The sinking was to be done at so much a foot, and the defendants were to supply the engine at the mouth of the shaft, and provide two enginemen. Through the negligence of Lawrence, one of the enginemen, an accident took place, and some heavy machinery fell down the shaft and injured the plaintiff, who was employed by W. on work at the bottom of the shaft.

Temple, Q.C., and *Gully* for the plaintiff.

Herschell, Q.C., and *McConnell* for the defendants.

COCKBURN, C.J.—I am of opinion that the judgment of the court below should be affirmed. The reasons upon which I feel myself justified in pronouncing that opinion, are founded upon the answers given by the defendants to the plaintiff's interrogatories. That being so, it appears to me quite unnecessary to decide whether *Wiggett* v. *Fox* (1), which has been relied upon for the defendants, applies to this case. For myself I do not think that case does apply.

I regret the decision which we have been compelled to come to, the more because the plaintiff has undoubtedly sustained a very serious injury, and that through the negligent conduct of Lawrence, who was at the time no doubt the general servant of the defendants, but that fact in point of law becomes immaterial if, at the time the injury was sustained, Lawrence, the engineman, was in the employment of the contractor, Whittle, as being under his orders, and in his service for the purpose of carrying out the particular work which he had contracted to perform. If the facts were that Whittle had contracted with the defendants to sink the shaft, but that incidentally the defendants had agreed to do a portion of the work

A themselves, the person by whose negligent conduct the plaintiff was injured would be the servant of the defendants, and they would be liable, but the answers to the interrogatories disclose that, whereas in order to carry out the excavation, and to bring the excavated earth, etc., to the surface, the contractor would have to find a steam engine and an engineman to work it, the company having already engines and enginemen on the spot, say to the contractor, "we will lend them to you, B to be under your orders for the purpose of doing that part of the work." I think they placed this man at Whittle's disposal just as much as if they had said that.

When one person lends his servant to another, and in the course of the servant's employment by that other, some injury occurs through the servant's negligence, the servant must be held to be the servant of the borrower (if I may use the expression), for the purpose of the particular work the latter employs him to do, and the borrower C must be held liable. That being so, the moment it is made out that Lawrence and the plaintiff were in the common employment of Whittle, for the purpose of carrying out that particular work, and that the injury was sustained by the plaintiff in the course of that common employment, it is settled law which it is now too late to disturb, that a servant cannot recover damages from his employer for any injury sustained through the negligence of his fellow servant. I think that in this D case Lawrence and the plaintiff were fellow servants in the employ of Whittle, with respect to the sinking of the shaft, and that the plaintiff cannot sustain his action against the defendants. The judgment of the court below is, therefore, in my opinion right, and must be affirmed.

MELLISH, L.J.—I am of the same opinion. There are two questions in this E case: First, was Lawrence acting as the servant of the defendants or of Whittle? If he was acting as the servant of the defendants they might be liable to the plaintiff for the consequences of Lawrence's negligence, but if Lawrence was not acting as the servant of the defendants, then they are not liable. If Lawrence was acting as servant to the defendants, the second question arises, Was the plaintiff his fellow servant? In my opinion it is unnecessary to give an answer to the F second question, because I think that Lawrence was not acting, at the time the injury was done, as the defendants' servant.

The question of law is not an entirely novel one; it came before the Court of Appeal in *Purnell* v. *Great Western Rail. Co.* (2). The action was against the Great Western Rail. Co., and a contractor who was employed by them, for damage for injuries caused by the defendants' negligence in unloading timber. We had to G consider under what circumstances a man who was the general servant of A. can make himself the servant of B. The question was, whether in doing this particular act the persons who caused the injuries had made themselves the servants of the Great Western Railway. We thought that in so acting, though they were acting for the benefit of the Great Western Railway, yet they were, in doing the particular act, acting under the immediate orders of their own master, Harris: we thought H on that ground they still continued the servants of their old master the contractor, although at the time they were doing something for the benefit of the Great Western Railway.

In the present case there is no doubt, I think, that Lawrence was the general servant of the defendants, but the question is, was he not lent to Whittle, the contractor, so as to make him Whittle's servant for the purpose of that work. I The evidence is that Whittle took a contract with the defendants to carry on the sinking of a shaft, which the defendant had begun. It so happened that the defendants had engines and men there on the spot, and it was agreed between the defendants and Whittle that the company's engines should go on doing the work. The answer to the interrogatories is, that it was agreed that the enginemen were to be under the control of Whittle, and act under his orders while they were doing the work necessary to complete the sinking of the shaft. In my opinion, the effect of all this is to make the acts of the engineman during that employment the act of Whittle in point of law. The negligence complained of on the part of the engineman

was in not obeying the orders of Whittle. That was the negligent act of Lawrence, and the plaintiff being his fellow servant, there is no action against Whittle, but this action is brought against the defendants for the act of a man who was not their servant, and the result is that the defendants are not liable.

BAGGALLAY, J.A.—I am of the same opinion. It appears to me immaterial whether Lawrence was the servant of Whittle for all purposes, because I am satisfied that at the time of the accident, he was the contractor's servant for the purpose of carrying on the particular work which was being done. The contract between Whittle and the defendants was to sink the shaft, and at first I was rather impressed with the argument used by counsel for the plaintiff, that the contractor's duty was only to excavate, and that it rested with the defendants to raise to the surface and dispose of what had been excavated. But I do not think that that is the fair construction of the contract. It seems to me clear, and it is shown by the answers to the interrogatories that it was also the duty of the contractor to lift and carry away what had been excavated, the defendants providing him with machinery and men to work it, in order to enable him to do so. For these reasons, I think Lawrence was acting as the servant of the contractor at the time the injury was done, and that the defendants are not liable.

BRAMWELL, J.A.—I am of the same opinion. I think it is a case of common employment, and when that is the case I think it is most undesirable that a servant should be able to sue his master for injuries sustained through the negligence of his fellow servant, and I can see no reason in favour of his so being able, except perhaps the having some one to apply to for damages. The master is under an obligation to provide a competent man; if he does not he is liable to an action. I think the judgment of the court below must be affirmed.

Appeal dismissed.

Solicitors: *Torr, Janeway & Co.*, for *Edwin Hughes*, Liverpool; *Mather*, for *Scott & Ellis*, Wigan.

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

A

PRINCE AND OTHERS *v.* ORIENTAL BANK CORPORATION

[Privy Council (Sir James Colville, Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier), January 23, 24, 1878]

B [Reported 3 App. Cas. 325; 47 L.J.P.C. 42; 38 L.T. 41; 26 W.R. 543]

Bank—Branch bank—Position of branch bank qua head office—Promissory note—Remittance of draft between branches—Action by promisee for money had and received—Competency.

C An action for money received for the use of a plaintiff cannot be maintained unless there has been an actual receipt of money by the defendant, or something equivalent to it, or unless the defendant is estopped by representations made to the plaintiff from denying the receipt.

The appellants were payees of a promissory note payable at a branch bank of the respondent banking corporation. When the note became due the D manager of the branch bank cancelled it as paid, and remitted to the head branch a draft for the amount in favour of the appellants' bankers. The note was dishonoured, and the next day the manager of the branch bank wrote to the manager of the head branch, requesting him to cancel the draft and returning the dishonoured note, endorsed "cancelled in error." No intimation was given to the appellants or their bankers that the note had been paid. In an E action by the appellants against the respondent bank,

Held: branch banks were not separate and distinct banks, but the agents of one principal banking firm or corporation, and, therefore, the remittance of the draft was only between different offices of the same bank and did not amount to a receipt of money by the head branch; accordingly, the appellants were not F entitled to sue the respondents for money had and received to their use.

Notes. Distinguished: *Bank of Africa* v. *Colonial Government* (1888), 13 App. Cas. 215. Considered: *Brown* v. *Swan* (1921), 37 T.L.R. 787; *Maude* v. *I.R.Comrs.*, [1940] 1 All E.R. 464. Referred to: *Fielding* v. *Corry*, [1898] 1 Q.B. 268; *R.* v. *Lovitt*, [1912] A.C. 212; *Sinclair* v. *Brougham*, [1914–15] All E.R.Rep. 622; *Calico Printers Association, Ltd.* v. *Barclays Bank* (1931), 145 L.T. 51; G *Savory & Co.* v. *Lloyds Bank, Ltd.* (1932), 48 T.L.R. 344; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579.

As to effect of notice of dishonour, see 2 Halsbury's Laws (3rd Edn.) 177; and for cases see 3 Digest (Repl.) 184–5.

Cases referred to:

H (1) *Warwick* v. *Rogers* (1843), 5 Man. & G. 340; 6 Scott, N.R. 1; 12 L.J.C.P. 113; 134 E.R. 595; 3 Digest (Repl.) 250, *681*.

(2) *Simson* v. *Ingham* (1823), 2 B. & C. 65; 3 Dow. & Ry.K.B. 249; 1 L.J.O.S.K.B. 234; 107 E.R. 307; 3 Digest (Repl.) 274, *806*.

(3) *Clode* v. *Bayley* (1843), 12 M. & W. 51; 13 L.J.Ex. 17; 2 L.T.O.S. 123; 7 Jur. 1092; 152 E.R. 1107; 3 Digest (Repl.) 184, *329*.

I (4) *Woodland* v. *Fear* (1857), 7 E. & B. 519; 26 L.J.Q.B. 202; 29 L.T.O.S. 106; 3 Jur.N.S. 587; 5 W.R. 624; 119 E.R. 1339; 3 Digest (Repl.) 237, *612*.

(5) *Garnett* v. *McKewan* (1872), L.R. 8 Exch. 10; 42 L.J.Ex. 1; 27 L.T. 560; 21 W.R. 57; 3 Digest (Repl.) 243, *642*.

(6) *De Bernales* v. *Fuller* (1810), 14 East, 590, n.; 104 E.R. 728; 3 Digest (Repl.) 277, *823*.

(7) *Mackersy* v. *Ramsays Bonars & Co.* (1843), 9 Cl. & Fin. 818; 8 E.R. 628, H.L.; 3 Digest (Repl.) 185, *336*.

Also referred to in argument:

Pollard v. *Bank of England* (1871), L.R. 6 Q.B. 623; 40 L.J.Q.B. 233; 25 L.T. 415; 19 W.R. 1168; 3 Digest (Repl.) 251, *692*.

Appeal by the plaintiffs from a decision of the Supreme Court of New South Wales, dated Sept. 11, 1876, and making absolute a rule nisi to set aside the verdict for the plaintiffs and to enter a verdict for the defendants in an action for money alleged to have been received by the defendants for the use of the plaintiffs.

The following facts are taken from the judgment of the court.

At the trial, which took place before MARTIN, C.J., and a jury, it was either proved or admitted that the appellants, Prince & Co., had sold goods to Hopkins & Gate, storekeepers at Young, and had received from them in payment their promissory note for £426 9s., dated Dec. 1, 1874, and falling due on Saturday, April 3, 1875. The respondents' firm had branches or agencies at Young, at Murrumburrah, and at Sydney. Hopkins & Gate had an account with the respondents' bank at Young, but they had no account with the Murrumburrah branch, and on April 3, 1875, their account at the Young branch was overdrawn. The promissory note had been made payable at the Murrumburrah branch, at the request of the respondents' manager of the Young branch, in order that the respondents might get the benefit of the exchange on collection. The appellants lodged the note with the bank of New South Wales for collection, and thereupon, that bank became the appellants' agent to collect that amount. That bank then lodged it with the respondents' Sydney branch for collection, for which the respondents were to receive one quarter per cent. The note was transmitted in due course by the respondents to their Murrumburrah branch, at which it was made payable, and it was there stamped as having been paid on April 3, the day on which it fell due, and on the same day the respondents' manager at Murrumburrah sent to their manager in Sydney a transfer draft in favour of the Bank of New South Wales for £758 3s. 8d., being for four separate items, one of which was Hopkins & Gate's note for £426 9s. In the respondents' books at Murrumburrah there was an account current between the Young agency and the Murrumburrah agency, and in that account under date April 3, the Young agency, where Hopkins & Gate banked, was debited with their note for £426 9s. and other items, and under the same date credit was given for the above-mentioned draft for £758 3s. 8d. At about two p.m. on Sunday, April 4, Hopkins & Gate's store at Young was entirely destroyed by fire, and their credit was thereby injured, and they afterwards made an assignment of their property for the benefit of their creditors. On Monday, April 5, the Murrumburrah manager wrote to the respondents' Sydney manager requesting him to cancel the transfer draft in favour of the Bank of New South Wales, and returning the promissory note dishonoured; and on the receipt of the latter, the respondents' Sydney manager returned the note to the Bank of New South Wales; and on April 7 that bank gave the appellants notice of the dishonour of the note. No intimation was ever given by the respondents to Hopkins & Gate that their account was charged, and there was no evidence that it ever was, in fact, charged with the amount of the bill; and no intimation was ever given by the respondents to the appellants or to the Bank of New South Wales that such amount had been paid, nor was it, in fact, paid.

At the close of the appellants' case counsel for the respondents submitted that the appellants ought to be nonsuited, or that the verdict should be entered for the respondents, and, after argument, a verdict for the appellants for £437 16s. 5d. was entered by consent, leave being reserved to the respondents to move to enter the verdict for them, and on Aug. 30 a rule nisi was granted by the Supreme Court. The rule came on for argument before MARTIN, C.J., HARGRAVE and FAUCETT, JJ., on Sept. 11, 1876, when the court was divided in opinion, the Chief Justice holding that what the respondents had done was equivalent to an acknowledgment of the receipt of the money, and that they were estopped from alleging that no payment took place; and HARGRAVE and FAUCETT, JJ., being of opinion that the appellants ought to

A have been nonsuited. The rule was accordingly made absolute to set aside the verdict for the appellants and to enter it for the respondents in lieu thereof. From this decision the appellants appealed.

Cohen, Q.C., and *Erskine Pollock* for the appellants.
Benjamin, Q.C., and *Webster* for the respondents.

B **SIR MONTAGUE SMITH.**—In this case their Lordships are of opinion that the judgment of the court below ought to be affirmed.

The action is brought to recover money alleged to have been received by the respondents for the use of the appellants. It is essential to the maintenance of such an action that the money sought to be recovered should have been actually C received by the respondents, or that something should have occurred which is equivalent to a receipt of money, or that representations should have been made to the appellants under circumstances which would estop the respondents from denying the receipt of the money. In the present case their Lordships think that none of those positions is stablished by the evidence.

The facts lie in a small compass. It is clear beyond dispute that the makers of D this note, Hopkins & Gate, had not paid any money in respect of it into the bank. There is no evidence of the state of their account at Young, and it certainly cannot be taken as against the defendants that that account was in funds. The appellants, although they called Hopkins, did not attempt to prove that the Young branch was in funds, or that Hopkins and Gate had any agreement with the respondents' bank for the payment of this note. It is contended on behalf of the appellants that E what passed between the Murrumburrah and the Sydney branches of the bank, and the remittance by the officer at Murrumburrah to the officer at Sydney of the transfer note, was equivalent to a payment of money to the Sydney branch. Even so, the whole of the appellants' case must rest upon the foundation that these branches are to be treated for this purpose as if they were separate and independent banks. If they had been separate and distinct banks, it may be that the F remittance by the Murrumburrah Bank to the bank at Sydney of this draft to be put to the credit of the New South Wales Bank, would, if so accepted, have been equivalent to a receipt on the part of the Sydney bank of money from the Murrumburrah bank to be held for the New South Wales bank. However, the difficulty of the plaintiffs' case is that these banks are not separate and distinct banks, but branches of one and the same banking corporation or establishment. They are G indeed separate agencies, but agencies of one principal, that principal being the corporation of the Oriental Bank.

How then are the respondents liable? They have not received the money, nor anything equivalent to money from any source outside their own establishment. Supposing the Murrumburrah branch had sent money from their till to the branch at Sydney, whose money would it have been?—the money of the Oriental Bank. H It would have gone from the till at Murrumburrah to the till at Sydney, but would remain, notwithstanding the transfer, the bank's own money. Then, if so, the remittance of the draft and the entries, which at most are only equivalent to a transfer of money, and might be so as between distinct banks, cannot have greater effect than an actual transfer of money. They are entries and transactions only by and between the respective officers of the same bank. If these transactions had I been communicated to the New South Wales Bank or to the appellants, it may be that the Oriental Bank would have been estopped from saying that they did not hold the money to the account of the appellants or of the New South Wales Bank. No such communication was made, however, and before anything was known beyond the walls of the bank itself, the order given by the officer at Murrumburrah to the Sydney Bank to credit the New South Wales Bank was cancelled and withdrawn, and the memorandum "cancelled in error" was made upon the note. The first thing that the appellants or the New South Wales Bank hear or know is that the note is dishonoured.

If any damage has arisen in consequence of negligence or delay on the part of the bank in getting payment of this note, an action may lie for such omission or negligence, in which the true amount of damages would be assessed, but their lordships have nothing to do with any question of that kind. The single question they have now to determine is whether money has been received by the respondents to the use of the appellants, or whether they have in any way held out to the appellants that there was money in their hands belonging to the appellants. The mere fact of cancelling the signature of the makers, and writing "paid" on the note, corrected, as it was, before the note was sent back, by the memorandum "cancelled in error," cannot be effectual to charge the bank with the receipt of the money, see *Warwick* v. *Rogers* (1); nor, unless the branches are to be regarded as distinct banks, can the uncommunicated entries in the books of the bank have such an effect, see *Simson* v. *Ingham* (2).

The case really turns upon the position or status of these branch banks. In principle and in fact they are agencies of one principal banking corporation or firm, and the few decisions which have taken place with respect to them are consistent with this view. In *Clode* v. *Bayley* (3) it was held that for the purpose of estimating the time at which notice of dishonour should be given, the different branches were for that purpose to be regarded as distinct. In considering whether notice of dishonour was given in time it was thought reasonable that the bill should be sent successively to the branch banks through which it had come to the principal bank, before giving the notice. It was pointed out by Lord Abinger that it was not possible for the bank in London to know from whom the bill came; therefore, it was necessary, in the ordinary course of the transaction of business, that it should be sent to the branches before notice of dishonour could properly be given. In *Woodland* v. *Fear* (4) it was held that a joint-stock bank was bound to pay the cheques of a customer at that branch only at which he kept his account, and had not violated its engagement with the customer by refusing to pay his cheque at another branch. The reason of this decision is obvious. It would be difficult for a bank to carry on its business by means of various branches if a customer who kept his account at one branch might draw cheques upon another branch, however distant from that at which he kept his account, and demand that they should be cashed there. The latter branch could not possibly know the state of his account. The case decides no more than this, that the bank came under no engagement or promise to their customer to honour his cheques at any branch except that at which he kept his account.

The only other case is one that affords strong support to the view which their Lordships are disposed to take: *Garnett* v. *McKewan* (5). There the plaintiff had accounts at two branches of the London and County Bank. His account at branch A was in funds; his account at branch B was overdrawn. He drew a cheque upon his account at branch A where he had funds, and the bank refused to pay it because his account at branch B was overdrawn, and the court held it was justified in so doing. The principle of that decision affirms the identity of the bank, and of its separate branches; although separate agencies, they were still agencies of one principal bank, with which alone the plaintiff contracted. Acting upon this principle, the court held that the money of the plaintiff lodged at one branch, and being still there to the credit of his account, was to be treated as part of the customer's entire account with the bank, and that the whole account was to be looked at to see on which side as between him and the bank the balance stood. Bramwell, B., said (L.R. 8 Exch. at pp. 14, 15):

> "The question is one of mixed law and fact. It is admitted that in some cases the bank could not debit the customer with a debt due to them; for example, a debt due to the bank as carrying on a different business, as that of brewers. Nor, again, would they have any right to blend two accounts kept by one person with them in different characters as a personal and a trust account [no, nor would any other bank, whether it had branches or not]. But

A here there was nothing except the fact that there were two branch establishments."

That fact, in the opinion of the learned judge, established no difference between the case of a bank having branches and an ordinary bank.

Another question of some importance has been argued: whether, assuming that the bank had received the money from the makers of the note, the appellants could B sue the bank for it, or whether their right of action would not be against the New South Wales Bank, whom they employed to collect the note. The question thus barely stated does not really arise, because it is not pretended that the bank did receive money specifically for the purpose of taking up the note. If the makers of the note had paid the money to the bank with an express direction that it should be appropriated to the payment of this note, then the point would have C arisen which was decided in *De Bernales* v. *Fuller* (6). That case appears to be in some degree an exceptional one, and turned upon the precise circumstances existing in it. At first sight it seems opposed to the general rule that a principal cannot sue a sub-agent for want of privity existing between them. The case has been referred to in several later decisions. It has never been overruled, and it has been put on a ground on which it may stand by MAULE, J., in *Warwick* v. *Rogers* D (1). He says (5 Man. & G. at pp. 359, 360):

> "In *De Bernales* v. *Fuller* (6), where money was paid into a banking house for the purpose of taking up a particular bill which was lying there for payment, it was held to be money had and received to the use of the then owner and holder of the bill, and that it could not be applied by the bankers to the general account of the acceptor who paid in the money, though the bankers' E clerk had said at the time the money was paid in that he would not give up the bill till he had seen his master. But that decision turned upon the fact that the money having been expressly paid into the defendants' house for the specific purpose declared at the time of taking up that particular bill, and that purpose not having been directly repudiated till afterwards, it must be taken to have been received at the time for the use of the holder of the bill."

F

It would seem, therefore, that the case may be supported on the ground that money had been paid in specifically for the payment of the particular bill, and had been accepted by the bankers for that purpose, and that they made themselves, by so accepting the money, agents to hold it for the plaintiffs.

The general rule, however, was affirmed by two learned Lords in the House of G Lords, in *Mackersy* v. *Ramsays Bonars & Co.* (7). There two bills payable in India had been deposited by Mackersy with Ramsays, who were bankers at Edinburgh, to collect for him. They sent the bills to their English correspondents, Coutts & Co., and Coutts & Co. remitted them to their own correspondents, one to Palmers, and the other to Alexander & Co., in India, to collect. Both bills were paid in India, one to Palmers, and the other to Alexanders, but both these houses failed, H and did not remit to Coutts. The House of Lords decided that Mackersy was entitled to recover the amount of the bills from Ramsays, his own bankers in Edinburgh, as his principal agents, inasmuch as they were liable to him as soon as their sub-agents received the money; deciding, in fact, that the receipt of the sub-agents was, as between Mackersy and Ramsays, the receipt of Ramsays. In the course of giving judgment, LORD COTTENHAM said (9 Cl. & Fin. at pp. 846, 847):

I "From the time the bills were sent to the pursuers the appellant did not interfere. It was not intended that he should do so, nor indeed could he have done so, as none of the intended agents acted under his authority; he, therefore, had no control over them. All that Mackersy undertook to do by the bills had been accomplished."

LORD CAMPBELL said (ibid. at p. 845):

> "Mackersy could not have interfered with the money either in the hands of Alexander & Co. or of Coutts & Co. There was no privity between him and

either of those houses; but payment to Alexander & Co. was payment to Coutts & Co., and payment to Coutts & Co. was payment to Ramsays & Co."

In the view which LORD CAMPBELL entertained, no action could have been brought by Mackersy against either Coutts & Co. or Palmer & Co., or Alexander & Co., there being no privity between him and them which would have entitled him to sustain it.

There is a further difficulty in the way of the appellants suing the respondents directly, and passing over their immediate agents, the New South Wales Bank. All that the respondents apparently undertook to do was to place the amount of the bills when collected to the account of the New South Wales Bank, subject, it may be, to the accounts between the two banks. In their Lordships' view, however, it is not necessary to determine the case upon the questions last referred to, because they are of opinion that neither the appellants nor the New South Wales Bank are entitled, for the reasons they have already given, to sue the Oriental Bank for money had and received to their use. Their Lordships will humbly advise Her Majesty to affirm the judgment of the Supreme Court, with the costs of this appeal.

Appeal dismissed.

Solicitors: *Parker & Clarke*; *Murray, Hutchins & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

NORRIS AND ANOTHER *v.* BEAZLEY

[COMMON PLEAS DIVISION (Lord Coleridge, C.J., Denman and Grove, JJ.), January 12, 1877]

[Reported 2 C.P.D. 80; 46 L.J.Q.B. 169; 35 L.T. 846; 25 W.R. 320]

Practice—Parties—Joinder of defendant—Counterclaim by defendant—Embarrassment to plaintiff.

The defendant, acting on behalf of himself and as trustee for the members of a projected company, purchased a ship from the plaintiffs, and he accepted a bill of exchange in part payment. In an action brought by the plaintiffs to recover £500 on the bill the defendant alleged that the company had a counterclaim against the plaintiff for fraud, and applied under R.S.C., 1875, Ord. 16, r. 13, [now R.S.C. (Revision) 1962, Ord. 15, rr. 6. 8], to add the company as defendant.

Held: the rule was not intended to add a defendant who had no interest in the action for the convenience of another defendant; the joinder sought would embarrass the plaintiffs; and, therefore, the application would be refused.

Notes. Applied: *Atid Navigation Co., Ltd.* v. *Fairplay Towage and Shipping Co., Ltd.*, [1955] 1 All E.R. 698. Referred to: *Amon* v. *Raphael Tuck & Sons, Ltd.*, [1956] 1 All E.R. 273.

As to effect of non-joinder of parties, see 30 HALSBURY'S LAWS (3rd Edn.) 394, and R.S.C. (Revision) 1962, Ord. 15, rr. 6, 8; and for cases see DIGEST (Practice) 429.

Cases referred to:

(1) *Blake* v. *Done* (1861), 7 H. & N. 465; 31 L.J.Ex. 100; 5 L.T. 429; 7 Jur.N.S. 1306; 10 W.R. 175; Digest (Practice) 268, *53.*

(2) *Edwards* v. *Lowther* (1876), 45 L.J.Q.B. 417; 34 L.T. 255; 24 W.R. 434; 2 Char. Pr. Cas. 293; Digest (Practice) 424, *1203.*

A Also referred to:

Pollock v. *Campbell* (1876), 1 Ex.D. 50; 45 L.J.Q.B. 199; 34 L.T. 360; 24 W.R. 320; 6 Digest (Repl.) 439, *3085.*

Oger v. *Bradnum* (1876), 1 C.P.D. 334; 45 L.J.Q.B. 273; 34 L.T. 578; 40 J.P. 327; 24 W.R. 404; 2 Char. Pr. Cas. 132; 6 Digest (Repl.) 438, *3077.*

B **Motion** by the defendant to rescind an order of GROVE, J., refusing leave to add a defendant under R.S.C., 1875, Ord. 16, r. 13.

The plaintiffs, shipbrokers, and the defendant entered into an agreement for the sale by the plaintiffs to the defendant of a ship for £3,500. In an action brought by the plaintiffs to recover £500 due on a bill of exchange of which the defendant was the acceptor, for the balance of the purchase money, the defendant alleged that he was induced to enter into the agreement by a fraudulent representation that the ship was seaworthy, and that he and the Niger Merchants, Ltd., on whose behalf he alleged he bought the ship (but which at the time of the agreement was not incorporated and to whom he had later transferred it) had suffered damage. The defendant applied to GROVE, J., in chambers for leave to add the Niger Merchants, Ltd., as defendants in the action.

D By R.S.C., 1875, Ord. 16, r. 13 [now R.S.C. (Revision) 1962, Ord. 15, rr. 6, 8]

"No action shall be defeated by reason of the mis-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a E judge to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined be struck out and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person F shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice."

G *W. Arnold Lewis* for the plaintiffs.

Crump for the defendant.

LORD COLERIDGE, C.J.—This is an application on the part of the present defendant for leave to add another party as defendant to the record. The action is upon a bill of exchange of which the defendant is the acceptor. He pleads a H number of pleas, one of which sets up a case of fraud by which he says he was induced to accept the bill.

A ship was bought on behalf of the Niger Merchants Co., Ltd., who were not at the time an incorporated company, and she was subsequently transferred to them. They have a ground of complaint against the plaintiff, giving rise to a counterclaim in which is set up a charge of fraud. The plaintiff replies, and the I defendant now moves for leave to add the Niger company as defendants. The company it seems are willing to be so added; while the plaintiffs made some objections on the merits which are not very material. The whole question is one of procedure. R.S.C., 1875, Ord. 2, r. 6, [now revoked] directs that the procedure under the Bills of Exchange Act shall be continued. Under that Act the application could not have been made at all. But it is not necessary to decide the question upon that Act, because by Ord. 16, r. 13, it is provided that the name of any party who ought to have been joined may be added on certain terms. If this rule were unqualified I should have acceded to the application of counsel

for the defendant. His case is this: "I am merely a nominal defendant, the real defendants are the Niger Merchants Co., who have a large counterclaim in respect of a cause of action of which this bill of exchange is only a part; and their counterclaim would be a substantial one if the action were brought against them. I am only a trustee."

If matters stood there, I should have thought it proper that the company should be before the court for the purpose of determining the validity of their claim, and should have allowed this application. But counsel for the plaintiffs called our attention to a subsequent part of the rule, which I consider very material, and adverse to the defendant. These words occur, "No person shall be added as a plaintiff . . . . without his own consent thereto." Here it is sought to make a party a plaintiff (so far as regards the counterclaim), in respect of a matter which he does not seek an adjudication upon; and then come the words,

> "All parties whose names are so added as defendants shall be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order &c. . . . "

Counsel argued that those words imply that a defendant to be added must be a party against whom the plaintiff has some cause of complaint, and not a person against whom the plaintiff neither has, nor desires, any claim. I think counsel for the plaintiffs has answered the argument of counsel for the defendant, and that under this section it is not intended that one defendant should be added for the convenience of another. It is important to keep strictly to rules. I cannot look into the merits of this case. It might be possible to use this section to harass plaintiffs, and to insert parties who have no interest; and by that means to do great injustice. Therefore, I think this power should be exercised with discretion, that we have no authority to add the Niger Merchants Co. as defendants, and that the order appealed from ought not to be interfered with.

DENMAN, J. I am of the same opinion. In the present case the proceedings have reached the point at which Ord. 16, r. 13, would be applicable, if a proper case were made out. It is impossible to say that Ord. 16, r. 13, is to be wholly confined to cases where a plaintiff in his original statement of claim shows a cause of action against particular parties, and to limit the power of the court to the introduction of a defendant against whom that claim shows a right of action. It may sometimes be necessary to bring in another party; but the court ought not to bring in any person as defendant whom the plaintiff does not desire to sue, unless a strong case is made out for its doing so. In this case the plaintiff sues the defendant as acceptor of a bill of exchange, and there is no denial of the acceptance; but the defendant says that although the bill was given in part payment of the price of a ship, yet it was obtained under an agreement founded upon a fraudulent misrepresentation of fact. If the case of the defendant is true he may perhaps hereafter recover the damages he seeks against the plaintiff in his counterclaim, in the character of a trustee for the Niger company. But the action is upon a bill of exchange, to which the defence is a counterclaim by a third party. We ought not, upon a mere statement of such a cross claim, to join as a co-defendant a party the plaintiff does not wish to join. There is no necessity for it, there is no justice in it, and it may be very detrimental to the rights of the plaintiff. We must be guided by the whole of Ord. 16, r. 13. The earlier words of it are qualified by the later ones, though the court cannot altogether decide the point upon that ground. There might be cases in which a party might properly be added, but they would only be cases where such an addition would enable the court to do substantial justice.

GROVE, J.—I am of the same opinion. Counsel for the defendant said when this case came before me on appeal from the master that he applied under Ord. 16, r. 13, and I have also some faint recollection of Ord. 16, r. 13, being then cited. My impression was then and is now, that the object of the rule was to enable

A the court of its own motion, or upon the motion of a party, to add a plaintiff, or a defendant, with his consent, upon service of a summons and notice. Under the Common Law Procedure Act, 1852, s. 222 [repealed by Statute Law Revision Act, 1892], power was given to amend all defects and errors in civil proceedings; but it was a moot question whether parties could be added under that section, and a more precise power was desirable: *Blake* v. *Done* (1). Therefore, the rule was B made that where either party was likely to be damaged by the non-joinder of necessary parties a plaintiff or a defendant might be added. The rule is limited to questions involved in the action. The word "involved" is an elastic word. Collateral rights may be involved. It is difficult to give an exact demarcation to the word; but there must be some limitation to its meaning.

I am prepared to concur in this case with the judgment of the court, because I C hold that the right to be set up by the Niger Merchants Co. is not a right fairly involved in the action, though I do not say that that company may not have some rights over against the plaintiffs. If the court is to add parties because there may arise contingencies in which an action over may be possible, such an extension of the object of the rule would lead at least to great embarrassment, and would actually unsettle questions. In this case there has not been even a D sufficient prima facie case of right to add a defendant made out. In so saying I speak from the affidavits relied on by the plaintiffs. The contract, as a part performance of which the bill of exchange was given, was made not with the Niger Merchants Co., but with the defendant. There is no allegation of agency, although the ship was conveyed over to the company afterwards. The defendant gave the bill of exchange in question. If, where a bargain of sale is made, and the seller E elects to take as payment a bill of exchange, he is to be told that he has a right of action against a third person, and to have his right of payment deferred till the rights of the third person can be settled, a most formidable obstacle would be interposed to the making of contracts. The seller would say: "My contract is with the person who gave me the bill, and not with others behind him." The case made out by the counterclaim is the unseaworthiness of the ship. Are we F to extend the Act upon bills of exchange to try the case of the sale of a ship? A counterclaim is not applicable to claims by third parties, but to those by the parties to the action themselves. The subject of this counterclaim is too remote.

LORD COLERIDGE, C.J.—I wish to guard against being supposed by anything I have said to have meant that a defendant could never be added at the G instance of the defendant. Such was not my meaning. I desire to adopt the language of ARCHIBALD, J., in *Edwards* v. *Lowther* (2),

> "all parties against whom relief or remedy is sought should, if possible, be joined in the same action."

Application dismissed with costs.

H Solicitors: *Trinders & Curtis Heywood*; *Brook & Chapman.*

[*Reported by* S. HARE, ESQ., *Barrister-at-Law.*]

LAX AND BAINBRIDGE *v.* DARLINGTON CORPORATION

[Court of Appeal (Bramwell, Brett and Cotton, L.JJ.), June 24, 25, December 2, 1879]

[Reported 5 Ex.D. 28; 49 L.J.Q.B. 105; 41 L.T. 489; 44 J.P. 312; 28 W.R. 221]

Market—Negligence—Liability of owner of market to cattle owners—Payment for storage of cattle—Injury to cow.

The defendants were the owners of a cattle market. In the street in which the market was held there was a statue, round which the defendants had placed some iron railings. The plaintiffs brought a cow to the market for sale and paid the market toll. In attempting to jump the railings, the cow was injured and subsequently died. In an action for damages by the plaintiffs, the jury found that the railings were dangerous because they were not high enough.

Held: the defendants being the owners of the market and having received toll from the plaintiffs were prima facie bound to offer a reasonably safe place to the plaintiffs for the storage of their cattle; and, since they had not done so, the plaintiffs were entitled to damages for the loss of the cow.

Notes. This case should now be read in the light of the provisions of the Occupiers' Liability Act, 1957; 37 Halsbury's Statutes (2nd Edn.) 379.

Considered: *Yarmouth* v. *France* (1887), 19 Q.B.D. 647. Explained: *Norman* v. *Great Western Rail. Co.*, [1914] 2 K.B. 153; Considered: *Hall* v. *Brooklands Auto-racing Club*, [1932] All E.R.Rep. 208; *Brackenborough* v. *Spalding*, [1942] 1 All E.R. 34. Referred to: *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; *British Petroleum Co.* v. *A.-G. for Ceylon*, [1926] A.C. 147.

As to the duty of an occupier, see 28 Halsbury's Laws (3rd Edn.) 40 et seq.; and for cases see 36 Digest (Repl.) 45 et seq. As to rights and liabilities of the owner of a market, see 25 Halsbury's Laws (3rd Edn.) 389 et seq.; and for cases see 33 Digest (Repl.) 454 et seq.

Cases referred to:

(1) *Clayards* v. *Dethick and Davis* (1848), 12 Q.B. 439; 116 E.R. 932; 36 Digest (Repl.) 154, *809*.

(2) *Wyatt* v. *Great Western Rail. Co.* (1865), 6 B. & S. 709; 6 New Rep. 259; 34 L.J.Q.B. 204; 12 L.T. 568; 29 J.P. 630; 11 Jur.N.S. 825; 13 W.R. 837; 122 E.R. 1356; 36 Digest (Repl.) 36, *172*.

Also referred to in argument:

Winch v. *Thames Conservators* (1874), L.R. 9 C.P. 378; 43 L.J.C.P. 167; 31 L.T. 128; 22 W.R. 879, Ex. Ch.; 36 Digest (Repl.) 61, *333*.

Gautret v. *Egerton* (1867), L.R. 2 C.P. 371; 36 L.J.C.P. 191; 15 W.R. 638; sub nom. *Gantret* v. *Egerton*, *Jones* v. *Egerton*, 16 L.T. 17; 36 Digest (Repl.) 47, *247*.

Thompson v. *North Eastern Rail. Co.* (1862), 2 B. & S. 119; 31 L.J.Q.B. 194; 6 L.T. 127; 8 Jur.N.S. 991; 10 W.R. 404; 1 Mar.L.C. 207; 121 E.R. 1012, Ex. Ch.; 36 Digest (Repl.) 189, *1000*.

Curwen v. *Salkeld* (1803), 3 East, 538; 102 E.R. 703; 33 Digest (Repl.) 458, *91*.

Prince v. *Lewis* (1826), 5 B. & C. 363; 8 Dow. & Ry.K.B. 121; 4 Dow. & Ry.M.C. 19; 4 L.J.O.S.K.B. 188; 108 E.R. 135; 33 Digest (Repl.) 475, *305*.

Mosley v. *Walker* (1827), 7 B. & C. 40; 9 Dow. & Ry.K.B. 863; 5 L.J.O.S.K.B. 358; 108 E.R. 640; 33 Digest (Repl.) 458, *93*.

R. v. *Starkey* (1837), 7 Ad. & El. 95; 2 Nev. & P.K.B. 169; Will. Woll. & Dav. 502; 6 L.J.K.B. 202; 1 J.P. 265; 1 Jur. 672; 112 E.R. 406; 33 Digest (Repl.) 461, *119*.

Appeal by the defendants from a decision of Lush, J., in an action tried by him with a jury at Newcastle Assizes.

A The plaintiffs brought the action to recover damages for the loss of a cow occasioned by the negligence of the defendants, who were owners of a public market for the sale of cattle at Darlington. The defendants had placed some iron railings round a statue in the street in which the market was held. The plaintiffs brought a cow to the market for sale, and it tried to jump over the railings, and was killed. At the trial, the only question left to the jury was whether the railings B were kept negligently in not being of a sufficient height, and the jury found that they were. After further consideration LUSH, J., on Dec. 21, 1878, delivered judgment in favour of the plaintiffs for £22 14s. 6d.

Herschell, Q.C., and *Hugh Shield* for the defendants.
Cave, Q.C., and *John Edge* for the plaintiffs.

C *Cur. adv. vult.*

Dec. 2, 1879. The following judgments were read.

BRETT, L.J.—This action was brought against the defendants as owners of a market, and when the case was tried before LUSH, J., the only question that was discussed, and the only question that was left to the jury, was the question whether D any part of the market was dangerous. The whole stress of the argument before the learned judge was on the question whether the defendants were under any liability to the persons who brought cattle into their market if that market was in any part dangerous, that is, whether such persons were entitled to have the market in a non-dangerous condition. The defendants are owners of this market. They have a franchise without doubt, but they are, in brief, owners of the land. They receive E cattle, and they gain profit thereby from the tolls which they receive. I am aware that the toll consists of various items. Although these items are in fact paid in one lump sum, part of that toll is without doubt for storage, for the defendants do not merely own a franchise of a market, they also own the land, and, as I have said, receive sums of money for the storage of cattle. I cannot doubt that the defendants are in this case prima facie bound to offer a safe place for the receipt and storage of F cattle. Therefore, on the main question, I think that the defendants were bound to offer a reasonably safe place to the plaintiffs for the storage of their cattle, and the jury have found that they did not do so.

No other question was left to the jury, and it is clear that this was done of purpose by both the parties. It is, of course, clear that, although the defendants are prima facie liable, yet, if the plaintiffs have been guilty of an unreasonable G want of care, or have purposely undertaken a risk the extent of which was fully known to them, then they either contributed to, or were themselves the sole cause of the injury which has happened. As, however, this question was not raised at the trial, and no evidence was given so as to raise this contention against the plaintiffs, I am of opinion that the judgment of the learned judge must be affirmed.

H **BRAMWELL, L.J.**—BRETT, L.J., has said that the plaintiffs are entitled to succeed on this appeal. I am glad that this is so, and I agree that they are so entitled. This appeal should, in my opinion, never have been brought. There is no question of principle at stake. I am not influenced by the fact that this is a case of a market. The defendants are persons who take the money of customers for profit; they invite the plaintiffs to come on to their land and to use their market I for profit, and they are, therefore, prima facie bound to have that land in a non-dangerous condition. It was either their folly or their misfortune that the rails round the statue were too low. I think that the case would have been the same if the defendants themselves or some other authorised persons, such as a local board, had made a trench in this land; it would have been the duty of the defendants to warn the plaintiffs of the fact of the trench, unless, indeed, the danger were obvious. A prima facie case, therefore, is made out against the defendants that they have not done their duty to their customers, who come to them for their profit, in warning them against a danger which was not obvious.

It has been stoutly argued that the plaintiffs knew of the danger and incurred a risk which was obvious. I own that I should not be without misgivings if this question were properly before us; but it is not, and I am glad that it is not, for, if the plaintiffs had been volunteers, and had run into a danger which was obvious, then I should hold that the defendants would not be liable. I mention this because I think that the principle of these cases is often misunderstood. A passenger in a railway train is carried beyond the platform, he jumps out, is injured, and then he sues the company for damages for the injuries received. I think that is not the proper course to take. The passenger should remain in the train, allow himself to be carried on beyond his destination, then sue the company for damages because they failed to do their duty in supplying proper accommodation at their station.

I wish to say a word about *Clayards* v. *Dethick and Davis* (1), for a phrase is found more than once in that case which seems to me to give countenance to a mischievous idea. It is said that a person is not bound to abstain from doing something; I agree. Bound to whom? The word is misleading. In that case, the cabman was without doubt not bound to stay at home; but if he chooses to go out when there is danger, then he must take all the consequences. So, if a man were unlawfully detained by being shut up at the top of a house, he undoubtedly would not be bound to stay there; but, if he were to jump out of a window and so to break his leg, he would not be entitled to recover for that injury. Again, the word "prudent" is also misleading. A prudent man may lead a forlorn hope; a prudent man may, on a balance of chances and probabilities, do what in the result may not be a success. If *Clayards* v. *Dethick and Davis* (1) is to be supported, I think that it must be on a ground which is indicated in the judgment of WIGHTMAN, J.; that is, that the danger in that case was not obvious, that the cabman was led into trouble by something which partook of the nature of a trap or pitfall. It has been said that *Clayards* v. *Dethick and Davis* (1) has been adopted in *Wyatt* v. *Great Western Rail. Co.* (2). If that be so, then I must say that I think the authority of this last case also is shaken. But, as has been said, the question of contributory negligence does not arise in the case now before us, and, therefore, the appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. I agree with the reasons given by BRETT, L.J., and I do not think it necessary now to discuss the authority of *Clayards* v. *Dethick and Davis* (1), or *Wyatt* v. *Great Western Rail. Co.* (2).

Appeal dismissed.

Solicitors: *Chester, Urquhart & Co.*, for *Clayhills*, Darlington; *A. S. Lawson*, for *Dunn Watson*, Darlington.

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

ALLISON *v.* BRISTOL MARINE INSURANCE CO., LTD. AND OTHERS

[House of Lords (Lord Chelmsford, Lord Hatherley, Lord Penzance, Lord O'Hagan and Lord Selborne), July 2, 1875, February 25, March 30, 1876]

[Reported 1 App. Cas. 209; 34 L.T. 809; 24 W.R. 1039; 3 Asp.M.L.C. 178]

Insurance—Marine insurance—Freight—Half freight paid on signing bills of lading—Insurance of unpaid half—Loss of ship during voyage—Liability of insurer.

By a charterparty for a voyage from G. to B. it was provided that freight was to be paid on unloading and right delivery of the cargo at the rate of 42s. per ton on the quantity delivered, and that "such freight is to be paid one half in cash on signing bills of lading less four months' interest at bank rate . . . five per cent. for insurance, and two-and-a-half per cent. on gross amount of freight in lieu of consignment at B, and the remainder on right delivery of the cargo. . . ." Half of the estimated amount of freight was paid in advance, and the shipowner insured the unpaid freight with the respondents. The ship was lost, but half the cargo was saved and delivered without any additional payment by the charterer in respect of freight. In an action by the shipowner on the policy,

Held: on the true construction of the charterparty the total amount of freight payable was to be calculated on the quantity of cargo delivered; one half of that sum had been received in advance by the shipowner, but the other half had been totally lost through risks insured against; and, therefore, in respect of that half the shipowner was entitled to recover.

Notes. Considered: *Anderson* v. *Morice* (1876), 1 App. Cas. 713. Referred to: *Smith, Hill & Co.* v. *Pyman, Bell & Co.*, [1891] 1 Q.B. 742; *Weir* v. *Girvin*, [1900] 1 Q.B. 45; *Reliance Marine Insurance* v. *Dudar*, [1913] 1 K.B. 265; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; *Marine Insurance Co.* v. *Grimmer*, [1944] 1 All E.R. 353.

As to insurance on freight, see 22 Halsbury's Laws (3rd Edn.) 147–149; and for cases see 29 Digest (Repl.) 118–120, 299–304.

Cases referred to:

(1) *Kirchner* v. *Venus* (1859), 12 Moo.P.C.C. 361; 33 L.T.O.S. 81; 5 Jur.N.S. 395; 7 W.R. 455; 14 E.R. 948, P.C.; 32 Digest (Repl.) 255, *9*.

(2) *De Silvale* v. *Kendall* (1815), 4 M. & S. 37; 105 E.R. 749; 12 Digest (Repl.) 639, *4943*.

(3) *Byrne* v. *Schiller* (1871), L.R. 6 Exch. 319; 40 L.J.Ex. 177; 25 L.T. 211; 19 W.R. 1114; 1 Asp.M.L.C. 111, Ex. Ch.; 41 Digest 656, *4883*.

(4) *Flint* v. *Flemyng* (1830), 1 B. & Ad. 45; L. & Welsb. 257; 8 L.J.O.S.K.B. 350; 109 E.R. 704; 29 Digest (Repl.) 170, *1059*.

Also referred to:

Irving v. *Richardson* (1831), 2 B. & Ad. 193; 1 Mood. & R. 153; 9 L.J.O.S.K.B. 225; 109 E.R. 1115; 29 Digest (Repl.) 134, *756*.

Stephens v. *Australasian Insurance Co.* (1872), L.R. 8 C.P. 18; 42 L.J.C.P. 12; 27 L.T. 585; 21 W.R. 228; 1 Asp.M.L.C. 458; 29 Digest (Repl.) 127, *711*.

Anon. (1682), 2 Show. 283; 89 E.R. 941; 41 Digest 648, *4794*.

Blakey v. *Dixon* (1800), 2 Bos. & P. 321; 126 E.R. 1304; 41 Digest 643, *4738*.

Mashiter v. *Buller* (1807), 1 Camp. 84; 170 E.R. 885, N.P.; 41 Digest 661, *4927*.

Andrew v. *Moorhouse* (1814), 5 Taunt. 435; 1 Marsh. 122; 128 E.R. 758; 41 Digest 621, *4518*.

Manfield v. *Maitland* (1821), 4 B. & Ald. 582; 106 E.R. 1049; 41 Digest 662, *4940*.

Saunders v. *Drew* (1832), 3 B. & Ad. 445; 110 E.R. 160; 41 Digest 664, *4953*.
Hall v. *Janson* (1855), 4 E. & B. 500; 3 C.L.R. 737; 24 L.J.Q.B. 97; 24 L.T.O.S. 289; 1 Jur.N.S 571; 3 W.R. 213; 41 Digest 600, *4257*.
Hicks v. *Shield* (1857), 7 E. & B. 633; 26 L.J.Q.B. 205; 29 L.T.O.S. 106; 3 Jur.N.S. 715; 5 W.R. 536; 119 E.R. 1380; 41 Digest 663, *4948*.
Jackson v. *Isaacs* (1858), 3 H. & N. 405; 27 L.J.Ex. 392; 157 E.R. 528; 41 Digest 664, *4959*.
Tamvaco v. *Simpson* (1865), 19 C.B.N.S. 453; 34 L.J.C.P. 268; 13 L.T. 160; 11 Jur.N.S. 926.
Watson & Co. v. *Shankland* (1873), L.R. 2 Sc. & Div. 304; 29 L.T. 349; 2 Asp.M.L.C. 115, H.L.; 41 Digest 664, *4960*.
Frayes v. *Worms* (1865), 19 C.B.N.S. 159; 144 E.R. 747; sub nom. *Trayes* v. *Worms*, 6 New Rep. 295; 34 L.J.C.P. 274; 12 L.T. 547; 11 Jur.N.S. 639; 13 W.R. 898; 2 Mar.L.C. 209; 41 Digest 664, *4949*.

Appeal from a decision of the Court of Exchequer Chamber in an action brought by the appellant, a shipowner, for freight.

The appellant was the owner of the ship *Merchant Prince*, and he chartered her to one De Mattos for a voyage from Greenock to Bombay with a cargo of coals, freight to be paid at the rate of 42s. a ton on the quantity delivered. The freight was to be paid one half in cash on signing bills of lading, and one half on delivery of the cargo at Bombay. A cargo of 2,178 tons of coal was loaded, bills of lading were signed, and £2,286 was paid on account of freight. The appellant insured the freight under the charterparty with the respondents. The ship was lost within a short distance of Bombay, but about half the cargo was saved, and delivered to the consignees of the charterer free of freight. The appellant brought this action on the policy, seeking to recover as for a total loss of the unpaid half of the freight, but the respondents contended that he was only entitled to recover half of the unpaid freight, and they paid that amount into court. The case was tried before Brett, J., and a special jury in December, 1872, when a verdict was found for the appellant, leave being reserved to the defendants to move to set it aside, and to enter a verdict. A rule was obtained by the respondents, but it was discharged by the Court of Common Pleas (Bovill, C.J., Brett and Grove, JJ.). The respondents appealed to the Exchequer Chamber, where the judgment of the Court of Common Pleas was reversed by Cockburn, C.J., Mellor, J., and Amphlett, B., Cleasby and Pollock, BB., dissenting. The appellant appealed to the House of Lords. The judges were summoned, and Kelly, C.B., and Mellor, Brett, Grove, and Blackburn, JJ., attended.

Watkin Williams, *Q.C.*, and *McLeod* (*Cohen*, *Q.C.*, with them) for the appellant.

C. Russell, *Q.C.*, *Benjamin*, *Q.C.*, and *Fullarton* for the respondents.

At the conclusion of the arguments the following question of law was left by their Lordships to the learned judges: "Whether, in the circumstances of the case, there was a total or only a partial loss of the subject-matter of insurance?" Kelly, C.B., Brett, J., and Grove, J., expressed the opinion that there was a total loss, while Mellor, J., and Blackburn, J., held that the loss was partial.

Their Lordships took time for consideration.

March 30, 1876. The following opinions were read.

LORD CHELMSFORD.—This appeal is from a judgment of the Court of Exchequer Chamber in an action brought by the appellant on two policies of insurance to recover a total loss of freight. The Court of Common Pleas unanimously gave judgment in his favour, but the Court of Exchequer Chamber reversed that judgment by a majority of three to two, holding that there was only a partial loss of the subject-matter of insurance. The learned judges who have been summoned to assist your Lordships have differed in opinion, so that in the result there are five judges in favour of the appellant and four in favour of the respondents. In this

difference of opinion it is impossible not to feel that the question is one of some difficulty. It appears to me to depend altogether upon the proper construction of the charterparty.

In considering the question it is necessary in the first place to determine the character of the payment which was made by the charterer at the time of signing the bills of lading. Was it an advance in the nature of a loan, or was it a prepayment of half the freight, the whole of which was to be earned by the unloading and delivery of the cargo at Bombay? It is unnecessary to consider *Kirchner* v. *Venus* (1), which was often referred to in the course of the argument, but which appears to me to have turned entirely upon the question of lien, so that the language used with respect to payments made by the shippers of goods at the port of discharge not acquiring the legal character of freight must be received with some qualification. This case is altogether removed from the authority of that case, because here the parties, by their charterparty, have agreed that the payment shall be the advance of half the freight and that the shipowner shall have an absolute lien for freight. The charterparty contains a provision for the charterer to deduct from the payment of half freight five per cent. for insurance, and BLACKBURN, J., in his opinion delivered to the House, stated

> "that it had always been held that a stipulation that the merchant is to insure the amount, is almost conclusive to show that it is not a loan on security of freight to be earned, but an advance of freight."

There can be no doubt, therefore, that the sum paid by De Mattos was a prepayment of freight, and as such, according to settled authorities, could not be recovered again.

That portion of the freight received by the appellant was, therefore, never at risk on the voyage insured. But the question arises: What was the portion of freight which was covered by this prepayment? On the part of the respondents it was contended that under the words of the charterparty the freight being payable, not in a gross sum, but after the rate of 42s. per ton of coals on the quantity delivered, the freight must be distributed over the whole cargo at the rate of 42s. for each ton, which will be equivalent to the payment of 21s. on every ton of the cargo put on board, leaving 21s. to be paid for freight on the entire cargo delivered. If this mode of calculating the freight is adopted, the appellant's loss would, of course, be only a partial one. But I am not disposed to take this view of the stipulation as to payment of freight in the charterparty. I think that the freight payable is the freight upon the whole quantity of coals delivered at the rate of 42s. per ton, and the part which was prepaid was assumed upon an estimate of half of that quantity. If the parties had intended that the prepayment should be calculated upon the footing of one half of the cargo, at so much per ton, nothing would have been easier than to have expressed this in words. The bill of lading was signed for 2,178 tons, the half freight was to be paid on signing the bill of lading, and the receipt was endorsed on the bill of lading. If the prepayment was meant to be applied to half the rate of freight over the whole number of tons of coal shipped, the amount could have been easily ascertained, and the intention clearly expressed. The manner in which the half of the freight was agreed upon satisfies me that the sum paid was taken generally as representing one half of the freight of the entire cargo at the rate of 42s. per ton.

This being my view of the case, it follows that the appellant never had more than half the freight as a gross sum at risk on the voyage insured. If all the coals had been delivered he would have had to receive the amount of the whole agreed freight, minus the £2,286 already paid. In the event which occurred he had secured himself against the loss of one half of the freight by the prepayment; the only insurable interest in the freight which remained to him was the unpaid half, the whole of which he lost by the perils of the seas, and, therefore, his loss was a total loss. I think the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD HATHERLEY.—I concur entirely in the view which has been taken of the case before us by my noble and learned friend who has preceded me in expressing his opinion upon it. The two points to be considered are, First, what is the insurance that has been effected by the policy and the subject-matter thereby insured; and we are led in consideration of that point to the further question, What was the contract between the insurer and the person with whom he bargained in order to ascertain what were the perils of the sea against which the assured desired so to protect himself.

We must bear in mind in this inquiry, in the first instance, that if there be any question or doubt (I think in truth we shall find there is none) as to what the subject-matter of insurance is, then on principle it is to be held in all cases that that in respect of which the insurance is made is that which is capable of being a subject-matter of insurance, namely, that which is at risk; and that in regarding the contract of insurance, we must not assume, and we cannot in any way consistently with law assume, that the insured is endeavouring to effect a policy on that which is at no risk whatever. When we come to look at the contract itself, it being a contract of freight, we have to remember that for a very long time it has been settled in our maritime law that prepaid freight cannot be recovered. I think when we consider these two points we shall be led very easily and safely to the solution of the difficulty which appears to have arisen in the case before us. We have now had the advantage of hearing the opinions of several judges who, both in the court below and also in your Lordships' House, have expressed their opinions upon the matter; and we have had the benefit of hearing the arguments upon which these opinions were founded, as well as the arguments which were adduced at the Bar. Therefore, it may well be that a subject which has been one of considerable doubt and has been supposed to be one of difficulty before arriving at this stage of the argument may, without presumption on my part, appear to me to be free from difficulty as regards the final conclusions we are bound to arrive at.

In the first place, the contract of insurance is an insurance of freight. The question is: What is that freight that was so insured? To answer that question we look at the charterparty which was entered into between the shipowner and the charterer; and that charterparty we find to be a contract or engagement on the part of the charterer with reference to a cargo of coals to be delivered at Bombay, that he will pay freight "on unloading and right delivery of the cargo at and after the rate of 42s. per ton on the quantity delivered," neither more nor less. He is not to pay more freight than at that rate upon whatever is delivered. That is the sum and substance of his agreement. But then as to the mode of paying the freight, instead of waiting until the time of delivery as regards the whole cargo, he engages that he will pay "one half in cash on signing bills of lading, less four months' interest." That is the discount on the payment in respect of its being made at once, and before the period of delivery at Bombay. "Less four months' interest, and less 5 per cent. for insurance."

What seems to have grown up to be the practice in shipping transactions of this character is founded very probably upon the determination of the courts of law that prepaid freight cannot be recovered. What seems to have happened is that the parties who are desirous of having the freight prepaid to a certain extent, in order to avoid being kept out of their money during a long voyage, have entered into an arrangement with the charterer to this effect: "I wish to have my money in hand, to some amount at all events, upon this charter of freight, I, therefore, stipulate with you that some of this money shall be paid down (in this case one half), but I will give a rebate of interest, which is in effect discounting this prepayment; and I will give a further rebate of insurance, because, inasmuch as you are making this payment, and inasmuch as you cannot recover it in the event of there being a loss of the cargo, the risk becomes yours, not mine." What would ordinarily be the risk of the shipowner with regard to the freight so prepaid is transferred in this way to the charterer; and the shipowner has the money in his pocket, and, having it in pocket and seeing that it cannot be recovered, it is at no

A risk. Whatever loss happens at sea he retains that money, and, therefore, if there be a total loss of the whole cargo, the loss in respect of this prepayment of freight falls upon the person who has so prepaid it. Consequently, a custom seems to have grown up of allowing a sum by way of insurance in order to compensate the person making this prepayment for the risk he thereby runs, inasmuch as he cannot recover it if there be a total loss of the cargo.

B That being so, you find this state of things—as to a moiety of this freight the shipowner is quite safe, he cannot want to insure it, he has got it, but as to the other moiety, he is not safe as regards the perils of the sea, because, if there should be a total loss, and if he should not be able to deliver any part of the goods, then he would get no more freight. He has got one moiety safe in his pocket; the other moiety is that which is at risk, and that he can insure. Therefore, when you C look at the contract of insurance in this case, and ask which of the moieties of freight the insurance is effected, the answer must be that the shipowner has effected the insurance upon the unpaid moiety, which may be lost entirely to him. He cannot effect an insurance upon that which is at no risk; therefore, he must be taken to have done that which only he rightly could do, namely, to have insured against that which is at risk, the other moiety of the freight, which may be lost D to him in consequence of the perils of the sea. On the other hand, what is the position of the charterer? It is this. He has agreed to pay 42s. per ton only on whatever is delivered to him; he has paid down to the extent of 21s. per ton; he can have only 21s. per ton more to pay, if the whole of the cargo is delivered to him; but supposing there is no more delivered to him than the 21s. per ton would cover, what is then to happen? Why, he is entitled to say: "You have delivered to me E half the cargo. I was only to pay you £4,000 for the 2,000 tons of coal, if you delivered the whole quantity; you have delivered to me, instead of 2,000 tons, only 1,000 tons. I have paid you for 1,000 tons already, and I am not to pay more." Otherwise, if you were to say that the charterer is to pay in respect of the half of the cargo saved, that is 1,000 tons, he would be paying £3 for every ton of coal delivered. Would he not have a right to say: "You have delivered to me 1,000 F tons. I paid £2 per ton on 1,000 tons before the ship started under the contract I entered into, and now you ask for another £1 in respect of the portion of the coals which has been saved, there being only one-half saved altogether. In that way you are making me pay £3 per ton for the coals delivered as to which I entered into an agreement to pay you £2 per ton, and no more." When we look at the case in that simple way, it appears to me that the whole difficulty is at once solved. On G the one hand, you have the charterer saying: "I am not to be compelled to pay more than I agreed to pay." On the other hand, you have the other party insuring, not the freight he has got in his pocket, but freight that is still at risk, and which he may lose by the loss of half the cargo.

Having said this much, I have little more to add upon the subject. But, with regard to the view taken by Blackburn, J., for whose opinion I have the highest H respect, it appears to me that he is under error when, in advising your Lordships, he thus states the case. He says that the contention of the plaintiffs in the cause is this:

> "That in short, under this charterparty, the loss of the freight was total as soon as half the coals were lost, and the risk to the owner of the goods, as far as regards the prepaid freight, or enhanced value of the goods, did not com- I mence till after the coals were lost."

But, as I said before, instead of being a total loss of freight to him he had got half the freight in his pocket. No doubt, when half the coals were lost he lost half the freight, but he had got the other half already in his pocket. I cannot conceive how by any process of reasoning, on the one hand, the shipowner can be taken to have insured what he had already got, or, on the other hand, how the charterer should be called upon to pay a higher freight than he had contracted to pay, namely, 42s. per ton.

I do not think that *Kirchner* v. *Venus* (1) has any bearing upon the case before your Lordships. Of course, any opinion of LORD KINGSDOWN carries with it great weight. But BRETT, J., whose opinion is of very great value, I think, in assisting your Lordships to arrive at a correct view of this case, dealt with *Kirchner* v. *Venus* (1) in the mode in which, in my opinion, it ought to be dealt with, and in which all judgments should be dealt with, namely, by taking it as applied to the subject-matter. What LORD KINGSDOWN there says is this: In the first place, it is not that prepayments are not freight, but that they are not the same thing as freight, having all the legal incidents of freight; and, in the second place, there is the case of lien. Applying LORD KINGSDOWN'S opinion to the subject-matter, you will not find him saying that prepaid freight is not freight, because it *is* freight to all intents and purposes. In settling the account you say, "That is part of the freight," in this case and in every other case where freight comes to be adjusted. What you find to be the course of shipowners and merchants dealing in this way with regard to the affreightment of vessels is this. The real transaction takes this form. The risk of so much as is prepaid is transferred to the charterer, instead of being at the risk of the shipowner, the latter taking the money and keeping it in his pocket under all circumstances, whatever may happen. In respect of that an allowance is made for insurance. When you come to look at it from this point of view, you see how this course of proceeding has naturally arisen. In truth, if we were to say that the appellant had not insured this freight, which he has entirely lost, on account of the total freight earned not amounting to more than a set-off to the half that has already been paid, if we were to say that that was the result, we should, as it appears to me, disturb the whole of those contracts which are made in the form of the one we have now before us in this case, and which seem to have become tolerably frequent. We should be in effect saddling the charterer before us with regard to what was the position between him and the shipowner, with a greater payment than any that he had contracted to make.

Some difficulty, no doubt, arose in the mind of one of the learned judges in the court below, AMPHLETT, B., in consequence of the charterer having himself effected an insurance on the cargo of coals in the form of an insurance of the coals, value increased by freight prepaid, so that, he said, it appeared to him that the result would be to make the different underwriters by whom the insurance had been effected pay twice over in respect of this loss. Whether or not the underwriters could have resisted the claim I will not stop to inquire, because I think there is another answer to the argument. BRETT, J., has pointed out that answer also, as he has dealt with almost every part of the case, with great clearness. He says the insurance so effected was effected on a valued policy, and if there be any apparent lack of justice towards the underwriters with reference to recovering upon that policy, it arises from the law allowing these valued policies. This being taken as a valued policy payment had to be made, although it might possibly be that the insurer's interest was not such as, but for the law allowing valued policies, could have been made the subject of contract with the underwriter. We have nothing to do with that here. All we have to do in the present case is to consider what is the engagement which the assured (here the appellant) has entered into with those who accepted the risk, and for that purpose to look at the contract which was entered into between him and the charterer. When we look at that contract the whole matter comes out plainly, that what was insured is exactly that which has been lost to him in consequence of the perils of the sea.

LORD PENZANCE.—The appellant brings his action upon two policies of insurance, one on "freight valued at £2,000" the other on "freight payable abroad valued at £2,000," and he claims a total loss. The answer of the underwriters is that the loss is only partial, as he might lawfully have claimed a part of the freight said to have been lost, from the charterer of his vessel. Whether he could do so or not depends on the terms of his charterparty. There is, therefore, in substance, but one question in this case, the proper construction of that charterparty as to the

A amount that became ultimately payable for freight in the events that happened. It is admitted on both sides that freight was earned in respect of a quantity of coals delivered, to the extent of what may in round numbers be called half the cargo. It is contended on the one side that, as freight to that amount had already been paid in advance, there was nothing more for the merchant to pay; on the other, that the money so paid in advance was not all paid in discharge of such B freight as might ultimately turn out to be earned, but was to the extent of a half only paid on that amount and consequently that there still remained a quarter of the entire freight for the merchant to pay. This latter view has been upheld by the Exchequer Chamber in the judgment now under appeal, and I am of opinion that it cannot be sustained.

I will test it in the first place by considering what results will flow from its adop- C tion. It is incontestable that if in accordance with this proposition the merchant should actually pay, in addition to the half freight previously advanced by him, another quarter of the entire freight, the result would be that the shipowner would have received three-quarters of the entire freight, though he had earned only half of that freight by carrying half the cargo safely to its destination. The result is so startling, and so irreconcilable, not only with apparent justice, but with all notions D of freight as a payment earned and measured by the quantity of goods safely carried and delivered, that it challenges the closest attention to the proposition upon which it is based. But it is, moreover, directly opposed to the actual language of the charterparty itself. It is impossible that the shipowner should receive this three-quarters of the entire freight for the carriage and delivery of half the cargo only, without doing violence to the express provision of the charterparty, by which E the amount payable for freight is defined. That provision is in these words:

> "The freight is to be paid at and after the rate of 42s. a ton on the quantity delivered."

There is no other provision in the charterparty defining the rate or amount of freight to be paid but this, and whatever time or times may have been by other F provisions fixed for the payment of it, the amount itself is thus unquestionably fixed in plain language admitting of no two interpretations, at 42s. a ton, calculated, not on the number of tons put on board, but on the number of tons actually delivered.

If, therefore, the shipowner be really entitled to receive not 42s. but 63s. a ton on the quantity delivered, it cannot be as freight earned under the charterparty that he does so, but it must be under some other and different kind of obligation created by G that instrument. Accordingly, the learned counsel for the respondents, recognising the difficulty, ingeniously argued that, though the advance of money made in this case was in the charterparty called "one half of the freight," yet that it really was not freight at all, but something else, and cited expressions in other cases by which the sort of payment for which he was contending was variously described. I do not feel called upon to enter upon a review of those cases, because the decisions H or expressions in them depended in each case upon the particular circumstances then existing, and because, whether those decisions were justified or not upon those circumstances, the language to be found in this charterparty excludes, in my opinion, the possibility of affirming that the word "freight," one half of which was to be advanced, was intended to convey anything short of, or beyond, or different from, its ordinary meaning. In the first place, it is, I think, difficult to I maintain, when one and the same word is used several times within the short space of eight or ten consecutive lines of a written document, that it means one thing in one place, and a totally different thing in another. Nothing but the absence of any other reasonable construction ought to lead to such a result. But if, in any case, it could be permissible to deal with a word so used in such a manner, it is, I think, impossible to do so in this instance, because the expressions of this charterparty in relation to this word "freight" are so bound up and connected together as to make it plain that the "freight" spoken of is one and the same throughout. The mere grammatical construction, therefore, of the terms in which the charter-

party is framed forbids the supposition that there are two sorts of freight spoken of, or that anything is intended by the word except that which is commonly known as "freight," which is to be earned only on safe delivery.

It is not inconsistent with this that a party of what is thus to become due on delivery should, like any other payment due on a future day or event, be, by special agreement, made payable by anticipation at an earlier period, and the effect of such a payment when made is simply to create a credit to that amount in favour of the person making it when the account is finally taken. The event upon which the right to freight is to accrue and its amount to be determined is one thing; the times at which it shall be paid is another. In this case a part of the payment is to be made by anticipation, but this is not inconsistent with the stipulation, in language perfectly unambiguous, that the entire amount of freight shall be calculated on the quantity delivered.

It is said a payment of freight in advance cannot be recovered if the goods do not arrive, and that this has been held good law in successive cases. This at least shows that such an advance is not unfamiliar either to the commercial community or the courts of law, and as to the injustice of it, the provisions of the present charterparty show how easily and simply any injustice is practically avoided. An advance of freight is nothing more than an arrangement for the convenience of the shipowner who wants an advance, and if the merchant will make it, is willing to pay the cost of insuring the advance when made, thus practically taking upon himself in another form the risk which properly belongs to him of the freight never being earned at all. It is, no doubt, true that it is impossible to know until the voyage is completed, and the cargo, or such part of it as arrives in safety, is delivered, what the actual amount due for freight, calculated at the stipulated rate, will turn out to be; and it is consequently impossible to calculate with accuracy, for the purpose of making the advance, what the half of that freight will amount to. But it is, I think, obvious enough that in speaking of "half the freight" being paid in cash on signing bills of lading, the parties intended "half the estimated freight," calculated on the quantities in the bills of lading at the rate named in the charterparty. The above mode of interpreting the charterparty, while it gives effect to the main and leading provision that the entire freight shall depend on the quantity of goods delivered, treats the provision for an advance as meaning what it says, namely, as "freight to be paid one half in cash." There seems little, therefore, to justify the conclusion that the shipowner could lawfully have demanded from the merchant a further payment of freight, notwithstanding that an amount equal to all the freight which had actually been earned had been already paid to him.

The most plausible form in which that proposition is maintained remains yet to be stated. It has been said that the true meaning of this charterparty is the same as if the words had run thus: "Freight to be at 42s. a ton, 21s. to be paid on right and true delivery, and 21s. in advance on signing bills of lading," thus splitting up the freight into separate sums of 21s. on each ton put on board, and 21s. on each ton delivered. But such a mode of translating the charterparty is only arrived at by omitting the particular provision upon which, in my opinion, the whole matter turns, namely, that the freight is to be calculated not at 42s. per ton as suggested, but at 42s. per ton delivered. This brings into a prominent light the real difference upon which the two opposite modes of reading the charterparty are based. The view now under discussion is based upon the proposition that the number of tons upon which the 42s. are to be paid is the number of tons put on board, half to be paid at once, and half on arrival, not the number of tons which are put out at the port of destination. The contention of the appellant, on the contrary, is that the measure of freight intended is not the number of tons which the cargo may weigh when shipped, but the actual weight of the goods when they are delivered; although for the purpose of making a money advance, a probable estimate of the latter must be made from the amount of the former. I have already pointed out that the

A appellant has the express words of the charterparty in his favour on this point: "42s. a ton on the quantity delivered."

There is another consideration which appears to me to place the matter beyond doubt. It is very well known that after a long voyage, even though the ship has met with no disaster, and the cargo has suffered nothing from "perils of the sea," the weight of the cargo when delivered will frequently differ, and sometimes very B considerably, from its weight when shipped. Whether the weight, therefore, which is to be the criterion for calculating freight is to be the weight when put on board, or the weight when delivered cannot fail to be a matter of much importance. It is also to be observed that a partial loss of his advance, in consequence of the cargo having decreased in weight, could not be covered by the merchant under any policy of insurance, for losses arising from the cause supposed are not caused by C any of the perils insured against, and are not the subjects of marine insurance. Yet it is obvious that the sum allowed by the shipowner as premium for insurance was intended to keep the merchant free from risk. Another reason against the adoption of this reading of the charterparty is that it would establish a distinction between an aliquot part, such as a half or a third of the freight being paid in advance, and a lump sum of money, such as £500 or £1,000 being advanced, as D is frequently the case in a similar manner. For it could hardly be said in the latter case that any particular sum was paid in respect of any particular part of the cargo.

One other argument only remains to be noticed. It has been said that the merchant in this case has by the policy which he opened to protect his advances, entitled himself to recover £1 per ton in respect of the coal which was lost, over and E above the value of such coal, and that if the appellant's view of the charterparty be correct, this £1 per ton must be a profit beyond anything he has lost, a result so inequitable that the appellant's view of the charterparty must, it is argued, be mistaken. The answer to this seems to me to be twofold—first, that the consequences of any contract entered into between the merchant and third persons can hardly affect the true construction of the contract previously entered into between F him and the shipowner; secondly, that on the assumption of the appellant's view of the charterparty being correct, the merchant ought not, upon the common principles of insurance law, to be able to recover either £1 per ton or any other sum from the underwriters. For the first principle of insurance is indemnity, and when no loss of the subject of insurance has been sustained, there ought to be nothing to receive under a policy. If the merchant in this case has had the full G value of his entire advance by setting it off against the freight actually earned, as the appellant contends that he is entitled to do, he has suffered no loss in respect of that advance, and ought to have no legal claim for indemnity. If, therefore, it be true that under the particular policy which has been effected in this case any such claim arises, it must be by reason of the special form of that policy, which I observe is a valued one, the result of which may be that the insured can obtain H compensation beyond the amount of any loss which he has really suffered.

Upon the whole, therefore, I think it is clear that the appellant could not have lawfully demanded from the charterer any further freight beyond that which was covered by the previous advances; and, consequently, that he was entitled to claim of the respondents a total loss under their policy. The judgment of the Court of Exchequer Chamber ought, therefore, in my opinion, to be reversed.

I

LORD O'HAGAN.—The question in this case is a short one; but the remarkable difference of opinion among the learned judges who have considered it, forbids us to regard it as free from serious difficulty. It arises really—extraneous and irrelevant matter being put out of account—on the construction of a single document, which is common and familiar in its form. We have to decide on the effect of the charterparty, which was executed between the appellant, a shipowner, and Mr. De Mattos, the charterer of the ship. For that purpose we are not much assisted by authority, although many cases have been cited in the progress of the argument. We must

deal with the document itself, having regard to the circumstances in which it originated, and the relations of the parties to it, and endeavouring to give a fair interpretation to its words in their natural and customary meaning. The question arises, as I have said, on the construction of the charterparty, and not on the policy which is the direct foundation of the suit, but will be operative for the appellant or the respondents, according to the view we take of that construction. For rightly ascertaining it I do not think your Lordships are at liberty to travel into considerations dehors itself, which have been pressed upon the House. For instance, we cannot properly consider the dealings of the charterer with other parties. Putting out of account all such irrelevant suggestions, I shall ask the attention of your Lordships for a very short time to the words of the charterparty.

The question is, half of the cargo having been lost by perils of the sea and half duly delivered at Bombay, and the owner having received payment for the carriage of one half of it, had he any further claim upon the charterer, or was the money received in England applicable to discharge the freight which had been earned at Bombay? The captain thought it was, and delivered the cargo without claiming any further freight, and the appellant brought his action on his policy as for a total loss. I think he was warranted in doing so, and is entitled to recover. I should add that in the receipt for the freight paid by the charterer it is described as "the sum of £2,286 10s., being an advance of half freight on within shipment." It seems to me that the purpose of the charterparty is very clear. It was to secure to the owner an integral freight for the voyage, the amount of which was approximately fixed according to the value of the coals to be put on board, and intended to reach Bombay; but it was to be paid half in advance on signing bills of lading, and the remainder on right delivery of the cargo.

What was the risk against which the owner insured? What was the purpose of his insurance? He received half of the freight, and, having received it, it was his absolutely, and was irrecoverable under any circumstances by the charterer. The peculiar doctrine of the English law is abundantly established by *De Silvale* v. *Kendall* (2), *Byrne* v. *Schiller* (3), and many other cases. The owner had thus got prepayment of a moiety of the entire debt which the charterer had contingently incurred for the hire of the ship, or a portion of it, and which might be described, reversing our ordinary legal phrase, as "debitum in futuro, solvendum in præsenti." That prepayment was applicable generally to the freight which, although a single liability, had been divided for the purposes of convenience into two halves, to be dealt with in different ways and at different times. When by the perils of the sea the owner has been disabled from fully completing his part of the contract, and failed to earn more than one half by delivery at Bombay, that being the express and essential condition of the charterer's liability, the prepayment became applicable to answer the only demand he could maintain, the charterer owed him nothing, and he fell back properly on his policy for the remainder of the freight which, not having earned it according to his bargain, he was unable to demand from the charterer. This appears to me to be a reasonable view of the matter, and the terms of the charterparty justify, I think, no other. The only thing at risk was the unpaid balance, and when that was hopelessly and totally lost the liability of the insurer was complete.

There has been much discussion as to the meaning of the word "freight" in the charterparty, and it has been represented as having been in the nature of a loan, or of a payment, not for the carriage of the goods, but for taking them on board the vessel and agreeing to carry them. But I see nothing to warrant the adoption of such a view. "Freight" has a definite meaning. It is described by Phillips on Insurance, c. 3, s. 2, in a passage cited by Bovill, C.J., as signifying "the earnings or profit derived by the shipowner from the use of [the ship] himself, or by letting it to others to be used, or by carrying goods for others"; and by Lord Tenterden in *Flint* v. *Flemyng* (4), as importing "the benefit derived from the employment of the ship." In this charterparty "freight" surely means nothing else. It is "the profit to be derived by the shipowner," on the delivery of the cargo at

A the end of the voyage, "for the use of the ship" in conveying the coals of the charterer. I agree with the clear words of CLEASBY, B., in the Exchequer Chamber (L.R. 9 C.P. at p. 574):

> "We cannot depart from the settled meaning of the word 'freight,' and the meaning expressly given to it in this charterparty, namely the amount to be
B paid at the end of the voyage for what is ready for delivery at the stipulated rate. This had been wholly satisfied by the advance made, and so the shipowner was entitled to receive no more, and the captain was right in delivering the half cargo free of freight."

The charterparty speaks first of "freight" generally, as to be paid "on unloading and right delivery," and it is "such freight" which it afterwards divides into the
C "one half" and the "remainder." Why should we strive to put an unnatural and unaccustomed meaning on an ordinary word, which is accepted by the parties as it is commonly understood, when they give and take a receipt for the money paid, not as a loan, or a payment for putting the cargo on board, or for accepting the goods without delivery, but asking "advance of half freight on within shipment," plainly pointing to an entire freight on the entire cargo to be fully or partially
D landed, and paid on the full or partial delivery of that cargo at Bombay.

Reliance has been placed on some expressions of LORD KINGSDOWN in *Kirchner* v. *Venus* (1), in which he states that "freight is the reward payable to the owner for the safe carriage and delivery of goods," and that

> "a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not
E acquire the legal character of freight because it is described by that name in a bill of lading."

Any opinion of LORD KINGSDOWN, even an obiter dictum like this, is entitled to high consideration, and I do not think it at all necessary to impeach the correctness of his words for the purpose of sustaining the view I am submitting to your Lordships. Immediately after using them he goes on to recognise the right and
F power of those who enter into shipping agreements, "to supersede by a special contract the rights and obligations which the law attaches to freight in its legal sense," and that, even assuming the accuracy of his definition seems to me exactly what the parties have done in the present case. They have made a contract which unmistakably deals with the prepayment of "freight" and nothing else; and whatever might have been the legal force of the term if it stood by itself, and without
G the specific directions as to the "one half" and "the remainder," those directions equally give to both the character of "freight," although the first half is to be paid before delivery. So that I do not conceive the dictum of LORD KINGSDOWN to be adverse in reality to the contention of the appellant.

That contention on this point is strongly sustained by several cases, to two of which I shall briefly advert. In *De Silvale* v. *Kendall* (2), a charterparty provided
H that the charterer should pay "for the freight and hire of the vessel" a specified sum in advance, and "the residue on the delivery of the cargo." The provision in that instrument was substantially the same as that with which we are dealing, and it was contended there as here that the advance was not freight, but in the nature of a loan. There LORD ELLENBOROUGH said (4 M. & S. at p. 42):

> "If the charterparty be silent the law will demand a performance of the voyage,
I for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words sufficiently intelligible to that end, that part of the freight should be paid by anticipation, which should not depend on the performance of the voyage, may they not so stipulate?"

Every word is applicable to the circumstances of this case; and, as LORD ELLENBOROUGH insisted on deciding on the terms of the charterparty before him, and declined to consider other cases, applying, as he said, "to other forms of covenant,"

so I think your Lordships may safely found your judgment upon the express words of this particular contract. In that case also the judges held expressly that there is no doubt of the competency of parties to stipulate for part payment of the freight before it can be known whether any freight will accrue or not. So in *Byrne* v. *Schiller* (3), the last case bearing on the present, the charterparty provides that a vessel is to be sent on a voyage at a specific rate of freight, "such freight," as here, to be paid partly in advance, and "the remainder on right delivery of the cargo at the port of discharge." The court dealt with the payments as "on account of freight."

The circumstances of those cases make the observations of the judges directly applicable to the case before us, and they and others show also that a stipulation to pay freight in advance, and before delivery, is not only legal, but of common use among commercial people. I might have been disposed to dwell on the inconvenience possible to arise in a case like this from the adoption of the view of the respondents, but this point has been so well put by my noble and learned friend, Lord Penzance, that I shall not occupy time by dwelling upon it. I am satisfied, with much deference to the adverse view that has been so strongly supported, that on the construction of the charterparty alone the appellant is entitled to recover, and I prefer to base my opinion upon that sufficient ground. I think the judgment of the Exchequer Chamber should be reversed.

LORD SELBORNE.—The difficulty in this case—for I certainly felt some difficulty during the argument, and it has been the subject of much difference of opinion between judges of high authority—arises out of the peculiar rule of English mercantile law, that an advance on account of freight to be earned, made at the commencement of a voyage, is, in the absence of any stipulation to the contrary, an irrevocable payment at the risk of the shipper of the goods, and not a loan repayable by the borrower if freight to that amount be not earned. The authorities referred to by Brett, J., certainly establish this general rule, whether reasonable in the abstract or not, and it must be taken that payments in advance, such as that which was made by the charterer in the present case, are in this country generally made and received, as between the parties to contracts of affreightment, upon this understanding. It is, however, remarkable that none of the authorities seems to touch the precise question in this case, namely, whether the charterer under a contract like that before your Lordships, has a right to deduct the whole amount paid by him in advance from any freight which may actually be earned in case of a loss of part of the cargo, or whether such advance ought to be apportioned over the whole cargo delivered on board, so that the loss of a proportionate part of it will fall upon the charterer if part of the cargo is lost.

It does not seem to me to be material, or to create any difficulty in the application of the principle, whether the advance is of an aliquot part of the estimated freight or of a gross sum of money. Blackburn, J., if I understand him rightly, thinks that on principle the latter view is that most consistent with the rule established by the authorities, and that there is nothing in the express contract between these parties to justify a different conclusion. The actual settlement between the shipowner and the charterer did indeed take place upon the opposite view; but the insurer was no party to that settlement, and what was done inter alios could not enlarge his liability. It may be that the principle on which that settlement proceeded was according to a general usage of trade, but of this I find no proof. I am by no means clear that the reasoning of Blackburn, J., is fully met by the observation of Brett, J., that, if this be not the correct principle, "the charterer must in effect pay more than £2 per ton in every case except where the whole cargo is delivered." If the whole cargo is lost, he must in "effect" pay £1 a ton on the goods put on board, though under the contract no freight whatever has been earned. The introduction of the words "in effect," when the question is as to the legal consequences of an anomalous rule not expressed in terms by the contract. may perhaps be fallacious. On the other hand, the conclusion of Blackburn, J.,

A rests entirely upon the ground that in a contract so worded as the present, a stipulation tantamount to that expressed by the words, "the amount paid in signing the bill of lading to be deducted from freight in settlement thereof," ought not to be implied if it is not expressed.

I am unable to adopt that opinion, and upon the whole case, though I should have thought it more satisfactory if there had been some authoritative source of B information as to the usage of trade, I think that the view of the proper construction and effect of such a contract taken by the majority of the learned judges, and by your Lordships, is the more reasonable, and that which is most in accordance with the natural meaning of the words of the charterparty, and with the probable intention of the contracting parties. If so, there was clearly, in this case, a total loss of the whole interest of the assured in the whole subject-matter of the insurance; C and the judgment of the Court of Exchequer Chamber ought, therefore, to be reversed.

Appeal allowed.

Solicitors: *W. Nash*; *Angles & Rawlins.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

D

E

Re HALLETT'S ESTATE. KNATCHBULL *v.* HALLETT. COTTERELL AND OTHERS *v.* HALLETT

[COURT OF APPEAL (Sir George Jessel, M.R., Baggallay and Thesiger, L.JJ.), F November 26, December 3, 17, 1879, February 11, 1880]

[Reported 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732]

Bailment—Right of bailor to follow goods bailed—Proceeds if goods disposed of—Goods mixed with other goods—Charge by bailor on mixed property.

G Where a specific chattel is entrusted by one person to another, whether that other be a trustee in the strict sense, or a bailee, or an agent, either for safe custody or to be disposed of for the benefit of the person entrusting the chattel, then, either the chattel itself, or its proceeds if it has been disposed of, and whether it has been rightfully or wrongly disposed of, may be followed at any time, although the chattel itself or its proceeds may have been mixed in a H mass of like chattels or with other money. In such a case the beneficial owner of the property is entitled at his election to take the property if it is identifiable or to have a charge on the whole of the mixed property for the amount of that of which he is the owner.

Judgment—Judicial decision as authority—Establishment of principle which court can follow.

I Per SIR GEORGE JESSEL, M.R.: The only use of authorities, of decided cases, is the establishment of some principle which the court can follow in deciding the case before it.

Notes. Considered: *Harris* v. *Truman* (1881), 7 Q.B.D. 340. Applied: *Re Mawson, Ex parte Hardcastle* (1881), 44 L.T. 523. Distinguished: *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q.B.D. 374. Applied: *Collins* v. *Stimpson*, [1881–5] All E.R.Rep. 382. Considered: *Marten* v. *Rocke, Eyton & Co.* (1885), 53 L.T. 946. Applied: *Re Murray, Dickson* v. *Murray* (1887), 57 L.T. 223. Distinguished: *Ellis* v. *Goulton*, [1893] 1 Q.B. 350. Explained: *Re Hallett, Ex parte*

Blane, [1894] 2 Q.B. 237. Considered: *Davis* v. *Petrie*, [1904–7] All E.R.Rep. 356. Applied: *Wilsons and Furness-Leyland Line* v. *British and Continental Shipping Co.* (1907), 23 T.L.R. 397. Approved: *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, [1911–13] All E.R.Rep. 970. Applied: *Sinclair* v. *Brougham*, [1914–15] All E.R.Rep. 622; *Re Dacre, Whitaker* v. *Dacre*, [1915] 2 Ch. 480. Considered: *Banque Belge Pour L'Etranger* v. *Hambrouck*, [1921] 1 K.B. 321. Referred to: *Lyell* v. *Kennedy* (1887), 18 Q.B.D. 796; *Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433; *Wimbledon (Vicar, etc.)* v. *Eden, Re St. Mark's, Wimbledon*, [1908] P. 167; *Burdett* v. *Horne and Horne* (1911), 27 T.L.R. 402; *Re Wait (Trading as Wait and James), The Trustees* v. *Humphries and Bobbett*, [1926] All E.R.Rep. 433; *Madras Official Assignee* v. *Krishnaji Bhat* (1933), 49 T.L.R. 432.

As to the obligations of a bailee, see 2 HALSBURY'S LAWS (3rd Edn.) 102–105; and for cases see 3 DIGEST (Repl.) 63–67, 104 et seq. As to the duties of trustees generally, see 38 HALSBURY'S LAWS (3rd Edn.) 966 et seq.; and for cases see 43 DIGEST 760 et seq.

Cases referred to:

(1) *Re West of England and South Wales District Bank, Ex parte Dale & Co.* (1879), 11 Ch.D. 772; 48 L.J.Ch. 600; 40 L.T. 712; 27 W.R. 815; 3 Digest (Repl.) 337, *1078.*

(2) *Pennell* v. *Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 22 L.T.O.S. 126; 18 Jur. 273; 1 W.R. 499; 43 E.R. 551, L.JJ.; 43 Digest 1021, *4612.*

(3) *Whitecomb* v. *Jacob* (1710), 1 Salk. 160; 91 E.R. 149; 35 Digest (Repl.) 182, *2.*

(4) *Ryall* v. *Rowles (Rolle)* (1750), 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 9 Bli.N.S. 377; 27 E.R. 1074; 5 Digest (Repl.) 809, *6840.*

(5) *Re Jullian, Ex parte Dumas* (1754), 1 Atk. 232; 2 Ves. Sen. 582; 26 E.R. 149; 5 Digest (Repl.) 756, *6493.*

(6) *Scott* v. *Surman* (1742), Willes, 400; 125 E.R. 1235; 5 Digest (Repl.) 755, *6486.*

(7) *Ex parte Sayers* (1800), 5 Ves. 169; 31 E.R. 528, L.C.; 5 Digest (Repl.) 758, *6513.*

(8) *Taylor* v. *Plumer* (1815), 3 M. & S. 562; 2 Rose, 457; 105 E.R. 721; 5 Digest (Repl.) 775, *6606.*

(9) *Frith* v. *Cartland* (1865), 2 Hem. & M. 417; 34 L.J.Ch. 301; 12 L.T. 175; 11 Jur.N.S. 238; 13 W.R. 493; 71 E.R. 525; 43 Digest 1021, *4609.*

(10) *Birt* v. *Burt* (1877), 11 Ch.D. 773, n.; 36 L.T. 943, C.A.; 43 Digest 1022, *4620.*

(11) *Re Strachan, Ex parte Cooke* (1876), 4 Ch.D. 123; 46 L.J.Bcy. 52; 35 L.T. 649; 41 J.P. 180; 25 W.R. 171, C.A.; 5 Digest (Repl.) 776, *6613.*

Also referred to in argument:

Middleton v. *Pollock, Ex parte Elliott* (1876), 2 Ch.D. 104; 45 L.J.Ch. 293; 25 Digest (Repl.) 221, *380.*

Re Strahan, Ex parte Geaves (1856), 8 De G.M. & G. 291; 25 L.J.Bcy. 53; 27 L.T.O.S. 129; 4 W.R. 536; 44 E.R. 402; sub nom. *Re Strahan, Ex parte Greaves*, 2 Jur.N.S. 651, L.JJ.; 43 Digest 1016, *4571.*

Brown v. *Adams* (1869), 4 Ch. App. 764; 39 L.J.Ch. 67; 21 L.T. 71; 17 W.R. 999, L.J.; 43 Digest 1021, *4613.*

Appeal from a decision of FRY, J., in an action brought by a general creditor to administer the estate of Mr. Henry Hughes Hallett, a solicitor, who died in February, 1878, insolvent. After his death, it was found that he had misappropriated money and property belonging to clients. A Mrs. Cotterill, one of his clients, had entrusted to him Russian bonds to the amount of £2,442 for safe custody. He was also to receive the coupons for the interest on the bonds, and to pay it over to her from time to time. He duly accounted to her for the income, but in November, 1877, he sold the bonds, and received the proceeds, amounting to £1,804 0s. 7d. He also

A sold, improperly, other Russian bonds which belonged to the trustees of his own marriage settlement, the proceeds amounting to £770 10s. On the morning of Nov. 14, 1877, there was a balance of £1,796 5s. 2d. to the credit of Mr. Hallett on his banking account with Messrs. Twining. This balance was in no respect composed of trust moneys over which he had control, but had been entirely derived from his own resources. On that day he paid in to the credit of the account two B sums, one the £770 10s. 5d. and the other the £1,804 0s. 7d. The court took the view that for the purposes of these proceedings they must be regarded as trust moneys. Both sums were paid in on the same day, but the entry of the receipt of the £770 10s. 5d. preceded that of the receipt of the £1,804 0s. 7d. in the books of Messrs. Twining, and also in Mr. Hallett's pass-book. The account was continued until the death of Mr. Hallett, on Feb. 2, 1878, during which period Mr. C Hallett drew out and paid in further sums, all of which were in respect of his private affairs. The banking account did not contain, on either side, any entry in respect of trust moneys other than the two mentioned as having been paid in on Nov. 14. The sums drawn out amounted in the aggregate to £2,662 0s. 2d., while those paid in amounted to £1,320 19s. 1d. only, and the balance to the credit of the account on the day of Mr. Hallett's death was £3,029 12s. 5d. The balance D to the credit of the account never fell below the aggregate of the two sums of trust moneys—£2,574 11s. Both Mrs. Cotterill and the trustees of the settlement took out summonses in the action claiming to be paid out of the balance standing to Mr. Hallett's credit the proceeds of the sales of their respective bonds. This point was decided by Fry, J., in her favour. The further question then arose whether the payment in of the trust moneys to the credit of the account with the bankers E ought not to be taken to have been wiped out by the drawings of the testator in the order of their date, i.e., the earlier payments first. Fry, J., held that this was so, and the result was that the £770 having been entered on the credit side of the account before the £1,804, the whole of the £770 must be taken to have been drawn out and part of the £1,804 also.

The creditor, the trustees of Hallett's settlement, and Mrs. Cotterill, appealed.

F Nov. 26, Dec. 3, 1879. *Higgins*, *Q.C.*, and *Fossett-Lock* for the creditor.
J. Pearson, *Q.C.*, and *Dundas Gardiner* for the trustees of Hallett's settlement.
De Gex, *Q.C.*, and *Beaumont* for Mrs. Cotterill, were not called on to argue.

SIR GEORGE JESSEL, M.R.—The appeal in this case raises a question of law of considerable importance. A Mrs. Cotterill either had some money which G Mr. Hallett had invested for her in the purchase of Russian bonds, or she had some Russian bonds which he had delivered to her and she re-delivered to him. What, however, is proved is that he gave her a receipt, which, of course, is binding against him and his estate, for a Russian bond and Waggon Co. debenture bonds. It appears that he had bonds to that amount in his possession, and it also appears that in 1873 the exact amount was deposited by him with his bankers in a separate H parcel. I think Mrs. Cotterill is not called upon to prove any more, and, therefore, as against Mr. Hallett and his legal personal representative, these bonds are her bonds deposited with Mr. Hallett according to the receipt, for safe custody, which would make him an ordinary bailee. In addition to that, it appears that Mr. Hallett was in the habit of receiving the income arising from these bonds on behalf of Mrs. Cotterill. I suppose he or the bankers cut off the coupons, and he received I the money and accounted for the exact amount to her every half year. He was bailee of the bonds, and an agent to receive the dividends on the bonds.

There is no doubt, therefore, that Mr. Hallett stood in a fiduciary position towards Mrs. Cotterill. Mr. Hallett, before his death, improperly sold the bonds and put the money to his general account at his bankers. It is not disputed that the money was at his bankers mixed with his own money at the time of his death; that is, he had not drawn out that money from his bankers. In that position of matters Mrs. Cotterill claimed to be entitled to receive the proceeds, or the amount of the proceeds, of the bonds out of the money in the hands of Mr. Hallett's

bankers at the time of his death, and that claim was allowed by the learned judge in the court below, and I think was properly so allowed. Indeed, as I understand the doctrines of equity, it would have been too clear a case for argument, except for another decision of the learned judge himself: *Ex parte Dale & Co.* (1).

The modern doctrine of equity as regards property disposed of by persons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale, if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds, if you can identify them. There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested, together with money belonging to the person in a fiduciary position, in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it.

What is the position of the beneficial owner as regards such purchasers? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust money, although it is not confined, as I will show presently, to express trusts. In that case, according to the now well-established doctrine of equity, the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase, or, as we generally express it, he is entitled at his election either to take the property or to have a charge on the property for the amount of the trust money. But where a trustee has mixed the money with his own, there is the distinction that the cestui que trust or beneficial owner can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased for the amount of the trust money laid out in the purchase, and that charge is quite independent of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word "trustee" in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows.

That is the modern doctrine of equity. Has it ever been suggested until very recently that there is any distinction between an express trustee or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position? I have never heard until quite recently such a distinction suggested. It cannot be found in any reported case except in the recent decision of FRY, J., to which I shall draw attention. It can have no foundation in principle, because the beneficial ownership is the same, wherever the legal ownership may be. If you have goods transferred to a man upon trust to sell and hand over the net proceeds to another, that other is the beneficial owner, but if, instead of being transferred so as to vest the legal ownership in the trustee, they were deposited with him to sell as agent, so that the legal ownership remains in the beneficial owner, can it be supposed in a court of equity that the rights of the beneficial owner are different, he being entire beneficial owner in both cases? I say on principle it is impossible to imagine there can be any difference. In practice we know there is no difference, because in a court of equity, where a principal can sue an agent as well as a cestui que trust can sue a trustee, no such distinction was ever suggested, as far as I am aware.

Therefore, the moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply. I intentionally say modern rules, because it must not be forgotten that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt, they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as the rule against perpetuities and the rules of

A equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and, therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined, and improved; and, if we want to know what the rules of equity are, we must look rather to the more modern than to the more ancient cases. That being the established doctrine of equity on this point, I will B take the case of the pure bailee. If the bailee sells the goods bailed, the bailor can in equity follow the proceeds wherever they can be distinguished, either when actually kept separate, or when mixed up with other moneys.

I have only to advert to one other point, and that is this. Supposing, instead of being invested in the purchase of land and goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense C as including every person in a fiduciary relation, does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust had D a right to take 1,000 sovereigns out of the bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt about it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns; but if, instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if a trustee lends trust money E to a third person the beneficial owner can follow it. If, in the case supposed, the trustee had lent the £1,000 to a man without security, the beneficial owner could follow the debt, and take it from the debtor. If the trustee lent it on a promissory note, the beneficial owner could take the promissory note, or a bond, if it were on a bond. If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1,000, the only difference would F be that, instead of taking the bond or the promissory note, the cestui que trust would have a charge for the amount of the trust money on the bond or promissory note. So it would be on a simple contract debt—that is, if the debt were of such a nature that, between the creditor and the debtor, the debt could not be severed into two, so as to show what part was trust money. Then the cestui que trust would have a right to a charge upon the whole. Therefore, there is no difficulty in G following out the rules of equity and deciding that in a case of a mere bailee, as Fry, J., has decided, you can follow the money.

I feel bound to say something about the authorities, and for two reasons. First of all, this decision of Fry, J., in *Ex parte Dale & Co.* (1) may do mischief if not corrected; and, secondly, it appears to me, speaking with the greatest possible respect for such an eminent master of equity as Fry, J., that he has entirely H misconceived the proper use of authorities in holding himself to be bound by a long line of cases to decide against that which he saw most clearly was good equity. In other words, he decided against his own opinion as to the rules of equity, in obedience, as he thought, to a series of authorities, opposed, as he conceived, to all principle, because he thought he was bound to do so in utter oblivion of what I will take the liberty of stating is the right mode of viewing authorities, I and also of that salutary provision of the Judicature Act that, where there is a difference between the principles of law and equity, the rules of equity are to prevail [now Supreme Court of Judicature (Consolidation) Act, 1925, s. 44].

First of all, what is the proper use of authorities? This is almost elementary, but I am bound to state it, because, as I will show presently, that use has not been made in the case on which I am going to comment. The only use of authorities, of decided cases, is the establishment of some principle which the judge can follow in deciding the case before him. There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shown

by our tribunals. Were it not for that, our law would be in a most distressing state of uncertainty, and so strong has that been my view that where a case has decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it where it is of respectable age, and has been used by lawyers as settling the law, leaving to the appellate court to say that case is wrongly decided, if the appellate court should think so.

When we come to look at *Ex parte Dale & Co.* (1) we find him saying this (11 Ch.D. at p. 778):

> "Does it make any difference that instead of trustee and cestui que trust it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which, if a wrong act arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own. That seems to me to be the logical result of *Pennell* v. *Deffell* (2)."

Up to that point I agree with every syllable, and I think it would be impossible to express the doctrine more clearly than it is there expressed by FRY, J. But now comes this passage:

> "but that result is opposed to the long line of authorities to which I have referred, and from which I do not feel myself justified upon any reasoning of my own in departing."

So he decided the case wrongly and against his own opinion, and against *Pennell* v. *Deffell* (2), in deference to a long line of authorities.

That being so, I feel bound to examine this long line of authorities, which are not very numerous, and show that not one of them lends any support to the doctrine or principle which, he thinks, is established by them. The first case is the well-known case of *Whitecomb* v. *Jacob* (3). I may say the cases are so fully extracted, if I may use the word, in the judgment of FRY, J., in *Ex parte Dale & Co.* (1), as regards the material portions of them, that it is more convenient to read them from that than it is from the reports themselves.

> "If one employs a factor and entrusts him with the disposal of merchandise, and the factor receives the money and dies indebted to debts of a higher nature, and it appear in evidence that this money was vested in other goods and remains unpaid, those goods shall be taken as part of the merchant's estate and not the factor's, but if the factor have the money it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, etc.; for, in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor."

Therefore, *Whitecomb* v. *Jacob* (3) decides that the equity as to following the proceeds attaches to the case of a factor as well as to the case of a cestui que trust and trustee. It decides, secondly, that you could not follow money because it had no ear-mark. The first part is good law at the present day; the second is not. Whether it was good law or not at the time of SALKELD, it is immaterial to consider. It is very doubtful whether equity had got quite so far at that date as since, and, therefore, I will not say it was not, but it is not so now. *Whitecomb* v. *Jacob* (3), therefore, is no authority on the second point on which it was decided, and so FRY, J., said. FRY, J., proceeds in his judgment to say (11 Ch.D. at pp. 775, 776):

> "Now, with the single exception that it appears to have been held subsequently that money may be so far ear-marked that it may be followed if it has been kept separate, that case appears to have been always held to be an authority."

A That is to say, with the single exception that the sole ground for the decision has been overruled, it is to be an authority! Did any one ever hear anything, if I may say so, so extraordinary as such a comment on an old case? The sole ground of that decision was that, although as a general rule you may follow the proceeds as against a factor in the same way as against a trustee in equity, yet, because the money has an ear-mark, you cannot follow it. That was later overruled, and still B the judge holds it to be an authority. It appears to me no authority at all, the sole ground of decision having been overruled—indeed it was overruled by some of the authorities which Fry, J., cites.

He goes on (ibid. at p. 776):

> "In the celebrated case of *Ryall* v. *Rolle* (4), Burnet, J., in delivering judg-
> C ment, says, 'Suppose goods are consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods, these goods will not be subject to the bankruptcy.' "

It is the same as *Whitecomb* v. *Jacob* (3). You may follow the goods, but you cannot follow the money. That is no longer law. In bankruptcy no part of the D law is better settled than that, if money be kept separate, it does not fall into the general estate. It has been decided by a long line of cases in bankruptcy, and there is no doubt about it if it is kept separate; but Burnett, J., only said what was said in *Whitecomb* v. *Jacob* (3) that you could not follow money, a notion which was prevalent at that time. That part of *Ryall* v. *Rolle* (4) is as much overruled as *Whitecomb* v. *Jacob* (3). But it is to be observed that the judges E thought then that you could not follow money in equity, not merely that you could not follow it between principal and agent, or merchant and factor. They thought that you could not follow it at all, even as trustee and cestui que trust, because the money had no ear-mark. *Whitecomb* v. *Jacob* (3) is not an authority for a distinction between the case of principal and agent and the case of cestui que trust and trustee; it is an authority, if it is an authority for anything, that you F cannot follow money in that way.

Then Fry, J., says (ibid.):

> "In another case of *Re Jullian, Ex parte Dumas* (5) before Lord Hardwicke, the petitioners were certain persons who had claimed bills arising from the produce of certain goods transmitted to them, and the Lord Chancellor said: 'Suppose the petitioners had consigned over goods to Jullian as their factor, and
> G he had sold them and turned them into money, the principal then could only have come in as a general creditor under the commission; but if the goods had continued in specie and had been found in Jullian's hands at the time of his bankruptcy, it would have been otherwise, and has been so determined in several cases.' "

H There it is to be noticed that the expression is "turned into money," but nothing is said about the money being kept separate or not. I looked into Mr. Lewin's book on Trusts to see what he said about this case, because it is very odd that Lord Hardwicke should say so; and Mr. Lewin says that it seems that in the time of Lord Hardwicke it was supposed that you could not follow money in equity, which, perhaps, is the explanation, namely, that the doctrine is more modern I than his decision. This is certainly not law now. As I said before, there is no doubt that in bankruptcy, if the money is kept separate it can be followed, but it is the same proposition. It is not as if there were any difference between the position of a factor and the position of trustee, but it is that you cannot follow the money. That he treats as well ascertained law at that time.

Fry, J., goes on to say (ibid.):

> "Willes, J., in delivering the considered judgment of the Court of Common Pleas in the case of *Scott* v. *Surman* (6) says: 'We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before

his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of the estate, in that case the plaintiffs could not have recovered anything in this action, but must have come in as creditors under the commission, as it is laid down in the case of *Whitecomb* v. *Jacob* (3), and in many other cases.' ''

First of all, that is merely a dictum of that very eminent judge, WILLES, J., and he has not adverted to the distinction between money ear-marked and money not ear-marked. He has simply quoted from *Whitecomb* v. *Jacob* (3) without considering it at all. If you read it literally, it means if it has not been laid out on any specific thing. That was not the law in bankruptcy in his time, and I am quite sure, if the attention of WILLES, J., had been called to the phrase used, he would have said it was too general. If the money had been laid aside by the bankrupt, and put into a bag, and marked, you could take the money. I think WILLES, J., could have qualified it. It is a mere dictum, and it really only follows *Whitecomb* v. *Jacob* (3). FRY, J., says (ibid. at pp. 776, 777):

''In the year 1800 the Lord Chancellor [LORD THURLOW], in *Ex parte Sayers* (7) adopted the same view. He considered that there were in that case special circumstances which showed that, although the money had got with the general fund constituting the estate of the bankrupt, it had got out again; and he said it had acquired an identity and a distinction from the rest of the fund. Still, he adopted the general principle that, if it had been in the form of money at the time of the bankruptcy, the creditor could only rank with the other creditors.''

It is quite true he said so, but again the same observation applies. He states it generally on the supposition of the factor having turned the goods into money, without distinguishing between the cases of the money being kept separate and the cases where it was mixed with his own and could not be followed.

We come to the well-known case of *Taylor* v. *Plumer* (8), where we have the decision of a great judge, LORD ELLENBOROUGH, and there he entirely throws over all the prior decisions as to money not ear-marked not being followed. At that time it was well known it could be ear-marked in equity, and, therefore, when you come to look at it you will find it an express decision in conflict with all the others cited as to the ear-marking of money. LORD ELLENBOROUGH says this (3 M. & S. at p. 575):

''It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman* (6), or into other merchandise, as in *Whitecomb* v. *Jacob* (3), for the product of or substitute for the original thing, still follows the nature of the thing itself as long as it can be ascertained to be such.''

That, if I may say so, is the law at the present moment; and, although I cannot say it always was law, it always ought to have been law, because it is consonant with principle. Now comes the point,

''And the right only ceases when the means of ascertainment fail.''

That is correct. Now there comes a point which is not correct, but which I think is not correct merely because LORD ELLENBOROUGH's knowledge of the rules of equity was not commensurate with his knowledge of the rules of common law,

''which is the case when the subject is turned into money and mixed and confounded in a general mass of the same description.''

He was not aware of the rule of equity which gave a charge—that, if you lent £1,000 of your own and £1,000 trust money on a bond for £2,000, or on a mortgage for £2,000, or on a promissory note for £2,000, equity could follow it, and create a charge; but he gives that, not as law—the law is that it only fails when the means of ascertainment fail—he gives it as a case in which the means of ascertain-

A ment fail, not being aware of this refinement of equity by which the means of ascertainment still remain. With the exception of that one fact, which is rather a fact than a statement of law, the rest of the judgment is, in my opinion, admirable. It goes on:

> "The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way, i.e., as predicated only of an undivided and undistinguishable mass of current money."

B

There again, as I say, he did not know that equity would have followed the money, even if put into a bag or into an undistinguishable mass, by taking out the same quantity.

C I have finished the authorities cited by Fry, J. Is there one of them (and I say there is not) which suggests there is any difference in the position of the factor and the position of the trustee as regards following money? So far from that being the case, they all proceed on the ground that there is no distinction, and the only reason of the difficulty was that which was so lucidly expressed by Lord Ellenborough, the difficulty of ascertainment. I come, before parting with the case, to

D the decision of *Pennell* v. *Deffell* (2), which is an equity case decided by the Court of Appeal in Chancery, and, therefore, of as high authority as any of those cases cited, and of greater weight, because it is more modern than the decisions of Lord Hardwicke and Lord Thurlow; and, if inconsistent with them, would have overruled them. What is said in *Pennell* v. *Deffell* (2)? Knight-Bruce, L.J., there supposes the case of a trust fund kept separate, and he then refers to the

E case of a trust fund mingled with the other money, that is, if the trustee in the case I suppose put the money in a box with other money of his own, it would make no difference to the cestui que trust except that he would have the right to take the first money out of the box; and then he says (4 De G.M. & G. at p. 382):

> "But not in either case, as I conceive, would the blending together of the trust moneys, however confusedly, be of any moment as between the various cestuis

F que trust on the one hand, and the executors, as representing the general creditors, on the other."

In addition to that, I will only refer to one other case. It is again the decision of a well-known equity judge. It is *Frith* v. *Cartland* (9). I will read the marginal note (2 Hem. & M. at p. 417):

G

> "The rules as to following trust funds in the hands of a defaulting trustee apply against the assignees of a defaulting trustee as fully as against the trustee himself [that is, they apply in bankruptcy as well as they do on death], and the circumstances that the trust fund was acquired on the eve of the bankruptcy, and when the bankrupt was about to abscond with that and his other moneys, HELD, not to raise any equity in favour of the assignees."

H I read that because the bankrupt was an agent, and Wood, V.-C., never dreamt it made any difference, nor did anybody else. The vice-chancellor says this (ibid. at p. 420):

> "*Pennell* v. *Deffell* (2) is a very instructive case upon all questions of this kind."

I I am citing the case for the next remark which I think would have presented itself to Fry, J.:

> "It does not, indeed, lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines in their bearings upon circumstances of some difficulty. The guiding principle is, that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second

principle is, that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own."

That is, that the trust property comes first. I think it would have been well if this, which was stated as established equity law in *Frith* v. *Cartland* (9) by WOOD, V.-C., had been accepted and adopted in *Ex parte Dale & Co.* (1). Then he says (ibid. at p. 421):

"If a man has £1,000 of his own in a box on one side, and £1,000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own purposes, the court will not allow him to say that that money was taken from the trust fund. The trust must have its £1,000 so long as a sufficient sum remains in the box. So here, Edwards could not be allowed to say that the £284 deposited in the Bank of England was his own, and that the trust portion of the fund was that which he took abroad with him, and from which he drew as he required for his own purposes. There is, therefore, no difficulty in treating that sum at the bank as belonging to the trust, together with what remains of the sum which he took abroad."

I think that after those authorities it must be considered settled that there is no distinction, and never was a distinction, between a person occupying one fiduciary position or another fiduciary position, regarding the right of the beneficial holder to follow the trust fund; that those cases which have been cited at law, so far from establishing a distinction, establish the contrary; and that the mere error of supposing that equity could not follow or distinguish money in the cases supposed, if error it was, and perhaps it was not so originally, is attributable to the fact that the judges who followed the earlier cases were not aware of what I may call the gradual refinement of the doctrine of equity. Therefore, looking at the authorities to find out the principle, you do not find any such distinction established as that suggested by FRY, J., or anything of the kind even mentioned in them. It is only out of my great respect and esteem for the learned judge from whom this appeal comes that I have thought it right to go so fully into the cases to show that there is no foundation whatever for the suggested distinction, and, therefore, his decision in this case rests on no trivial or slight distinction between this case and *Ex parte Dale & Co.* (1), but is grounded on the well-ascertained doctrines of equity.

There was cited to FRY, J., a decision of the Court of Appeal. It is reported in a note to *Ex parte Dale & Co.* (1), and the name of it is *Birt* v. *Burt* (10). That was a case of money put into the bank. The only reason why I have not referred to it in the course of my judgment is that I took part in the decision of the appeal, together with COLERIDGE, C.J., and BAGGALLAY, L.J., and we considered the case too clear for argument and dismissed the appeal.

BAGGALLAY, L.J.—I am also of opinion that this appeal should be dismissed. It appears to me sufficient, to support the conclusion at which I have arrived, to say that I entirely agree with FRY, J., that, upon the facts and law of the case, Hallett stood in a fiduciary position, that he violated his duty, that Mrs. Cotterill consequently had the same right to relief against him as if he had been a trustee under the more common designation of the term, and that under those circumstances she had a right to follow the produce of the sale of bonds. Nor should I have thought it necessary to have adverted to *Ex parte Dale & Co.* (1), which had been previously decided by FRY, J., had it not been that the Master of the Rolls has very closely examined the judgment in that case, and expressed his disapprobation at the decision arrived at. I cannot forget that *Ex parte Dale & Co.* (1) is a decision of a very recent date, and it may possibly come before the court of which I am a member by way of appeal, and for this reason I should desire to keep my mind as free from any bias or prejudice upon it as possible, but at the same time I think it right to express an opinion upon it. It must be borne in mind that

A FRY, J., arrived at the conclusion at which he did arrive in that case with much hesitation, and that he, apparently, would have arrived at a different conclusion had he not felt himself bound by certain authorities to which he alluded, and from which he stated that he did not feel himself justified in departing, though he regarded them as inconsistent with the general principles of equity applicable to cases involving fiduciary relationship. I feel bound to say that I cannot concur B in the view expressed by FRY, J., as to the binding character of the authorities to which he referred.

THESIGER, L.J.—The facts of this case are undisputed, and the inference to be drawn from them is so clear that I need say no more than that I entirely agree with the view that was taken by FRY, J., with reference to that inference. C With regard to the law applicable to the case, we have had an elaborate exposition of it from the Master of the Rolls, and in the main features of that exposition I entirely agree; but I must add at the same time that the principles which have been laid down today are no new principles, and have been laid down recently in this court, not only in the case to which the Master of the Rolls has referred of *Birt* v. *Burt* (10), but also in *Ex parte Cooke* (11). If the judgment of BRAMWELL, L.J., in that case, is D well looked at, it will appear that even to the mind of a common law judge the principles of law which have been applied now for some time in equity have been made perfectly plain. It has been established for a very long period in cases of law as well as in cases of equity, that the principles relating to the following of trust property are equally applicable to the case of a trustee, using the term in the narrow and technical sense which is applied to it in the court below, and to the case of factors, E bailees, and other kinds of agents. It has been also established, and for a long period, and I think, notwithstanding the observations of the Master of the Rolls, that it has been present to the mind of the common law judges as well as to the mind of the equity judges, that those principles may, under certain circumstances, be applicable to money as well as to specific chattels.

The principle of law may be stated, as it appears to me, in the form of a very F simple, although at the same time very wide and general proposition. I would state that proposition in these terms, namely, that wherever a specific chattel is entrusted by one man to another, either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person entrusting the chattel, then, either the chattel itself or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although G either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material. I may say that that proposition, wide as it is, was adopted almost in those terms by BRAMWELL, L.J., in *Ex parte Cooke* (11). There is no doubt that there are to be found here and there in the books dicta, principally of common law judges, which would appear to militate against the generality of the proposition, and which would appear to H show that in the minds of those judges there was the view that, while chattels might be followed, or money so long as it could be looked upon as a specific chattel as moneys numbered and placed in a bag, yet when those moneys had been mixed with other moneys that there was no ear-mark, and that neither at law nor in equity could they be followed. With reference, however, to those dicta, it appears to me there are two observations to be made. In the first place, I cannot I find any decision which has followed out those dicta to their consequence, assuming that those dicta are to be treated as having the generality which at first sight attaches to them. In the second place, it appears to me that in many cases those dicta, looking to the facts of the particular case, may be restrained by those facts, and possibly may have a more limited meaning than that which has been attached to them by FRY, J., in *Ex parte Dale & Co.* (1), or by the Master of the Rolls in his judgment in the present case.

As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception, for all cases where it has

been held that moneys mixed and confounded, but still existing in a mass, cannot be followed, may I think be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts—in other words, they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee or cestui que trust, or principal and agent. I think it unnecessary, and to my mind it is undesirable, to give an opinion upon *Ex parte Dale & Co.* (1) until we consider it on a case properly brought upon appeal, and when it is necessary to decide the point whether that case does or does not come within the exception to which I have referred.

Bank—Current account—Customer a trustee—Mixture of trust and personal money—Attribution to personal money of drawings for personal purposes.

When a trustee has a balance to his credit at his bankers consisting in part of funds which he may properly apply to his own purposes and in part of trust funds which he cannot lawfully so apply the case does not fall within the decision in *Devaynes* v. *Noble, Clayton's Case* (1) (1816), 1 Mer. 572, that on a current account with a bank earlier drawings are to be attributed to the earlier payments in, but the trustee's intentions are to be presumed to be honest, and his drawings for his own purposes should be atrributed to his own funds and not to the trust funds.

So **held** by Sir George Jessel, M.R., and Baggallay, L.J.; Thesiger, L.J., dissenting.

Notes. Explained: *Kirkham* v. *Peel* (1880), 43 L.T. 171. Applied: *Hancock* v. *Smith*, [1886–90] All E.R.Rep. 306; *Re Wreford, Carmichael* v. *Rudkin* (1897), 13 T.L.R. 153. Considered: *Cory Bros. & Co., Ltd.* v. *Turkish Steamship Mecca (Owners), The Mecca*, [1895–9] All E.R.Rep. 933; *Mutton* v. *Peat* (1900), 82 L.T. 440. Distinguished: *Roscoe (Bolt)* v. *Winder*, [1915] 1 Ch. 62. Considered: *Davis* v. *Petrie*, [1904–7] All E.R.Rep. 356; *Re Diplock's Estate, Diplock* v. *Wintle*, [1948] 2 All E.R. 318. Referred to: *Lyell* v. *Kennedy* (1887), 18 Q.B.D. 796; *Re Miller, Ex parte Official Receiver*, [1893] 1 Q.B. 327; *Re Stenning, Wood* v. *Stenning*, [1895] 2 Ch. 433; *Re Oatway, Hertslet* v. *Oatway*, [1903] 2 Ch. 356; *Galula* v. *Pintus* (1911), 104 L.T. 574; *Re Hodgson's Trusts, Public Trustee* v. *Milne*, [1919] 2 Ch. 189.

As to the appropriation of payments in to a current banking account, see 2 Halsbury's Laws (3rd Edn.) 171, 172; and for cases see 3 Digest (Repl.) 192, 193.

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest (Repl.) 192, *370.*

(2) *Pennell* v. *Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 22 L.T.O.S. 126; 18 Jur. 273; 1 W.R. 499; 43 E.R. 551, L.JJ.; 43 Digest 1021, *4612.*

(3) *Devaynes* v. *Noble, Sleech's Case* (1816), 1 Mer. 529, 539; 35 E.R. 767, 771; 3 Digest (Repl.) 340, *1101.*

(4) *Henniker* v. *Wigg* (1843), 4 Q.B. 792; 1 Dav. & Mer. 160; 1 L.T.O.S. 229; 7 Jur. 1058; 114 E.R. 1095; 3 Digest (Repl.) 193, *371.*

(5) *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692; 43 L.J.C.P. 344; 30 L.T. 883, Ex. Ch.; 12 Digest (Repl.) 552, *4185.*

(6) *Merriman* v. *Ward* (1860), 1 John. & H. 371.

(7) *Brown* v. *Adams* (1869), 4 Ch. App. 764; 39 L.J.Ch. 67; 21 L.T. 71; 17 W.R. 999, L.J.; 43 Digest 1021, *4613.*

(8) *Frith* v. *Cartland* (1865), 2 Hem. & M. 417; 34 L.J.Ch. 301; 12 L.T. 175; 11 Jur.N.S. 238; 13 W.R. 493; 71 E.R. 525; 43 Digest 1021, *4609.*

(9) *Re Strachan, Ex parte Cooke* (1876), 4 Ch.D. 123; 46 L.J.Bcy. 52; 35 L.T. 649; 41 J.P. 180; 25 W.R. 171, C.A.; 5 Digest (Repl.) 776, *6613.*

(10) *Lord Chedworth* v. *Edwards* (1802), 8 Ves. 46; 32 E.R. 268, L.C.; 20 Digest (Repl.) 287, *298*.

Dec. 3, 17, 1879. The appeals of the trustees of Hallett's settlement and Mrs. Cotterill from so much of Fry, J.'s order as directed that the claim of the trustees was to be governed as to the application of drawings from Hallett's banking account against payments in to the account by *Clayton's Case* (1) were argued.

J. Pearson, *Q.C.*, and *Dundas Gardiner* for the settlement trustees.
De Gex, *Q.C.*, and *Beaumont* for Mrs. Cotterill.
Higgins, *Q.C.*, and *Fossett Lock* for the creditor, plaintiff in the action.

SIR GEORGE JESSEL, M.R.—This is an appeal from a decision of Fry, J., and the singularity of the case is that it is an appeal in favour of the opinion of Fry, J., though it is against his actual decision, the explanation of it being that the learned judge conceived himself bound by some decisions of the Court of Appeal to decide against his own opinion. I am far from saying that I dissent from him on either point, either as to the principle on which the case ought to be decided, or that he, as a judge of first instance, could very well have decided otherwise.

The question is whether or not the trustees of the settlement are entitled to say that the sums drawn out by Mr. Hallett subsequently to Nov. 14, 1877, and applied for his own use, are to be treated as appropriated to the repayment of his own moneys which had been paid in, or whether his executors are right in their contention that they are to be treated as repayments of the trust moneys which had been first paid in, so as to diminish the amount now applicable to the repayment of the trust fund.

I will first of all consider the case on principle, and then I will consider how far we are bound by authority to come to a decision opposed to principle as does sometimes happen. First, upon principle I think nothing can be better settled either in our own law, or I suppose the law of all civilised countries, than that where a man does an act which may be rightfully performed, he cannot say that the act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another, as agent for the owner, cannot prevent the owner adopting the sale, and deny that he acts as agent for the owner. This principle runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease, believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant the lease under the power. Whenever an act can be done rightfully the man who has done it is not allowed to say, as against the persons entitled to the property or the right, that he has done it wrongfully. That is the universal law.

When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has trust money in the shape of a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in a way that cannot be distinguished, and the next day he draws out for his own purposes 100 sovereigns, could he be heard to allege that what he drew out was the first 100 sovereigns—the trust money—and that he left his own 100 sovereigns in the bag? It is obvious he must have taken away that which he had a right to take away, his own 100 sovereigns. What difference does it make if, instead of putting the trust money into a bag, he deposits it with his banker, then pays in other money of his own, and then draws out money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of drawing out the money be attributed to anything except to his ownership of

money which was at his bankers? It is said that according to the modern theory of banking the deposit banker is a debtor for the money. So he is, and not a trustee in the strict sense of the word. At the same time one must recollect that the position of a deposit banker is different from that of an ordinary debtor. Still he is, for some purposes, a debtor; and it is said that, if a debt of this kind is paid by a banker, although the total balance is the amount owing by the banker, yet, considering the repayments, and the sums paid in by the depositor, you attribute the first sum drawn out to be the first sum put in.

That was a rule first established by SIR WILLIAM GRANT on *Clayton's Case* (1), a very convenient rule, and I have nothing to say against it, unless there is evidence either of agreement to the contrary, or of circumstances from which a contrary intention must be presumed. Then, of course, that which is a mere presumption of law gives way to those other considerations. Therefore, it does appear to me there is nothing in the world laid down by SIR WILLIAM GRANT in *Clayton's Case* (1), or in the numerous cases which follow it, which in the slightest degree conflicts with the principle which I consider to be clearly established. Then I come to the great difficulty in the case, the difficulty which, as I shall show from an extract or two from FRY, J.'s judgment, weighed with him. What he says is this:

> "The second question is whether these drawings, which appear to have been entirely for Hallett's own benefit, were to be attributed to anything but his own funds. If the matter were unfettered by authority, it would appear to me clear that where a man has a balance to his credit, consisting in part of funds which are his own, and which he may legally draw out and apply to his own purposes, and in part of trust funds which he cannot lawfully draw out and apply to his own purposes, his drawings for his own purposes ought to be attributed to his own funds, and not to the trust funds. But it appears to me that I am not at liberty, in the existing state of the authorities, to act according to the inclinations of my own mind."

Then he refers to *Pennell* v. *Deffell* (2), and one or two cases that have followed it. In a second judgment in the same case FRY, J., says this:

> "I have already expressed the opinion I should have been inclined to act on if I had been at liberty, but I am not at liberty."

So it is plain, as far as FRY, J., was concerned, that he would have decided otherwise if he had not been fettered by authority.

The only authority worth considering for this purpose is *Pennell* v. *Deffell* (2). I will in a moment say a word or two about the subsequent decisions. First of all, with regard to *Pennell* v. *Deffell* (2), one must remember that the decision there is the decision of a court of co-ordinate jurisdiction with the present Court of Appeal, and was pronounced several years ago. But, on the other hand, it must be remembered that the law as explained or laid down in a decision or judgment which guides a future judge or another judge in applying it, is simply the expression of principle which is to be ascertained from the judgment. No doubt a part of the decision in *Pennell* v. *Deffell* (2) was exactly this case, and the court applied the law, as correctly stated by FRY, J., by applying *Clayton's Case* (1) even to such a case as this, and to that extent destroyed the claim of the cestui que trust. But that was not the whole case of *Pennell* v. *Deffell* (2). The main part of *Pennell* v. *Deffell* (2) was giving effect to the right of the cestuis que trust in the case of blended trust moneys, and upon the very principle which I have endeavoured to explain, and which, if I may say so, was so clearly explained by FRY, J., in his judgment. If, therefore, we are to ascertain the principle on which *Pennell* v. *Deffell* (2) is decided, we must look at the whole of the judgment and not at one part of it only, and that being so, I have come to the conclusion that the principle is rightly laid down there, and it is rightly applied throughout the judgment, except in this one point, and that as to this portion of the case there has been a

mistake, not in the principle, but in the application of the principle. Therefore, if I am to be guided by the principle as laid down, I think the principle must prevail without regard to a mere slip in its application.

It has been urged that this part of *Pennell* v. *Deffell* (2) has been since followed in other cases in the Court of Appeal as well as in the courts of first instance. No doubt it has been followed. As regards the Court of Appeal, it seems to have been followed, certainly in one, if not in two, cases, without question, but, although there are cases in our law in which erroneous decisions not reconcilable even with the judgment on which the decision proceeded have created a rule of conduct, and the judges, after the lapse of years, have not felt themselves at liberty to overrule those decisions, that is not so in the present case. No human being ever gave credit to a man on the supposition that he would misappropriate trust money and so increase his assets, and still less on the assumption that he would pay the trust money to his account at his bankers, and then draw out a larger sum for his own purposes. The decision in *Pennell* v. *Deffell* (2) could not have established a rule of conduct affecting the transactions of mankind. It appears to me we would not be deferring to authority, but would be making a misuse of authority, which is to declare the law, and not fetter judges, if, by reason of this which appears to me a mere slip in *Pennell* v. *Deffell* (2), and which it must be recollected was a very small portion of the contest in that case, we were to consider ourselves bound to decide against what is the settled principle. Therefore, in my opinion, the appeal must be allowed.

BAGGALLAY, L.J., read a judgment in which he stated the facts, and continued: An action having been commenced for the administration of Mr. Hallett's estate, summonses were taken out by the trustees of his marriage settlement, and by a lady named Cotterill, who were respectively interested in the two trust funds, the former claiming payment in full of the sum of £770 10s. 5d. out of the balance which at the time of Mr. Hallett's death was standing to the credit of his banking account, and the latter claiming payment out of the same balance of £1,708 16s. 0d., part of the said sum of £1,804 0s. 7d. The claim of the trustees was based on this, that, having regard to the circumstances of the case, the drawings of Mr. Hallett ought to be appropriated to such portions of the balances from time to time standing to his credit as had arisen from his own moneys, as distinguished from those of which he was a trustee. If this claim was well founded, an application of the same principles would have entitled Mrs. Cotterill to the full sum of £1,804 0s. 7d. and not to the portion of it only which she claimed. Her claim, however, was based upon an application of the well-known rule in *Clayton's Case* (1), that drawings out from a banking account should be appropriated in strict order of date to the payments in. That rule, it was contended, had been extended to cases similar to that under consideration, by the decisions of the lords justices in *Pennell* v. *Deffell* (2) and the cases which have followed it. If the rule was applicable to the present case, the aggregate amount of Mr. Hallett's drawings was sufficient, as will appear from the figures I have quoted, to exhaust not only the original balance of £1,796 5s. 2d., which had arisen from Mr. Hallett's private money, but the whole of the sum of £770 10s. 5d. and £95 4s. 7d. of the sum of £1,804 0s. 7d., which consisted of trust moneys. Fry, J., considered himself bound by the decisions referred to, and disallowed the claim of the trustees, but allowed that of Mrs. Cotterill. Thus, of the two trust funds paid in on the same day, the cestuis que trust of the one lost everything, while the cestuis que trust of the other were losers to the extent only of a very small sum.

While, however, Fry, J., felt bound to follow these decisions, he distinctly intimated that, if he had been unfettered by authority, he would have been prepared to hold that, when a man has a balance to his credit at his bankers consisting in part of funds which he may properly apply to his own purposes and in part of trust funds which he cannot lawfully so apply, his drawings for his own purposes ought to be attributed to his own funds and not to the trust funds.

From the decision of FRY, J., the trustees of Mr. Hallett's settlement have appealed. Inasmuch as my own views as to what ought to be done in respect of the claim of the trustees, are, except so far as I may feel that they ought to be controlled by authority, entirely in accordance with those expressed by FRY, J., I propose to examine somewhat in detail *Pennell* v. *Deffell* (2), with the view of ascertaining, first, what principles were enunciated by the lords justices in the course of their judgments in that case; secondly, how those principles were applied by them to the circumstances of that case; and, thirdly, whether, having regard to the principles enunciated, and to the decision arrived at, *Pennell* v. *Deffell* (2) is an authority binding upon us in our dealing with the case now under consideration. Mr. Green, whose estate was in course of administration in *Pennell* v. *Deffell* (2), died on Oct. 22, 1849. For some time previously to his death he had two banking accounts, one with the Bank of England, and the other with the London Joint Stock Bank. At the time of his death there was a balance to his credit of £1,988 11s. 8d. at the former, and of £2,174 0s. 10d. at the latter. I shall have occasion later to examine these accounts more closely, as they varied considerably in the character of their details, but for the present it is sufficient to say that each of these accounts embraced moneys paid in and drawn out by Green, partly on account of the trust estates which he represented and partly on his own private account. Inquiries as to the balances having been directed by the decree, the master found that the whole of one balance and the greater part of the other belonged to the trust estates; but, upon exceptions to the master's report, the Master of the Rolls held that the trust moneys could not be followed into either of the banking accounts, and directed that the whole of both balances should be treated as part of Green's general estate.

The substantial question involved in the appeal to the lords justices, was whether the Master of the Rolls was right in holding that the trust moneys could not be followed into the banking accounts. Upon this question TURNER, L.J., in the course of his judgment, expressed himself as follows (4 De G.M. & G. at p. 388):

> "It is, I apprehend, an undoubted principle of this court that, as between cestui que trust and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all fruits of such property, whether in its original or in its altered state, continue to be subject to or affected by the trust."

After illustrating this principle by a reference to the way in which the court was in the habit of dealing with cases in which trust property had been invested in trade, the lord justice proceeded as follows (ibid. at p. 389):

> "But of course in those cases, as in other cases, the property which is the subject of the trust must in some manner be ascertained."

He then refers to the judgment of the Master of the Rolls as having proceeded upon a supposed impossibility of ascertaining what portion of the balances belonged to the trusts and what portion of the balances to Green's general estate, and answers, in the terms I am about to read, an inquiry suggested by himself, whether there were not rules and principles for determining what belonged to the trusts in such a case as that under consideration. He said (ibid. at pp. 390, 391):

> "Suppose a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust account, and pays in other moneys, could it for one moment be denied that the moneys standing to the account of the debt due from the bankers arising from the moneys so paid in would belong to the trust and not to the private estate of the trustee? Then suppose the trustee subsequently pays in moneys of his own—not belonging to the trust—to the same account. Would the character of the moneys which he had before paid in—of the debt which had before accrued—be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out part of the trust moneys which he has before paid in, would the remainder of

those moneys, and of the debt contracted in respect of them, lose their trust character? Can the circumstance of the account consisting of a continued series of moneys paid in and drawn out alter the principle? It may, indeed, increase the difficulty of ascertaining what belongs to the trust, but I can see no possible ground on which it can affect the principle."

KNIGHT-BRUCE, L.J., in the course of his judgment, after some previous suggestions leading up to that to which I am about to refer, put the case of a trustee placing in a particular repository, such as a chest, certain moneys held by him in trust, and also certain other moneys of his own, and of his so mixing and blending the two that the particular notes or coins of which each consisted could not be identified, and of his taking a sum of money from the repository, after such mixing and blending, and applying it to his own purposes. In expressing his opinion as to the conclusion to be arrived at in such a case, the lord justice used the following language (ibid. at p. 382):

"I apprehend that, in equity at least, if not at law also, what he so took would be solely or primarily ascribed to those contents of the repository which were in every sense his own. He would, in the absence of any evidence that he intended a wrong, be deemed to have intended and done what was right; and if the act could not in that way be wholly justified, it would be deemed to have been just to the utmost amount possible."

The lord justice added—and no one will, I think, dissent from what he said—that the proposition which he had just stated was founded in principle, and supported by authority. Is there any reason why, if the proposition is founded in principle, it should be limited to moneys placed in and taken out of a particular repository? Why should it not be applicable also to a case of moneys paid into and drawn out of a banking account kept in the sole name of a trustee? It is true that in *Sleech's Case* (3), which immediately preceded *Clayton's Case* (1), SIR WILLIAM GRANT held that, as between the banker and the customer, the payment of a sum of money into a banking account created a debt and was not a mere deposit; but, as between the customer, who is a trustee, and his cestui que trust, is there any reason why an honest intention should not, as far as possible, be attributed to him in the one case as well as in the other? Let me illustrate my meaning. On a certain day I receive £10 of trust money in sovereigns and place them in a drawer in my desk; the next day I receive £10 of my own moneys also in sovereigns, and place them in the same drawer; on the third day I require £5 for my private purposes, and I take out five sovereigns from the mixed fund in the drawer. An application of the principle of KNIGHT-BRUCE, L.J., would appropriate the five sovereigns taken out on the third day to the £10 of my own moneys placed in the drawer on the second day, and not to the £10 of trust moneys placed there on the first day. Again, I receive a cheque for £100 on a trust account; it will not be required for a few days, and it is too large a sum to be kept in my desk. I pay it into a bank, and on the following day, receiving £100 on my own private account, and not wanting it for a few days, I pay it into the same account. I require £50 or £100 for my own purposes before the time arrives for requiring any money for trust purposes, and I accordingly draw against the mixed fund for the £50 or £100. Can any reason be assigned why in this latter case as well as in the former I should not, as between myself and my cestui que trust, have the honest intention attributed to me of drawing against my own private funds, and not against the trust fund though it was the first paid in?

That KNIGHT-BRUCE, L.J., saw no distinction in principle between the two cases is, I think, clear from the next proposition or principle which he enunciated in the following terms (4 De G.M. & G. at p. 383):

"When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which as long as it remains due, belongs specifically to the trust as much and as effectually as

the money so paid would have done had it specifically been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the cestuis que trust, it must be deemed specifically theirs as between the trustee and his executors and general creditors after his death, on the one hand, and the trust on the other."

After some observations not material to be now noted, the lord justice continued as follows (ibid. at p. 384):

"This state of things would not I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him, money in every sense his own."

It must be admitted that the language of this latter sentence is somewhat vague. The previous sentence had reference to a trustee paying in trust moneys to a banking account; did the lord justice, when speaking of the bank holding also for the trustee money in every sense his own, refer to, or intend to include, private moneys of the trustee paid in by him to the same account? This appears to me to be the reasonable construction of the language used. In the various steps by which the lord justice had arrived at his previous proposition he had taken, first, the case of trust money placed in a particular repository; then the addition to such trust moneys of the trustee's own moneys; and, thirdly, the abstraction from the mixed fund of moneys applied to his own purposes; and in advancing the second proposition he first takes the case of trust moneys paid into a banking account and insists upon their being regarded as if placed in a particular repository, and then follows the passage the effect of which I am now considering The inference appears to me to be irresistible that the lord justice intended to adopt exactly the same steps in connection with a banking account as he had previously suggested with reference to moneys placed in a particular repository. If the proposition, as a whole, is so read, it has the effect of extending to blended funds in a banking account, the like rule or principle of attributing, where possible and as far as possible, an honest intention to a trustee drawing out money for his private purposes, as the lord justice had previously enunciated with reference to blended funds in a particular repository.

The principles thus enunciated by the lords justices (for TURNER, L.J., expressed his full concurrence in the views expressed by KNIGHT-BRUCE, L.J.), taken and considered by themselves amount to this: First, that trust moneys may be followed into a banking account; and, secondly, that in dealing with an account composed in part of trust and in part of private funds an honest intention should, if and as far as possible, be attributed to a trustee. Apart from the application of a third principle, also enunciated by the lords justices, which I will consider presently, they would have fully justified the order which FRY, J., expressed himself ready to make, had he not felt himself fettered by authority.

The third principle was enunciated by the lords justices in the following terms. KNIGHT-BRUCE, L.J., said (ibid. at p. 384):

"It may be, however, and I think is, true that cheques drawn by the trustee in a general manner upon the bank, would for every purpose be ascribed to and affect the account in the mode explained and laid down by SIR WILLIAM GRANT in *Clayton's Case* (1). The principles there stated would, I conceive, be applicable, notwithstanding the different nature and character of the sums forming together the balance due from the bank to the trustee, whatever the purposes and objects of the cheques."

TURNER, L.J., enunciated the same principle in the following terms (ibid. at p. 391):

"We must see, however, whether the law does not furnish the means of meeting even the difficulty arising from such a continued series of moneys paid in and drawn out. I think that it does. I take it to be now well settled that moneys drawn out on a banking account are to be applied to the earlier items on the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose

A from trust moneys paid in by the customer, so much of those trust moneys is paid off, and unless otherwise invested on account of the trust, falls into the customer's general estate, and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, on the other hand, the earliest debt due from the banker arose from the customer's own moneys paid in by him, that debt is pro tanto discharged, and the trust moneys B subsequently paid in remain unaffected. The same principle runs through the whole account; each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid; and thus, when it is ascertained that moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled."

C In these clear and forcible terms, the lords justices enunciated the proposition that, as a general principle, the rule in *Clayton's Case* (1) must be applied to the banking accounts of trustees, for the purpose of determining the proportions in which their cestuis que trust and general creditors, or the several classes of their cestuis que trust, are entitled to the debt due from the bankers in closing their accounts.

To the general principle so enunciated I readily accede. But was it more than the D enunciation of a general principle, that is to say, a principle to be applied in the absence of special circumstances, but liable to be modified in its application by reason of the necessity or propriety of applying some other general principle of equal or paramount importance? In *Clayton's Case* (1) Sir William Grant held that, in dealing with an account between a banker and his customer, and in the absence of any evidence of a contrary intention, the law would imply an appropria- E tion, in the order of their respective dates, of the items drawn out to the items of debt constituted by the several payments of the customer; and he further held that the respective liabilities of successive partnerships in the banking firm must be regulated by the results of taking the accounts in the manner he had previously indicated. *Clayton's Case* (1) was decided upon the principle that, in the absence of any expressed intention to the contrary, or of special circumstances from which such an intention could be inferred, the appropriation of drawings out to the F payments in, as adopted in that case, represented what must be presumed to have been the intention of the parties concerned; and, so viewed, the decision is quite consistent with the like presumption being rebutted or modified in another case, in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in.

That that presumption could be so rebutted was held in *Henniker* v. *Wigg* (4), G decided by the Court of Queen's Bench, before the decision in *Pennell* v. *Deffell* (2), and more recently in *City Discount Co.* v. *McLean* (5), in the Exchequer Chamber, in which latter case, however, no reference appears to have been made to *Pennell* v. *Deffell* (2). In *Clayton's Case* (1) there were no circumstances from which it could be inferred that, either as between the bankers and their customers, or as H between the successive partnership in the banking firm, the parties had any intention other than that presumably to be attributed to them of appropriating in order of date the drawings out to the payments in; but the adjustment of the liabilities of the several partnerships, which was effected in that case by the application of the general principle enunciated by Sir William Grant might have been materially modified, had there been any special contracts between the parties or any equities I affecting them. So also, in my opinion, the general principle enunciated by the lords justices in *Pennell* v. *Deffell* (2) was based, or ought to be regarded as having been based, upon the like presumption as that acted upon by Sir William Grant in *Clayton's Case* (1), and that such presumption was liable to be rebutted or its effects modified by any equities affecting Mr. Greenwood and those claiming through him, unless there was sufficient reason to the contrary.

The questions then arise: Did any such equities exist in *Pennell* v. *Deffell* (2)? and, if so, was there any sufficient reason for not giving effect to them? That an equity might have existed sufficient very materially to modify the application of

the general rule that the drawings out should be appropriated in order of date to the payments in, I cannot doubt; that equity was the obligation so forcibly insisted upon by KNIGHT-BRUCE, L.J., of attributing to the trustee, when the circumstances would admit of it, an intention to act honestly. It is, however, equally clear that the lords justices did not modify the application of the general rule by reason of the existence of this equity, and upon this circumstance the respondents have laid much stress, and in support of their contention they have relied upon the following passage in the judgment of WOOD, V.-C., in *Merriman* v. *Ward* (6), in which, referring to *Pennell* v. *Deffell* (2), that learned judge said:

> "The lords justices had to consider whether the doctrine of appropriation could be overruled by another principle, namely, that the assignee must be presumed, as far as possible, to have drawn against his own fund, because the opposite presumption would be a presumption of fraud. Nevertheless the court held that the ordinary rule must apply of appropriating the earlier payments to the earlier debts."

If the lords justices had the question alluded to by the vice-chancellor, present to their minds when they delivered their judgments in *Pennell* v. *Deffell* (2), and deliberately solved it in the manner mentioned by him, it is much to be regretted that they did not make some specific reference to it; but I can find no reason assigned in the judgment of either lord justice, why the rule which had been so elaborately laid down, of attributing honest motives to a trustee, was treated as having no application when the order to be made upon the facts of the case came under consideration. The absence of any such assigned reason leads me to the conclusion that, either the suggested question was neither solved nor discussed, as one in controversy, or that some special circumstances existed which are not noticed in the report; and the comparative unimportance to the parties concerned of having the question decided or discussed may perhaps explain the omission.

I have already referred to the fact that Green had two banking accounts, upon each of which there was a considerable balance in his favour when it was closed. As regards the account with the London Joint Stock Bank, the two first items to his credit consisted entirely of his own moneys, and amounted together to upwards of £800, while the aggregate of all the moneys drawn out by him, whether on trust account or on private account, fell short of £800, so that it was wholly immaterial as regarded the result whether the account was taken upon the principle of appropriating the sums drawn out to the earlier items paid in or to that portion of the balance which was composed of his own private moneys. Whichever principle was adopted, the result would have been the same, viz., that the cestui que trust would recover the full amount of all the trust moneys paid in. But, as regards the account with the Bank of England, the facts were somewhat different. That account had commenced with a balance entirely composed of trust moneys, from which, on Oct. 4, 1849, Green had drawn out for his private purposes several sums amounting together to £107. Had the account been then closed, there would have been no blending of trust moneys with private funds; the sums drawn out would have been simply a misapplication of trust moneys to the extent of £107. On the following day, however, Green paid in to the credit of the account a sum of £72 16s. 3d. of his private moneys, and another sum of £442 12s. of trust moneys, and, on the same day, drew out £18 18s. for his private purposes, and £49 17s. 10d. for trust purposes. The sum of £72 16s. 3d. was the only sum paid in by Green to the credit of this account in respect of his private moneys; but subsequently to Oct. 5 he drew out and applied for his private purposes various sums which, being added to the £18 18s., exceeded by a small sum the amount of £72 16s. 3d. paid in by him on Oct. 5. By the decision of the lords justices the drawings of Green, as well before as on and after Oct. 5, were appropriated to the part extinguishment of the original balance, consisting entirely of trust moneys, and the general creditors were allowed, out of the ultimate balance, the full amount of the £72 16s. 3d. paid in by Green on Oct. 5.

With this result, therefore, the rule in *Clayton's Case* (1) was acted upon in dealing with the balance at the Bank of England. Had it been argued on the part of the appellants that the payment of the £72 16s. 3d. by Green on Oct. 5 ought to be treated as a repayment pro tanto of the £107 improperly drawn out by him on Oct. 4 before any blended account existed, the contention could hardly have been deemed unreasonable. No such contention, however, appears to have been raised. But the difference between the result of the system of appropriation adopted by the lords justices, and what would have been the result if, on both accounts, the moneys drawn out by Green had been set off against the moneys paid in from his private resources, is very trifling. Had the latter system been adopted the appellants would have been entitled to £4,077 5s. 4d., while under the order of the lords justices they took £4,011 13s. 5d., a difference of £65 only. They had succeeded in reversing the decision of the Master of the Rolls, who had deprived them of everything; and, as before observed, the substantial question argued was not whether the respondents were entitled to the £72 16s. 3d., but whether the appellants were entitled to anything. It is not an improbable view of the case that at the close of a judgment which had given them, within a fraction, all that they had claimed, they should have abstained from questioning a portion of that judgment with the view of obtaining an allowance of the additional fraction.

This view of the case appears to be borne out by the fact that, although judgment was reserved, it was eventually given without hearing a reply from the appellants, which would hardly have been the case if the appellants had objected to the allowance of the £72 16s. 3d. to the respondents, and it may fairly be inferred, as well from the opening words of KNIGHT-BRUCE, L.J., who offered to the counsel for the appellants a right of reply after judgment if they thought fit to claim it, as from the concluding words of TURNER, L.J., that a claim on behalf of the appellants for something more than was given them was at least arguable. TURNER, L.J.'s observation was that he had no doubt LORD ELDON would have gone at least as far as the lords justices were then going, and that his only doubt was whether he would not have gone further. Upon what was that doubt based? Upon what could it have been based? The lords justices could only have gone further than they did go, by depriving the respondents of the £72 16s. 3d. and giving it to the appellants.

Dealing with the decision of the lords justices in *Pennell* v. *Deffell* (2) as I find it reported, I cannot regard it as satisfactory, if it is to be considered as establishing, as a general proposition, that in all such cases as that then under their consideration, the presumption of an honest intention on the part of the trustee is to be altogether disregarded, however favourable to such a presumption the circumstances of any particular case may be, and the rule of appropriating, in strict order of date, the drawings out to the payments in is alone to be applied. On the contrary, I entertain a very decided opinion that, in cases like *Pennell* v. *Deffell* (2), or in such as that which is the subject of the present appeal, full effect should be given to the principle of attributing an honest intention wherever the circumstances of the case admit of such a presumption. It may, of course, happen that, through the acts of a trustee whether wilfully dishonest or not, the ultimate balance may not be sufficient to meet the full amounts of all the trust moneys which may have been paid into a blended banking account, and the question then raised may be as to the various claims in respect of distinct trusts. In such a case, the strict application of the general rule of appropriating in order of date the drawings out to the payments in may, and probably would, be correct. But in a case of another class, in which, as in that under consideration, the trustee has paid in trust moneys to the credit of his private account, and in his subsequent dealings with that account for his private purposes has never reduced his balance below the amount of the trust moneys so paid in, it is, to my mind, difficult to attribute to the trustee any other intention than that of appropriating his drawings to his own private moneys, so as to leave the trust moneys intact. If it is ever proper to follow trust moneys into a banking account in the interests of the cestui que trust,

I am unable to suggest a case more proper than that which we are now considering, for the application of the principle that an honest intention should be attributed to the trustee. If it can properly be considered that the decision in *Pennell* v. *Deffell* (2) proceeded upon the special circumstances of that case, it is, of course, not an authority by which this court is bound in dealing with the present appeal; but, however strong may be the impression upon my own mind—and it is very strong—that all the circumstances of that case necessary for rightly appreciating it are not to be found in the report, I cannot ignore the fact that for nearly thirty years it has been recognised as an authority in no way depending on special circumstances, but as establishing a general principle applicable to all cases of a similar character. In *Brown* v. *Adams* (7), to which our attention has been directed in argument, GIFFARD, L.J., not only held himself bound by the authority of *Pennell* v. *Deffell* (2), but stated that he should have arrived at the same conclusion in the case before him, even if not bound by that authority. With reference, however, to *Brown* v. *Adams* (7), it is to be observed that JAMES, V.-C., from whose decision the appeal was brought, had arrived at a different conclusion.

The question then remains, whether *Pennell* v. *Deffell* (2) is an authority so binding upon this court that, however decided may be the collective or individual opinions of its members as to what in the absence of authority should be done in the matter of this appeal, we are bound to disregard them and to shape our decision in accordance with what was decided in that case. My answer to that question must be in the negative. I fully recognise and appreciate the evils which in many cases would arise if the judges of the Court of Appeal, or, indeed, if any other court or judges, were to act upon their individual views, regardless of what is generally understood by the expression "authority." Repeated decisions have established rules for determining the construction of particular words when used in wills, and other wills have been prepared and executed upon the faith of such words receiving the like construction. Titles have been acquired and lands dealt with upon the footing of the law being as enunciated in the judgments pronounced in other cases; and so again, in matters of commercial business, contracts have been entered into upon the faith of certain rules, originating in the decisions of the courts, being recognised as conclusive. In such cases as these, and in others which will readily suggest themselves, the greatest injustice might be occasioned by a court or a judge treating such decisions as having been erroneously arrived at, and thereby creating doubt and uncertainty as to a rule of law which had previously been treated as well and clearly defined. But no such injustice could arise in consequence of our dissenting from the decision in *Pennell* v. *Deffell* (2), and giving effect to such dissent. It can hardly be suggested that since that decision any trustee has kept and dealt with a blended banking account upon the faith that, as between his general creditors and his cestuis que trust, the rule adopted in that case would also be adopted after his death in dealing with his ultimate balance. If a trustee had acted upon any such view, he could hardly be considered as having had an honest intention.

If, however, the actual decision in *Pennell* v. *Deffell* (2) had been a logical consequence of an application of the principles enunciated by the lords justices, I should certainly have felt myself bound to follow it; but, having to decide between general principles enunciated in a well-known case in which, as understood by me, I most entirely concur, and the decision arrived at in the same case, and apparently upon an intended application of the same principles, but which would give to those principles a construction and an effect in which I cannot concur, I feel myself bound to adopt and give effect to the general principles and to treat myself as unfettered by the actual decision. For these reasons I agree with the Master of the Rolls in thinking that the appeal should be allowed.

THESIGER, L.J.—I feel myself bound by authority to affirm the judgment of FRY, J. Upon principle there is great strength in the argument for the trustees. If specific coins, the proceeds of trust property, are deposited by a trustee in a box

A either in his own custody or in that of another person, and in that box are mixed confusedly with coins in every sense the property of the trustee, and being so mixed are subjected to dealings analogous to the drawings out and payings in of moneys standing in a banker's account, the trust is impressed upon the coins remaining in the box to the full amount of the proceeds of the trust property, if it be that at no time the mixed fund has been reduced below that amount, or, if the mixed B fund has at any time been reduced below that amount, then to any lesser amount below which it can be shown that the mixed fund has never been reduced.

So much is admitted by KNIGHT-BRUCE, L.J., in *Pennell* v. *Deffell* (2). But in that case and in other cases it has been held that the proceeds of trust property may be traced, followed, and claimed by the trust creditor when, instead of their being placed in a box or other special repository, they are paid to a banker to be C placed by him to the credit of the trustee's private account, and are so placed subject to the qualification at least that upon an appropriation of payment in accordance with the rule laid down in *Clayton's Case* (1), it appears that the money claimed has not been drawn out. It has been argued that the qualification cannot be supported, and that when once it is admitted that money may be followed into a bank account equally with money placed in a special repository, the money so D followed must be subject to the same conditions, and be recoverable under the same circumstances in the one case as in the other. True it is that in the case of money paid into the bank account it is converted into a debt, while in the case of money placed in a special repository it remains in specie; but it may be said with reason that this distinction would rather afford a ground for not following the money into the bank account at all than a ground, when it is held that it may be E followed, for not carrying out to their logical consequences considerations drawn from the analogy of the money placed in the special repository; and it is no doubt difficult to see why the rule as to appropriation of payments, which is a rule which embodies a presumption of fact rather than of law, and is founded upon the notion that in the absence of any expression of intention an appropriation of drawings F out and payings in of moneys upon a bank account in order of date would in most cases meet the intentions of the parties, should not bend before the fact that in the particular case such an appropriation would involve a breach of trust, if not a distinct fraud.

That the rule is what I have stated it to be is shown by *Henniker* v. *Wigg* (4), and *City Discount Co.* v. *McLean* (5), and those cases are good illustrations of the G character of circumstances which would be sufficient to prevent the application of the rule. A bond in one case, a guarantee in the other, given by third parties and covering a portion of the customer's account with his bank, was held to rebut the presumption that the balance covered by the security had been paid. In each of these cases, the presumption, if it had been acted upon, would have put an end to a civil remedy, which from the facts of the case it was manifest was intended H by all parties to be kept active. In the present case and in cases of a similar kind, if the presumption is acted upon, it would not only result in trust property, the proceeds of which are traced to the bank account, being lost to its proper owners, but would entail the further consequence of the customer being presumed to have committed a fraud, and this by an arbitrary rule not founded upon any equitable considerations (for general creditors have no equity as against the equity of a I cestui que trust to trace and follow into a bank account the moneys arising from a sale of the trust property: *Frith* v. *Cartland* (8)), but established for the purpose of dealing with general accounts in the absence of special indications by the parties of their intentions. The presumption of a man's innocence of crime may reasonably be set off against the presumption that he intended such an appropriation of payments upon his bank account as could only exist if he intended to commit a crime; and to the argument adduced by Mr. Hallett's representatives in the present case, that the facts proved indicate that he did in fact intend to misappropriate and had misappropriated the trust property, the answer might be given as it

might have been given to Mr. Hallett himself if he had been alive to use the argument, "Allegans suam turpitudinem non est audiendus."

Giving, however, full effect to this reasoning, which, be it observed, is reasoning that is not difficult for even an uncultivated mind to follow, it remains to be seen how eminent judges have dealt with the matter. *Clayton's Case* (1) is capable of being, and has been, distinguished from the present. It, with other similar cases, shows, according to BLACKBURN, J., in *City Discount Co.* v. *McLean* (5) (L.R. 9 C.P. at p. 701),

> "that when a partner dies and there is a change of the partnership, and the transactions with the new and old firms are all mixed up together in one account, the law treats the whole as one entire account, and applies the items of credit to those of debit according to date in favour of the estate of the deceased partner."

The decision of SIR WILLIAM GRANT, so explained, is quite consistent with the general rule clearly laid down in the common law cases, that accounts rendered are only evidence of the appropriation of payments to the earlier items, which may be rebutted by evidence to the contrary. The two cases already cited of *Henniker* v. *Wigg* (4) and *City Discount Co.* v. *McLean* (5), affirmed, as already pointed out, that general rule, and although they contained special features which might distinguish them to some extent from the present case, their ratio decidendi was wide enough to apply to the case of a person following his trust property into a banking account, and claiming to have that account adjusted so as to preserve his rights. Still it must be borne in mind that in these common law cases the inference arising upon the facts was that banker, customer, and third party all actually intended that the payments in and out of the account should not be taken in order of date, while here banker and third party could have had no intention in the matter, for they were ignorant of the fact that the trust funds had got into the account, and the intention of the customer is only derived from a presumption of law contrary to the probable facts of the case.

This being so, we have in *Pennell* v. *Deffel* (2), and in a court of co-ordinate jurisdiction with this court, or rather in a court, to the functions of which, among other functions this court has succeeded, a decision by which not only the principles applicable to cases like the present were considered and laid down, but in which the very point raised upon this appeal was discussed and decided. The steps which, as pointed out at the commencement of my judgment, seem to lead to the conclusion, as a matter of logical argument, in favour of the trustees' contention, were the steps taken by KNIGHT-BRUCE, L.J., in *Pennell* v. *Deffell* (2), which led him to an exactly opposite conclusion arrived at also by his colleague TURNER, L.J. Their judgment was given in 1853. In 1860 WOOD, V.-C., in *Merriman* v. *Ward* (6), following as he was no doubt bound to do that judgment, epitomised it in these terms (1 John. & H. at p. 377):

> "The lords justices had to consider whether the doctrine of appropriation could be overruled by another principle, namely, that the assignee must be presumed, so far as possible, to have drawn against his own fund, because the opposite presumption would be a presumption of fraud. Nevertheless the court held that the ordinary rule must apply of appropriating the earlier payments to the earlier debts."

The effect of *Pennell* v. *Deffell* (2) could not be put in terms more clear or more distinctly negativing the argument as regards the presumption of fraud which I have used.

In *Frith* v. *Cartland* (8), again, the same learned vice-chancellor, while distinguishing the case before him from that of *Pennell* v. *Deffell* (2), said of the latter (2 Hem. & M. at p. 422) that in it

> "part of the trust fund had been paid into a bank, but it was not ear-marked, and was wiped out by subsequent drawings, and the whole ultimate balance

A could not be fixed with the trust any more than a second £1,000 of stock which a trustee might happen to acquire after selling £1,000 of trust stock and spending the proceeds."

In 1869 the point arose before GIFFARD, L.J., in *Brown* v. *Adams* (7), in the same simple form in which it has been discussed before us, for the only question the B lord justice had to decide was whether in a bank account the appropriation of payments, according to the rule in *Clayton's Case* (1), was to take place so as to wipe off an item of £5,000 which was admittedly trust money, and the case came before the lord justice under circumstances favourable to the re-consideration of the decision upon the point in *Pennell* v. *Deffell* (2), for JAMES, V.-C., had granted an interlocutory injunction in favour of the trust creditor, but GIFFARD, C L.J., dissolved the injunction, not merely saying that he considered himself bound by the authority of *Pennell* v. *Deffell* (2), but adding that even without that authority he should have had no doubt in the case before him.

Again, in *Ex parte Cooke* (9), decided in 1876, BRAMWELL, L.J., one of the judges who took part in the decision in 1874 of *City Discount Co.* v. *McLean* (5), is reported to have said in reference to the point under consideration (4 Ch.D. at D pp. 127, 128):

"If the whole of the money had remained in the hands of the bankers without being drawn out, I think it clear that the cestui que trust could have claimed it as trust money traced into their hands, and, if on properly attributing the payments any part of it is found to remain there the same rule must apply to what so remains."

E

In that case the matter was referred to the registrar, and we are informed that upon the registrar appropriating the payments in accordance with these observations, and upon an appeal from the registrar to this court, *Pennell* v. *Deffell* (2) was treated as binding authority, and the appeal was dismissed.

I have purposely refrained from citing as authority in the same direction *Lord* F *Chedworth* v. *Edwards* (10), before LORD ELDON, as Chancellor, in 1802, because there may possibly be a doubt as to what he meant when he spoke of it being too much to infer that money at the bankers was the same money unconverted which had been paid in two years before, and the point does not appear to have been particularly argued before him.

Putting aside, however, that case, the matter as regards authority stands thus. G For a period of twenty-one years the judgment in *Pennell* v. *Deffell* (2) stood unchallenged, and was followed as laying down a correct rule; and even when, at the end of that period, *City Discount Co.* v. *McLean* (5) was decided, it was decided without reference to *Pennell* v. *Deffell* (2). As regards this last observation it may be pointed out that the lords justices decided *Pennell* v. *Deffell* (2) without reference to the previous case of *Henniker* v. *Wigg* (4), and it may be said that they had H proceeded upon a misapprehension of the principles of common law applicable to the appropriation of payments in a banking or any other account. This may possibly be so, and, if it was so, I am inclined to think that the misapprehension was shared in by SIR WILLIAM GRANT, in laying down the rule in *Clayton's Case* (1), for, although his decision may be distinguished, as it has been distinguished in the common law cases already cited, I cannot but think that the terms in which he I laid down the rule were intended by him to go beyond the limits of the particular case before him, and were wide enough, as they were assumed by KNIGHT-BRUCE, L.J., and TURNER, L.J., to be, to cover *Pennell* v. *Deffell* (2). The character of the bank account where, to use the words of SIR WILLIAM GRANT himself, "all the sums paid in form one blended fund the parts of which have no longer any distinct existence," was the keynote of his decision, and would have been scarcely necessary to be dwelt upon so prominently if any equity of the retired or deceased partner had been sufficient in itself to call for an appropriation of payments at least not contrary to any rule of law.

In this state of the authorities I cannot feel myself justified in taking upon myself to overrule judgments by which I think that in this court we ought to consider ourselves bound. I fully realise that in overruling those judgments no injustice or inconvenience would be worked such as would arise in cases where, upon the faith and footing of a particular rule of law having been correctly laid down, business affairs have been for some time conducted, the practice of conveyancers has been regulated, or titles to property of any kind have been acquired. But that consideration appears to me to be one proper to influence the mind of a superior tribunal asked to overrule a judgment of inferior tribunals, although of long standing and often followed, rather than to afford a ground for this or any other court disregarding such judgments when given by and followed in tribunals of co-ordinate jurisdiction. In other words, it constitutes a reason for holding that a decision in a particular court has not so passed into and become part of the common and recognised law of the land as to prevent any court overruling it, rather than for holding that it is not a binding decision upon all courts of co-ordinate jurisdiction.

It is said further that the point for our decision formed so insignificant a part of the judgment of the lords justices in *Pennell* v. *Deffell* (2), and may, perhaps, have been, or even probably was, so little dwelt upon in the argument before them, especially as no reply was heard by them, that their decision upon it is entitled to less weight than might otherwise have been given to it. The fact is manifest that the sum which was affected by the particular decision was a mere nothing compared with the amount of which the then Master of the Rolls' judgment had deprived the appellants upon the ground that the trust moneys could not be traced and followed into the bank account at all, which amount the lords justices held was recoverable by the trust creditor. Granting, however, this fact, it is still equally manifest that the lords justices did not overlook the minor point, or, indeed, treat it as a minor point. Their judgments contain on the face of them signs from which one cannot but collect that the point was carefully considered by them. It is lastly said that the principles they themselves laid down in their judgment so clearly demonstrate the erroneousness of their conclusion upon the particular point in question, that it is just one of those cases in which no court ought to be bound by such a conclusion. But here, again, however desirable it may be, as suggested in argument, that a judge should have the courage of his convictions, it is equally desirable that he should have respect for those of other judges, and I should attribute to myself another quality than that of courage if I were to hold that a conclusion which appeared a rational one to no less eminent judges than Knight-Bruce, L.J., and Turner, L.J., the present Lord Hatherley, and Giffard, L.J., and which did not appear open to review to the learned judges before whom upon a second occasion *Ex part Cooke* (9) came to be discussed, was necessarily illogical and absurd. Equity has gone very far in aid of trust creditors when it holds that they may follow and obtain in priority to general creditors moneys paid to a banker, and, therefore, no longer existing in specie as moneys numbered and earmarked, but converted into a debt, and it may be that the distinguished judges I have referred to may have thought that equity had gone far enough, and that in the absence of express appropriation the general rule of appropriation of payments in and out of a bank account should apply to that debt when forming part of a larger debt made up as to the rest of moneys not trust moneys paid into the bank. However this may be, and notwithstanding the hesitation which I naturally feel in differing upon the question of the binding effect of the authorities from the other members of the court, I must express my opinion that the law laid down in *Pennell* v. *Deffell* (2) is binding upon this court, and that the appeal ought, therefore, to be dismissed.

Appeal allowed.

Solicitors: *H. A. Dowse*; *Fladgate, Smith & Fladgate*; *Gatliff & Howse*; *Fairfoot & Webb*; *Humphreys & Son.*

[*Reported by* E. S. Roche, Esq., *Barrister-at-Law.*]

A

THE BYWELL CASTLE

[COURT OF APPEAL (James, Brett and Cotton, L.JJ., with Nautical Assessors), July 14, 15, 1879]

B [Reported 4 P.D. 219; 41 L.T. 747; 28 W.R. 293; 2 Asp.M.L.C. 207]

Shipping—Collision—Contributory negligence—Emergency caused by negligence of one vessel—Act done in moment of peril and difficulty by master of other vessel.

C The master of a vessel is not to be held guilty of negligence resulting in or contributing to a collision if in a sudden emergency caused by the default or negligence of the other vessel he does something which he might under the circumstances as known to him reasonably think proper, although those before whom the case later comes for adjudication are, with a knowledge of all the facts, and with time to consider them, able to see that the course which he adopted was not in fact the best. Masters of ships must not be expected to be something more than ordinary men, and perfect presence of mind, accurate D judgment, and promptitude in giving effect to that judgment under circumstances of extreme peril and difficulty are not to be expected.

Notes. Considered: *Stoomvaart Maatschappij Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; *Woodley* v. *Michell* (1883), 11 Q.B.D. 47. Approved: *The Tasmania and Freight Owners* v. *Smith*, *The* E *City of Corinth*, *The Tasmania* (1890), 15 App. Cas. 223. Applied: *S.S. Utopia* v. *S.S. Primula*, *The Utopia*, [1893] A.C. 492. Considered: *Dulieu* v. *White & Sons*, [1900–3] All E.R.Rep. 353. Applied: *S.S. Orduna* v. *Shipping Controller*, [1921] 1 A.C. 250. Approved: *United States Shipping Board* v. *Laird Line*, [1924] A.C. 286. Referred to: *The Harton* (1884), 50 L.T. 370; *The Frankfort* (1909), 101 L.T. 664; *The Hero*, [1911] P. 128; *Admiralty Comrs.* v. *Volute* (*Owners*), *The Volute*, F [1921] All E.R.Rep. 193; *Singleton Abbey* (*Owners*) v. *Paludina* (*Owners*), *The Paludina*, [1926] All E.R.Rep. 220; *Canadian Pacific Rail. Co.* v. *Kelvin Shipping Co.* (1927), 138 L.T. 369; *Corstar* (*Owners*) v. *Eurymedon* (*Owners*), *The Eurymedon*, [1938] 1 All E.R. 122; *Admiralty Comrs.* v. *North of Scotland and Orkney and Shetland Steam Navigation Co.*, [1947] 2 All E.R. 350; *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*), [1948] A.C. 140; *Davies* v. *Swan Motor Co.* (*Swansea*), G *Ltd.*, [1949] 1 All E.R. 620; *Henley* v. *Cameron*, [1949] L.J.R. 989; *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478.

As to negligence causing collision damage, see 35 HALSBURY'S LAWS (3rd Edn.) 687–696; and for cases see 41 DIGEST 768–773.

Appeal from a decision by SIR ROBERT PHILLIMORE in an action for damages arising from a collision which took place between the paddle-steamship *Princess* H *Alice* and the screw steamship *Bywell Castle*, off Tripcock Point, in the Thames, on Sept. 3, 1878.

The action was brought by the London Steamboat Co., owners of the *Princess Alice*, and the defendants, the owners of the *Bywell Castle*, counterclaimed in respect of the damage sustained by that vessel in the collision. The case was heard in 1878 before SIR ROBERT PHILLIMORE, assisted by Elder Brethren of the Trinity I House, and he held that both vessels were to blame for the collision. The defendants, the owners of the *Bywell Castle*, appealed.

Butt, Q.C., *Clarkson* and *Myburgh* for the owners of the *Bywell Castle*.

Webster, Q.C., and *Dr. W. G. F. Phillimore* for the owners of the *Princess Alice*.

JAMES, L.J.—Upon the point which is first to be considered, namely, whether the *Princess Alice* was in fault or not, we have the direct finding of the judge of the Court of Admiralty, and of the Trinity Masters who assisted him. They find in distinct terms that the *Princess Alice* was at one time on a course parallel with

that of the *Bywell Castle*, red light to red light, and that if their respective courses had been continued they would have passed at a safe distance from each other, but that when a very short distance, variously stated at from 100 to 400 yards, intervened between the two vessels, the master of the *Princess Alice* ordered his helm to be put a-starboard, by which he brought his vessel athwart the bows of the *Bywell Castle*. That was the finding of the judge and the Trinity Masters, who heard all the evidence, the comments on it, and any defence suggested by it. They came to that conclusion, and it would require a great deal to satisfy me that we, sitting as a Court of Appeal, could, on any considerations that have been suggested to us, overrule that finding of fact. My own opinion, moreover, is that the evidence supports it. With regard to the general conduct of the *Princess Alice*, on which I have not heard a comment made in support of her, the court says: "It appears to us, moreover, that the *Princess Alice* was navigated in a careless and reckless manner, without due observance of the regulations respecting look-out and speed." That is not to be questioned. Therefore, upon the issue, whether the *Princess Alice* was to blame, there can be no doubt that we must affirm the judgment of the court below.

The judge of the court below then says that the *Bywell Castle* appears to have been navigated with due care and skill till within a very short time of the collision; and I understand our assessors to agree with those in the court below in that opinion. The only question is as to the last act of the *Bywell Castle* before the collision, which is that she, in the very agony of the collision, just at the time when the two ships were close together, hard a-ported. The learned judge and both of the Trinity Masters were of opinion that that was a wrong manœuvre. I understand our assessors to agree in that opinion also; but they advise us that it could not, in their opinion, have had the slightest appreciable effect upon the collision. Everything else had been done that the few seconds allowed time for. That opinion, if adopted by us—and I think that it should be adopted—is sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right, after, by its own misconduct putting another ship into a situation of extreme peril, to charge that other ship with misconduct or contributory negligence, if, in that moment of extreme peril and difficulty, such other ship happens to do something wrong. A wrong manœuvre, under such circumstances, would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude in giving effect to such judgment under such circumstances, are not to be expected. You have no right to expect persons in charge of ships to be something more than ordinary men.

I am, therefore, of opinion that the finding of the court below that the *Bywell Castle* was, for the purposes of this suit, to be considered to blame, must be overruled, and that the *Princess Alice* was alone to blame.

BRETT, L.J.—In this case the Admiralty Court has found that both ships were to blame, and there are, practically, cross-appeals. The judgment of the Admiralty Court is made to depend on four principal findings, some of which are findings of fact, and the others are judicial opinions as to the manœuvres which were or ought to have been employed. The four principal findings seem to be these. First, that at one moment these ships had come on to courses which might be called parallel courses—red light to red light—so that if the respective courses had been continued they would have passed at a safe distance from each other. That is a finding in favour of the *Bywell Castle*, and the appeal of the *Princess Alice* is practically against that finding. Secondly, that the *Princess Alice* was going at full speed, and the *Bywell Castle* at something like half speed. Thirdly, that the *Bywell Castle*, up to a very short time before the collision—which, taken in conjunction with the evidence and the first finding, seems to mean up to the time of putting her helm hard a-port—was navigated with due care and skill. That is a finding in favour of the *Bywell Castle*, and, therefore, is challenged by the appeal of the

Princess Alice. Fourthly, that though up to that moment the *Bywell Castle* was right, and although the red light of the *Princess Alice* had been on her port bow, yet when the green light of the *Princess Alice* was opened on her port bow, she did wrong in ordering her helm hard a-port. That is a finding against the *Bywell Castle*.

There being in the judgment of the Admiralty Court four distinct and fundamental findings we are asked to review them. We ought not, in accordance with the rules that govern the Court of Appeal, to overrule any one of these findings unless we are convinced that it is wrong. Therefore, applying that rule to the findings which are in favour of the *Bywell Castle*, we must consider whether we can say that the Admiralty Court was wrong in holding that at some particular moment these vessels were on parallel courses, red light to red light, and that up to the time of the order being given to put the helm hard a-port the *Bywell Castle* had been navigated with due care and skill. So far from being able to say that the court was wrong, it seems, on the balance of evidence, tested by the probabilities of the case, that the findings were right.

[HIS LORDSHIP reviewed the evidence, and continued:] The last wrongful act of the *Princess Alice* was done so near to the *Bywell Castle* that it was impossible by any manœuvre to avoid the collision. If the order given by the master of the *Bywell Castle* to hard a-port had no effect upon the collision, it is immaterial whether it was given or not. Even if it had an effect and was wrong, we have come to the conclusion that the captain of the *Bywell Castle* was suddenly put into an extremely difficult position, and, assuming that a wrong order was given, that it ought not to be attributed to him as a thing done with such want of nerve and skill as entitles us to say that by negligence and want of skill the *Bywell Castle* contributed to the accident. Therefore, though agreeing with all the findings as to the *Princess Alice*, we must come to a different opinion as to the last finding, the result being that we must hold the *Princess Alice* solely to blame.

COTTON, L.J.—There are in this case two questions to consider. First, was the judge of the court below right in finding that the *Princess Alice* was in fault? We here are only dealing with the evidence which was brought before the judge of the court below, who had the benefit of seeing and hearing the witnesses. We have not had that opportunity of testing the evidence, and that in this case is of very considerable importance, because a great deal of the argument on behalf of the *Princess Alice* consisted in commenting on alleged discrepancies in the evidence of the witnesses for the *Bywell Castle*, and asking us practically to discredit their evidence. In such a case, in order to overrule the finding of a judge of the court below, we ought to be satisfied that his finding cannot upon the evidence be sustained. This in the present case I cannot say, because, on the evidence which we have heard, I should have arrived at the same conclusion as the learned judge of the court below. [HIS LORDSHIP commented on the evidence, and concluded that he agreed with what in substance was the evidence on behalf of the *Bywell Castle*, that the *Princess Alice* going over to the point on the north shore had got on the port bow of the *Bywell Castle*, and that she did alter her course by starboarding and hard a-starboarding her helm.]

On the other point, that the *Bywell Castle* did not contribute to the accident by hard a-porting before the collision, I agree with the view expressed by BRETT, L.J. Our assessors tell us that it could not in any way have been contributory to the accident, which, in their opinion, was then inevitable. Even if the collision had not been unavoidable at the time when the helm of the *Bywell Castle* was put hard a-port, I should not have held that vessel liable, for, in my opinion, the sound rule is that a man in charge of a vessel is not to be held guilty of negligence, or as contributing to an accident, if in a sudden emergency, caused by the default or negligence of another vessel, he does something which he might under the circumstances as known to him reasonably think proper, although those before whom the case comes for adjudication are, with a knowledge of all the facts, and with time

to consider them, able to see that the course which he adopted was not in fact the best. In this case, though to put the helm of the *Bywell Castle* hard a-port was not in fact the best thing to be done, I cannot hold that to do so was under the circumstances an act of negligence on the part of those who had charge of that vessel.

Solicitors: *Thomas Cooper & Co.*; *Newman, Stretton & Hilliard.*

[*Reported by* F. W. Raikes, Esq., *Barrister-at-Law.*]

BESANT *v.* WOOD

[Chancery Division (Sir George Jessel, M.R.), March 27, 1879]

[Reported 12 Ch.D. 605; 40 L.T. 445; 23 Sol. Jo. 443]

Husband and Wife—Separation agreement—Enforcement—Injunction to restrain breach—Breach—Covenant that child should reside with wife—Concurrence by husband in application to court under Custody of Infants Acts.
Judicial Separation—Refusal of decree—Separation deed—Delay.

By a deed of separation, dated Oct. 25, 1873, it was recited that unhappy differences had arisen between the husband and the wife, and it was provided that they had agreed to live separately from each other on the terms of the deed. It was further provided that the husband would allow a child of the marriage to reside with her mother during a specified part of the year. In May, 1878, he concurred as next friend of the infant in a petition under the Custody of Infants Act, 1873, for the custody of the child. Later in 1878 the wife alleged breaches by the husband of certain of the covenants in the deed and threatened to return to the matrimonial home and live with the husband. In an action by the husband to restrain the wife from molesting or annoying him or instituting any proceedings to compel him to cohabit with her, in which the wife counterclaimed for specific performance of the deed and asked for a judicial separation,

Held: a judicial separation was granted on the ground of cruelty or apprehended cruelty, and so a decree would not be granted where the cohabitation of the parties had ceased for years by mutual consent and could not be renewed without such consent; the husband's concurrence in the application under the Act of 1873 did not constitute a breach of his covenant with regard to the child in the deed; even if the husband had so misconducted himself that a court of equity would refuse at his instance an order for specific performance of the deed, that would not prevent him relying on the deed in the present case; and, therefore, an injunction would be granted restraining the wife from taking any action or other proceeding to compel the husband to cohabit with her.

Notes. Followed: *Hart* v. *Hart* (1881), 18 Ch.D. 670; *Rose* v. *Rose*, [1881–5] All E.R.Rep. 194. Considered: *Cahill* v. *Cahill* (1883), 8 App. Cas. 420. Applied: *Clark* v. *Clark* (1885), 10 P.D. 188. Considered: *Wennhak* v. *Morgan* (1888), 57 L.J.Q.B. 241. Followed: *Aldridge* v. *Aldridge* (1888), 13 P.D. 210; *McGregor* v. *McGregor* (1888), 21 Q.B.D. 424; *Sweet* v. *Sweet*, [1895] 1 Q.B. 12. Considered: *Russell* v. *Russell*, [1895] P. 315; *Kunski* v. *Kunski* (1895), 68 L.J.P. 18; *Kennedy* v. *Kennedy*, [1907] P. 49. Referred to: *Gandy* v. *Gandy*, [1881–5] All E.R.Rep. 376; *Gooch* v. *Gooch*, [1893] P. 99; *Bishop* v. *Bishop*, *Judkins* v. *Judkins*, [1897] P. 138; *Re Western*, *Davies* v. *Tagart*, [1900] 2 Ch. 164; *Hyman* v. *Hyman*, [1929] All E.R.Rep. 245; *Countess Russell* v. *Earl Russell*, [1934] All E.R.Rep. 569; *Tulip* v. *Tulip*, [1951] All E.R.Rep. 9.

As to agreements for separation, see 19 HALSBURY'S LAWS (3rd Edn.) 877 et seq.; and for cases see 27 DIGEST (Repl.) 212 et seq. As to judicial separation, see 12 HALSBURY'S LAWS (3rd Edn.) pp. 285–287, and cases there cited.

Cases referred to:

(1) *Matthews* v. *Matthews* (1860), 3 Sw. & Tr. 161; 29 L.J.P.M. & A. 118; 2 L.T. 472; 6 Jur.N.S. 659; 8 W.R. 591; 164 E.R. 1235; 27 Digest (Repl.) 415, *3451.*

(2) *Milford* v. *Milford* (1868), 37 L.J.P. & M. 77, H.L.; 27 Digest (Repl.) 295, *2402.*

(3) *Marshall* v. *Marshall* (1879), 5 P.D. 19; 48 L.J.P. 49; 39 L.T. 640; 27 W.R. 399; 27 Digest (Repl.) 214, *1708.*

(4) *Brown* v. *Brown and Shelton* (1874), L.R. 3 P. & D. 202; 43 L.J.P. & M. 47; 31 L.T. 272; 27 Digest (Repl.) 377, *3107.*

(5) *Wilson* v. *Wilson* (1848), 1 H.L.Cas. 538; 12 Jur. 467; 9 E.R. 870, H.L.; 27 Digest (Repl.) 220, *1757.*

(6) *Hunt* v. *Hunt* (1862), 4 De G.F. & J. 221; 31 L.J.Ch. 161; 5 L.T. 778; 26 J.P. 243; 8 Jur.N.S. 85; 10 W.R. 215; 45 E.R. 1168, L.C.; 27 Digest (Repl.) 242, *1949.*

(7) *Flower* v. *Flower* (1871), 25 L.T. 902; 20 W.R. 231; 27 Digest (Repl.) 241, *1942.*

(8) *Rowley* v. *Rowley* (1866), L.R. 1 Sc. & Div. 63; 35 L.J.P. & M. 110, H.L.; 27 Digest (Repl.) 376, *3103.*

Also referred to in argument:

Curtis v. *Curtis* (1858), 1 Sw. & Tr. 192; 27 L.J.P. & M. 73; 31 L.T.O.S. 272; 164 E.R. 688; affirmed (1859), 4 Sw. & Tr. 234; 27 Digest (Repl.) 543, *4908.*

Duke of Bolton v. *Williams* (1793), 2 Ves. 138; 4 Bro.C.C. 297; 30 E.R. 561, L.C.; 32 Digest (Repl.) 311, *508.*

Aylett v. *Ashton* (1835), 1 My. & Cr. 105; 5 L.J.Ch. 71; 40 E.R. 316; 30 Digest (Repl.) 451, *916.*

Action by the Rev. Frank Besant against his wife and the trustees of a deed of separation which had been executed by him and his wife, to enforce the covenants contained in the deed and to restrain Mrs. Besant from molesting or annoying him, and from instituting any action or other proceeding for the purpose of compelling him to cohabit with her. The wife counterclaimed for specific performance of the deed and a judicial separation.

Ince, Q.C., and *Wellington Cooper* for the husband.
Mrs. Besant in person.

SIR GEORGE JESSEL, M.R.—I have no doubt whatever as to the decision I ought to give. First of all I will state what my view is of the law upon the subject, then I will refer to one or two authorities upon the question, and then I will consider the circumstances of the case.

The counterclaim in this case is an application by the wife for a judicial separation from the husband on the ground of cruelty. The foundation of that jurisdiction, as I understand it, was always that the apprehension of cruelty or cruel treatment on the part of the husband made it impossible for the wife with safety to herself to continue to cohabit. The proof of the actual cruelty committed was only brought in to show that it was likely to be renewed, because it was perfectly well settled that the effects of cruelty might reasonably cause the same apprehension in the wife's mind, and might, therefore, be a foundation for a divorce a mensa et thoro, or a decree of judicial separation. That being so, it is very difficult to understand that the law can have any application to a case where the cohabitation has ceased for years by mutual consent and cannot be renewed without such consent. It cannot be said in that case that the wife is entitled to the protection of the court to separate her from her husband, because she is already separated by

an instrument which could be enforced by a court of equity. The reason of the court's intervention entirely disappears when the separation has once taken place and is agreed to by deed.

That involves the question whether the deed has or has not ceased to have any operation. I am told that JAMES, L.J., has thrown out an intimation of his opinion that this deed has so ceased to operate. I do not know how that may be, but I have the gratification of knowing that this case will certainly be taken to the Court of Appeal, and that he will give his reasons for that opinion if he entertained it. [In fact, there was no appeal.] All I can say is, I see no ground whatever for supposing that this deed has ceased to operate. No doubt one of the terms of the deed was that one of the children should be given to Mrs. Besant; but the court, in exercise of the power reposed in it by the legislature, has provided otherwise for the custody of the infant, and, notwithstanding the provisions of the deed, has taken away that custody from her. It appears to me that that does not destroy the deed. Custody was one of the considerations for the deed, but it must have been a consideration dependent entirely upon the interest of the infant requiring the court's intervention. That is my view. Although the attention of the court was called to it by the husband, and although the husband was the next friend of the infant, the interference of the court was in favour of the infant, and I am of opinion that there was no breach of covenant on the part of the husband.

Whether you consider this as being a covenant originally made subject to the terms of the Infants Custody Act, 1873, or whether you consider the Act itself, it, pro tanto, would still not be a breach on his part. It does not appear to me that that would destroy the deed, nor do I understand that anything would destroy such a deed except a return of the wife to cohabitation. No doubt the husband might so conduct himself that the court might refuse at his instance to enforce the deed. I understood that would be one of the points to be urged in the claim in this case, but it certainly cannot be alleged for one moment that the breach of the covenant by the husband could destroy the deed so as to have prevented the wife insisting upon it as a bar to a suit for a return to cohabitation instituted by the husband, and it is in that view I am inclined to see it. It appears to me that it is impossible that any breach of covenant on his part can prevent her insisting on the deed as a protection to her from any threatened violence, so that she would be entitled to invoke the interposition of a court of equity to restrain any action on the part of the husband for a restitution of conjugal rights.

That being so, it seems to me that in this case the lapse of time, coupled with the deed, is a complete bar to the cruelty alleged, all of which I see is alleged to have taken place not later than some time in the year 1873, before the execution of the deed of Oct. 23 in that year. Assuming that the acts of cruelty are proved, the husband and wife agreed to separate on Oct. 23, 1873, and this allegation is introduced by the defendant on Jan. 28, 1879, nearly six years after the alleged cruelty, and nearly six years after the execution of the deed of separation. I think that lapse of time coupled with the deed of separation would be a bar, but I think also that there are circumstances in this case which would make the lapse of time alone a bar.

There is another ground on which I think the claim for judicial separation could not be admitted. I am satisfied that it is not a bona fide claim on the ground of actual apprehension of violence. It is clear, to my mind, that the object of the claim is for another purpose—I by no means say an improper purpose. The object of the lady is to be free from having anything to do with her husband, and to acquire certain rights which only women who are thus separated can have. I have not a word to say against that motive, but the motive and purpose are evidently collateral, and the real motive, which ought to be the mainspring in such a suit, is protection of the wife from the violence of the husband. That that is so is clear from what has taken place in the suit. If the wife had really been in fear of the husband she would not have desired to return, but this suit has been instituted by the husband on account, not only of an expression of such a desire, but

A of a threat on her part to institute a suit for a restitution of conjugal rights. [HIS LORDSHIP referred to the facts on this point.]

The authorities to which I have been referred on the subject are, to my mind, conclusive upon it. First of all we have *Matthews* v. *Matthews* (1), in which there was lapse of time less—not much less—than in the present case. The cruelty was before October, 1853, and the suit was instituted, I think, some time in 1859.

B Then there was a separation deed, and the judge ordinary said:

> "The ground on which the ecclesiastical court in such cases interfered was to protect the person of the wife. In fact, the wife in this case is in no danger."

On appeal MARTIN, B., said, in agreeing that the lapse of time alone would not do: "You must also take into consideration the deed of separation." WILLES, J.,

C says:

> "This is a case which we ought not to encourage. We ought to carry out the law as far as we can . . . no apprehension of danger is now alleged."

The case also cited of *Milford* v. *Milford* (2) has this passage in LORD PENZANCE'S judgment:

D

> "The ground of the court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread."

As I said before, the defendant in the present case is now in no dread.

That being the position of matters, I have now to consider what would be the result if a suit were instituted by the husband for restitution of conjugal rights.

E There is a recent decision by SIR JAMES HANNEN, P., in *Marshall* v. *Marshall* (3). There he goes through the authorities, and comes to the conclusion that a deed of separation is a bar to a suit for restitution of conjugal rights, and he, therefore, held that when a wife brought a suit—the same thing would apply to the husband, of course—the plea of the deed of separation was a sufficient defence. If the husband brought the suit and the wife raised the deed, it would not be possible that

F any breach on his part of any of the covenants would prevent the wife from availing herself of the deed as a sufficient defence.

The only case cited by Mrs. Besant was *Brown* v. *Brown and Shelton* (4). That case was very different as regards dates from this. The last act of cruelty took place in June, 1872. The husband entered into an agreement with the wife that they should live separate, and the deed of separation was executed. Some time

G in 1873 the husband instituted a suit for divorce by reason of adultery. That suit came on to be heard on June 24, 1874. The jury found in favour of the wife as regards the adultery, and also found against the husband on the question of cruelty. On July 21, 1874, a motion was made for a judicial separation, which was granted. On what grounds did SIR JAMES HANNEN, then J.O., give the wife this benefit? The case was decided before *Marshall* v. *Marshall* (3). The learned judge ordinary

H does not seem to have taken into consideration the fact that the wife had a complete answer to a suit for the restitution of conjugal rights. It had not then been decided that she had, and, perhaps, that is the reason he did not take that point. But he seems to have considered that the husband had so misconducted himself that he was not entitled to rely upon the agreement for separation, and that, therefore, the wife was entitled to repudiate it.

I With the greatest respect for the learned judge, the repudiation of the deed of separation means, I suppose, the right to return to cohabitation, and, as that must be the voluntary act of the wife, it does not appear to me possible that she could say that she was in dread, or that there was any danger. He seems to have omitted from his consideration the foundation of the law, which was the apprehension of danger on the part of the wife. She could be, as in *Marshall* v. *Marshall* (3), in no danger at all. He says this:

> "I was asked on behalf of the petitioner not to grant a decree of judicial separation on the ground that the petitioner and respondent were, at the time

of the institution of the suit, living apart under the deed of separation, the terms of which have always been complied with by the husband, and to the obligations of which he still remains liable. I have several times expressed an opinion that it is not the duty of the court to discourage the settlement of matrimonial differences by arrangement between the parties rather than by litigation. It is always for the benefit of the children if there be any. A wife who has reason to complain of her husband's conduct may be disposed to submit to very disadvantageous terms rather than injure her children's prospects. If the husband, by bringing an unfounded charge against the wife, compels her to make known in self-defence her own grounds of complaint against him, the foundation of the settlement between them is removed, and the consideration fails upon which it was entered into."

I must say that I cannot accede to that argument; he cannot destroy the deed when one of the motives of the deed, no doubt, is to keep from the public eye the details of the matrimonial quarrels. But that is not the consideration for the deed. It is a motive, but not the consideration. Therefore, when he says that this is the consideration, it appears to me to be a mistake. There was no failure of consideration—at all events there is no total failure of consideration—nothing to destroy the deed, although it might be that one of the parties to an agreement might so misconduct himself or herself that a court of equity would refuse to enforce specific performance at his or her instance. But that does not, as it appears to me, destroy the effect of the instrument or prevent either, not misconducting himself or herself, from relying on the deed. It seems to me that the learned judge's objection will not hold good. When there is no danger, there is no ground for the interference of the Divorce Court. Then he says: "In such a state of things it is only just that the wife should be remitted to her original position." That puts an end to the deed.

As I said before, the question is: What does the law give? If the law is correctly stated in the cases to which I have referred, the law only gives judicial separation in cases where there is apprehended danger. But irrespective of the reasons for differing to some extent from the judgment of the learned judge, I must say that, assuming every word of it to be as well founded in law as his decisions usually are, it does not apply to the case before me. The ground that he puts it on is that the husband, by bringing a suit for divorce by reason of adultery, compels a wife to disclose in open court her grounds of complaint against him. I have assumed that that was so. It was inevitable in discussing the one charge that the other should be discussed. That is in no relation to a simple suit like this, for restraining the wife from instituting a suit for restitution of conjugal rights. The institution of a suit for restitution of conjugal rights cannot compel the wife to disclose the details of cruelty. She wants to go back—to return to cohabitation. It is her interest and her duty under those circumstances to cast a veil over all the wrongs her husband may have previously committed. She wishes to return to his home, and regain or retain his affection. How, then, can it be a case of compulsion on her to make known, in self-defence, acts of cruelty? It seems to me that there is no pretence for saying that in a suit of this kind there was any such compulsion, her object being, as alleged, to return. That was entirely contrary to the object of the husband—namely, to obtain a divorce.

It seems to me, taking every word of that judgment to be unassailable, it not only has no application to the case before me, but so far as it has any indirect application it is against the contention of the wife. I am, therefore, of opinion that this counterclaim for cruelty is barred by lapse of time, and by the execution of the deed of separation, and that, even if I came to the conclusion that the husband was not entitled to enforce the deed, it would still be an absolute bar to the right of judicial separation.

Ince, Q.C., and *Wellington Cooper* for the husband, asked for judgment in the action awarding an injunction in the terms asked for.

Mrs. Besant, in person, contended that a husband could not bring such an action as this against his wife, and referred to *Duke of Bolton* v. *Williams* (2 Ves. 138), and *Aylett* v. *Ashton* (1 My. & Cr. 105). Further, that the plaintiff had not performed his covenants in the deed, and, therefore, was not entitled to come to the court to have the deed enforced against her.

SIR GEORGE JESSEL, M.R.—This case is a most singular one. It is a suit between a husband and his wife who have been living apart for several years. The curious thing about it is that the husband does not wish to live again with the wife, and the wife does not want to live again with the husband; and yet the whole question before me is whether I ought to restrain the suit for restitution of conjugal rights which has been threatened on behalf of Mrs. Besant, which would fail if it was instituted, and which I am well satisfied the wife did not intend to institute. That is the odd position in which I am placed, and in which I have to decide some very important questions of law, there being no real intention on the one side or on the other to live otherwise than separately. The real contest between the parties is of a totally different character, as to the custody of the children of the marriage. As I understand it, the object of the wife, first of all, in threatening to institute a suit for the restitution of conjugal rights, and not asking for a decree of judicial separation, was really with reference to the custody of these children. That is the real question between these two people, and it is a question I cannot entertain in this suit except to a very moderate extent.

The suit raises points of the very greatest importance as regards the general law. Judicial opinion has varied a great deal, and must vary a great deal, when you consider the grounds upon which it has been founded. This branch of law depends upon what is commonly called "public policy." "Public policy" has no definite meaning; you cannot lay down any definite meaning to the term "public policy." You cannot say it comprises such and such a proposition, and does not comprise such and such another. It must be, to a great extent, a matter of individual opinion because what one person might think against public policy, another might think altogether excellent public policy. For a great number of years both ecclesiastical and lay judges thought it was something very horrible, and against public policy that a husband and wife should agree to live separate, and it was supposed that a civilised country could no longer exist if such agreements were enforced by courts of law, whether ecclesiastical or not. Well, a change came over judicial opinion as to public policy, other considerations arose, and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of court, although the one consequence might be that they would live separately, and that was the view carried out by the courts when it was once decided that separation deeds per se were not against public policy.

The next question was whether they could be enforced, and, if they were to be enforced, should they be enforced against the wife as well as against the husband? There are express decisions as to enforcing them against the husband; I think there are also decisions—or what amount to decisions—that they might be enforced against the wife. These decisions, however, are not so clear, and, possibly, opinions may vary as to the effect of them. I think that is the effect of them. If they can be enforced against the wife, on what grounds? It has been said over and over again, that a married woman cannot contract. That again is too wide a proposition. She undoubtedly can contract in certain cases. She can contract, we all know, with respect to property settled to her separate use. There is another kind of contract, not relating to separate use at all, but a contract for the disposal of real estate by which our law requires the concurrence of the husband, or a dispensation by a court of law with such concurrence. It is a contract by a conveyance acknowledged by a married woman. That is a case in which a married woman

can contract. [Now, by s. 1 of the Law Reform (Married Women & Tortfeasors) Act, 1935, a married woman is capable of dealing with any property and of suing and being sued, in tort, contract, or otherwise, in all respects as if she were a feme sole.]

Suppose a married woman is entitled to sue or defend alone—there are a great many cases in the ecclesiastical court, now the Matrimonial and Probate Court, where a woman sues for separation, or divorce, or restitution of conjugal rights. She sues the husband. Under the Judicature Act, the married woman by leave of the court is entitled to sue or defend alone even without a next friend. Of course all the old issues in equity still remain where a wife sues as plaintiff by her next friend. In these cases what are the wife's rights? She is, so to say, the mistress of the situation. She can sue through her friend, or she can bring on her case in the usual way, and conduct it in such a way as she thinks fit or directs. Is it conceivable that, having all these authorities, she has not also the power of compromising the case, and that she cannot withdraw or consent to terms? Is it conceivable that a court of justice which allows a married woman to institute a suit for divorce, or to institute a suit for restitution of conjugal rights, shall say: "You have no right to anything beyond that; you have no right to effect a compromise, but must go on to the bitter end. You can accede to no terms which can be binding on you, because you are incapable of entering into that agreement?" I think that is not conceivable. Having regard to that which is rational, and which I hope will always be law, I think the moment you empower a married woman to sue or defend in her own name, you must empower her also to compromise that suit on terms which may be fairly arranged, and, consequently, in all those cases, whether they have or have not reference to her personal status, she must take as an incident to the right to sue, the right to contract—to compromise the suit. Therefore, I think that is again an exception, and that the woman in that case must have a right to contract. I do not find it laid down in these plain terms, though I think I can extract as much from the decisions.

Now we come to the next point. If she can compromise a suit after she commences it, why not when she threatens it, or before she begins it? If, after instituting a suit for a divorce, or having a suit for a divorce instituted against her, and she defending it, she can compromise by agreeing to live separate on terms as regards maintenance of herself, custody of her children, and so forth, why not before? Why not before the litigation commenced? The very same reasons appear to me to apply to the one case as to the other. If the wife has the right to sue for restitution of conjugal rights, for separation, or for divorce, if she has the right after beginning a suit to compromise the suit, she ought to have a right to do so before; and, if she is bound by a compromise made after a suit has been started, why should she not be bound before the suit as regards matters as to which she has a clear right to institute a suit, matters of personal status, and the question that of living together or not? It seems to me to follow as a necessary corollary to the right to sue by herself that she must have the right to contract not to sue, and I should think that there would be no difficulty at all about it. At the same time I confess there are to be found numerous dicta the other way, though there are some my way as to what the law is. I think that the law is, therefore, that a woman can contract to live separate and apart from her husband. That contract, like all other contracts, if not against public policy, is one which may be upheld and enforced.

The case which really decided that contracts by spouses to live separate and apart from each other were not against the policy of the law is the well-known case of *Wilson* v. *Wilson* (5). The form of the appeal in that case was relating to the execution of a deed of separation, and not to enforcing the separation itself, but, of course, if the deed when executed had been against public policy, no order could have been made, but the House of Lords decided in that case that there was nothing against public policy in the deed of separation itself, and I

think it must be considered to be established by that case that any notion of such deeds being against public policy was finally dispelled.

No judgment in that case was given on the question whether the court could enforce by injunction a stipulation to live separate. The point came on afterwards in *Hunt* v. *Hunt* (6). There SIR JOHN ROMILLY, M.R., refused to grant an injunction, and among other grounds on which the injunction was refused was that there was no mutuality of agreement. It was appealed to LORD WESTBURY, who gives a clear expression of opinion that the ordinary power of contracting, of course, on both sides, ought to be enforced in the ordinary way. He afterwards gave a final judgment. I think from that judgment that the opinion of LORD WESTBURY was that you might sue the wife, and that you might claim and obtain an injunction against her. But here again I can support my conclusion by *Marshall* v. *Marshall* (3), before the President of the Probate Division. There is a clear expression of opinion by SIR JAMES HANNEN, coming to the same conclusion as that to which I have arrived, that LORD WESTBURY'S opinion was in favour of the power of the court to prevent the wife, in a suit brought against her by the husband, from instituting a suit for the restitution of conjugal rights. I may mention, in addition to those cases, a case which is of very little importance, because it is a case in which the wife did not appear, but it does show the opinion of WICKENS, V.-C., that such an injunction could be granted. It is *Flower* v. *Flower* (7). There is, as I said before briefly, a considerable mass of judicial opinion to be found in favour of the injunction. There are cases on the other side equally numerous, but, with one or two exceptions, all of them anterior to the decision of the House of Lords in *Wilson* v. *Wilson* (5).

I will only mention one more case, *Rowley* v. *Rowley* (8). There a divorce was sought by the wife; it was compromised by agreement, a juror being withdrawn, and the petitioner moving to have the petition taken off the file. The respondent husband assented to the application. The wife undertook to execute a deed of separation, which contained a covenant that she would not molest the husband or institute proceedings in the Divorce Court. She did institute proceedings, and it was held that her contract was a bar to those proceedings. The case was put entirely on the contract. It was contended that the agreement has been violated, and why should not the court give it effect. SIR JAMES WILDE, before whom the case came in the first instance, refers to suits for restitution of conjugal rights, and that applies emphatically in this case, because the wife promised by this agreement to live apart. Taking it in the narrower view of SIR JAMES WILDE, that case would apply. That was the opinion of the Full Court, and finally it went to the House of Lords. The House of Lords confirmed the decision, and the Lord Chancellor, in approving it, said the whole question in the case turned upon the meaning of the words in the agreement, and went on to discuss them. LORD CRANWORTH said the same. Therefore, everybody treated the deed as a valid contract, and called it an agreement binding on the wife, a contract that she would live separate and apart. The moment we get rid of the distinction, as it is now got rid of by the passing of the Judicature Act, that case seems to me to clearly apply to show that a deed of separation is a contract to be properly enforced. I believe, therefore, that so far as the general law is concerned, though you cannot treat it as settled, the husband as well as the wife is entitled to specific performance of the agreement to live apart.

As to the agreement in the present case. We have here a covenant or agreement to live apart, with special covenants in the agreement as to the custody of the children. I am not going through the long series of cases which finally settled that a father had not the power—here again public policy is invoked—to give up the custody of his children. He had not either in law or equity the power to abrogate his parental functions, and say that the custody of the children shall be given to the wife. The result was that those covenants and agreements contained in deeds of separation relating to the custody by which the father gave up the custody, care, and education of infant children to the wife, were held to be void,

and consequently the instrument founded upon them was held to be void also. This was considered a hardship, and the legislature ultimately took a different view of public policy from that taken by the judicial decisions, and it was ended by the [repealed] Custody of Infants Act, 1873, which received the Royal assent on April 24, 1873, by which it was enacted that no separation deeds made between the father and mother of an infant should be held to be void by reason only of its providing that the father of such an infant should give up the custody or control thereof to the mother, provided always that no court should enforce any such agreement, unless the court should be of opinion that it would be for the benefit of the infant or infants to give effect thereto. As I read that, it refers to an agreement between the father and the mother, and to that extent says that they may agree—it says no agreement shall be void. It appears to me entirely to confirm the view of the law, which, I think, is the correct view, but it does introduce a proviso that the court shall not enforce the agreement as regards the children, unless it be to the advantage of the children.

In the case now before me, I find that the only agreement between the husband and wife directly is an agreement contained in the beginning of the deed. It recites that unhappy differences had arisen between Frank Besant and Annie Besant, and they were now agreed to live separately from each other upon the terms and conditions thereinafter mentioned. When we come to the covenant by the trustees we find it in these words—so the parties completely understood there was an agreement between the husband and wife:

> "In pursuance and performance of the said agreement on the part of the said Annie Besant, and in consideration of the covenants of the respondent hereinafter contained, the trustees covenant and agree. . . ."

Besides that there is another covenant by the husband with the trustees that the wife is to enjoy her property for her separate use, and if she dies and leaves no will her property is to be divided among her next-of-kin and all after-acquired property shall be her own. He also covenants that he will pay an annuity of £110 per year by twelve equal monthly instalments, and then there are provisions for the custody of the children of the marriage. They are in substance that the daughter Mabel Emily shall reside with her mother free from the interference or control of the husband, and that the son shall reside with her for one month in the year. Then there is a proviso putting an end to the annuity if the wife molests her husband or interferes with him in any way. There is the usual covenant by the trustees indemnifying the husband against the wife's debts during the separation, and also a covenant by the trustees that the wife shall not molest her husband or prosecute any suit or proceedings in any court or courts whatever to compel the said Frank Besant to cohabit or live with the said Annie Besant. If I am right as to the view I have taken of the law, the only questions I have to decide are, first, whether the lady has broken her agreement; and, secondly, if I decide that against her, whether the husband has by reason of any conduct or misconduct on his part lost that right which he otherwise would have possessed to enforce specific performance of the agreement.

[His Lordship reviewed the evidence, held (i) that the wife had broken the agreement, and (ii) that there had been no such breach of the agreement by the husband as would result in his being deprived of the benefit of the deed, and granted an injunction restraining the wife from taking any action or other proceeding to compel the husband to cohabit with her.]

Solicitors: *Scott, Jarmain & Truss*; *Stibbard, Gibson & Co.*

[*Reported by* G. Welby King, Esq., *Barrister-at-Law.*]

A

GREEN *v.* SEVIN

[Chancery Division (Fry, J.), December 12, 13, 1879]

[Reported 13 Ch.D. 589; 49 L.J.Ch. 166; 41 L.T. 724; 44 J.P. 282]

B *Sale of Land—Contract—Time of performance—Time of the essence—Delay by one party in completing—Notice by other party to complete within reasonable time.*

There is no right in either party to a contract merely by notice to engraft in the contract a term so as to make time of the essence of the contract where it was not previously of the essence of the contract, but where there has been unreasonable delay on the part of one party the other party is entitled to give C him notice that he will consider the contract at an end if the delaying party does not complete it within a reasonable time.

Notes. Considered: *Phillips* v. *Howell*, [1901] 2 Ch. 773. Applied: *Smith* v. *Hamilton*, [1950] 2 All E.R. 928. Referred to: *Lee* v. *Soames* (1888), 59 L.T. 366; *Stickney* v. *Keeble*, [1915] A.C. 386; *Finkielkraut* v. *Monohan*, [1949] 2 All D E.R. 234; *Jennings' Trustee* v. *King*, [1952] 2 All E.R. 608; *Re Bann's Contract. Moorwell Holdings, Ltd.* v. *Barr*, [1956] 2 All E.R. 853; *Abergoyle Plantations, Ltd.* v. *Cheng*, [1959] 3 All E.R. 901.

As to when time is the essence of a contract, see 14 Halsbury's Laws (3rd Edn.) 623; and for cases see 20 Digest (Repl.) 281–282.

Cases referred to:

E (1) *Taylor* v. *Brown* (1839), 2 Beav. 180; 9 L.J.Ch. 14; 48 E.R. 1149; 12 Digest (Repl.) 349, *2702*.

(2) *King* v. *Wilson* (1843), 6 Beav. 124; 49 E.R. 772; 40 Digest (Repl.) 120, *939*.

(3) *Pegg* v. *Wisden* (1852), 16 Beav. 239; 20 L.T.O.S. 174; 16 Jur. 1105; 1 W.R. 43; 51 E.R. 770; 40 Digest (Repl.) 91, *689*.

F (4) *Wells* v. *Maxwell* (1863), 33 L.J.Ch. 44; 8 L.T. 713; 9 Jur.N.S. 1021; 11 W.R. 842, L.JJ.; 40 Digest (Repl.) 120, *940*.

Also referred to in argument:

Crowe v. *Barnicot* (1877), 6 Ch.D. 753; 40 L.J.Ch. 855; 37 L.T. 68; 25 W.R. 789; 40 Digest (Repl.) 455, *402*.

G *Rutter* v. *Tregent* (1879), 12 Ch.D. 758; 48 L.J.Ch. 791; 41 L.T. 16; 27 W.R. 902; 35 Digest (Repl.) 644, *3151*.

Tildesley v. *Harper* (1878), 7 Ch.D. 403; 47 L.J.Ch. 263; 38 L.T. 60; 26 W.R. 263; on appeal, 10 Ch.D. 393; 48 L.J.Ch. 495; 39 L.T. 552; 27 W.R. 249, C.A.; Digest (Pleading) 106, *912*.

MacBryde v. *Weekes* (1856), 22 Beav. 533; 28 L.T.O.S. 135; 2 Jur.N.S. 918; 52 E.R. 1214; 12 Digest (Repl.) 351, *2720*.

H *Hudson* v. *Temple* (1860), 29 Beav. 536; 30 L.J.Ch. 251; 3 L.T. 495; 7 Jur.N.S. 248; 9 W.R. 243; 54 E.R. 735; 12 Digest (Repl.) 348, *2694*.

Luke v. *South Kensington Hotel Co.* (1877), 7 Ch.D. 789; 47 L.J.Ch. 240; 38 L.T. 219; on appeal (1879), post; 11 Ch.D. 121; 48 L.J.Ch. 361; 40 L.T. 638; 27 W.R. 514, C.A.; 35 Digest (Repl.) 623, *2917*.

Crawford v. *Toogood* (1879), 13 Ch.D. 153; 49 L.J.Ch. 108; 41 L.T. 549; 28 W.R. I 248; 40 Digest (Repl.) 121, *947*.

Gee v. *Pearse* (1848), 2 De G. & Sm. 325; 64 E.R. 146; 40 Digest (Repl.) 245, *2058*.

Action for a declaration that the defendant was not entitled to exercise an option of purchase in consequence of his delay.

The plaintiff, William Green, was the lessee of a factory, and by an indenture, dated Mar. 24, 1875, he granted an underlease of the premises to the defendant, Charles Sevin, for ninety-nine years, from Mar. 25, 1870, except the last ten days

of that term, at a rent which gradually increased and from Sept. 29, 1876, was £500 a year. This underlease contained a proviso that the defendant, his executors, administrators, and assigns, should have the option at any time during the first seven years of the term thereby created of purchasing the whole of the premises thereby demised, and the lease, from the superior landlord to the plaintiff for the sum of £5,000, or, at the option of the defendant, his executors, administrators, and assigns, at a valuation as therein mentioned.

On Feb. 28, 1877, the defendant declared his intention of exercising his option and purchasing the premises and the lease from the superior landlord to the plaintiff for £5,000, but he was not able to serve a notice to this effect on the plaintiff until the following Mar. 15. On Mar. 19, 1877, the defendant's solicitor received a letter from the plaintiff's solicitor requiring the purchase to be completed on the 25th of that month, and on Mar. 20, he received an abstract of the plaintiff's title to the property. The defendant's solicitor having written to the plaintiff's solicitor requesting him to arrange for the production of the deeds to verify the abstract, received a telegram from him on Mar. 23 stating that Mr. Elgood, the solicitor to a mortgagee, would produce them. On Mar. 24, Mr. Dollman, the defendant's solicitor, attended at Mr. Elgood's office, but he was not in, and the deeds were not produced. On the same day he received a letter from the plaintiff's solicitor requiring the purchase to be completed the next day, and advising that the defendant should "pay the money into court." Mr. Dollman replied on the same day, saying he was ready to complete, and asking for an explanation of what was meant by paying the money into court. On Mar. 26 Mr. Dollman made another effort to examine the deeds, but unsuccessfully, and on the same day he wrote to the plaintiff's solicitor inquiring whether he had arranged what amount was due to the mortgagees. He received no answer to this letter, but, notwithstanding, on Mar. 29 he forwarded a draft assignment to the plaintiff's solicitor. No answer was received to this letter, nor was any communication received from the plaintiff or his solicitor until March, 1878, and the draft assignment was not returned until Mar. 25, 1879. This delay was caused by the fact that the plaintiff had mortgaged his original lease to Messrs. Farrer and Philpot, and a dispute arose between him and the mortgagees as to the amount due on the mortgage. In consequence of this an action of *Farrer* v. *Green* was commenced in the Chancery Division, and on Mar. 15, 1876, a decree was made whereby certain inquiries were ordered to be made. The certificate in the cause was dated Dec. 15, 1877, but the action was not finally concluded until March, 1879.

Meanwhile, on Mar. 6, 1878, the defendant's solicitor wrote to the plaintiff's solicitor reminding him that a twelvemonth had elapsed since the notice, and asking when the plaintiff would be able to complete the purchase. On the 16th of that month he received the following reply:

> "We have been trying to settle the suit with Messrs. Farrer, but have not succeeded. If you like to pay the money into court or deposit it in a bank in the joint names of Messrs. Farrer's solicitors and ourselves, the matter can, we think, be completed."

Mr. Dollman did not reply to that letter, and he heard nothing further from the plaintiff or his solicitor until Mar. 29, 1879, when the plaintiff's solicitor wrote returning the draft assignment considerably altered so that it could be engrossed. Among other alterations the name of H. J. Farrer had been struck out, he being dead, and Harriet Lidiard and Frederick Shaw Lidiard added as parties, as mortgagees of the plaintiff under a mortgage dated Nov. 20, 1877.

On April 1, 1879, the defendant's solicitor wrote to the plaintiff's solicitor, as follows:

> "I am sorry I did not see you this morning, as I should have explained to you that you have come down upon me all of a sudden after two years' silence. I had no idea how near to arrangement you were with Mr. Farrer, in fact I

have heard nothing whatever about the matter for so long that I had almost forgotten it. It so happens that I am now so very busy that I hardly know which way to turn, but I will look into the matter in a day or two, and write you again."

On April 3, 1879, the plaintiff's solicitor wrote to the defendant's solicitor, as follows:

"I have received your letter of yesterday. All the conveying parties are ready to complete the sale, and I am instructed to give your client, through you, notice that he must complete his purchase at once, and if it is not completed before the 22nd instant (that is, four weeks after the return of the draft to you) Mr. Green will seek to put an end to the contract, and to obtain such further relief as he may be entitled to."

On April 10 Mr. Dollman wrote to the plaintiff's solicitor saying that there would be no delay on the defendant's part beyond what was necessarily due to a change in the defendant's arrangements in consequence of the death of the gentleman who had agreed to lend him the money, and of whose death he had only lately heard. In a letter dated the 12th, the plaintiff's solicitor replied that his instructions were to put an end to the contract if the purchase was not completed on or before the 22nd inst. This letter was not received until April 15, in consequence of it being the Easter Vacation. On April 15 Mr. Dollman attended at the office of the plaintiff's solicitor to inspect the mortgage of Nov. 20, 1877, but was unable to see it in consequence of the plaintiff's solicitor being out. On April 16 the plaintiff's solicitor sent a copy of the chief clerk's certificate in the action of *Farrer* v. *Green*, and on April 17 he sent a copy of the order on further consideration in that action. On April 22 Mr. Dollman attended at Mr. Elgood's office, to whom he had been referred by the plaintiff's solicitor as having some of the deeds, and also at the office of the plaintiff's solicitor. All the deeds were produced except a document of Feb. 2, 1875, which could not be found. The plaintiff's solicitor was then told that the purchase money was ready, and that the defendant was willing to complete, but he said he should commence proceedings unless the money was paid that afternoon. It was not paid, and the writ in this action was served the next day, April 23.

The plaintiff claimed a declaration that the option of purchase given to the defendant, Charles Sevin, by the indenture of lease of Mar. 24, 1875, had not been and could not then be exercised, and that the notice of Feb. 28, 1877, was then of no effect, and that the contract (if any) which existed between the plaintiff and defendant for the purchase by the defendant of the premises comprised in that lease was duly determined. The defendant delivered a statement of defence and counterclaim. The defence contained some admissions, several statements of facts on which the defendant relied, and by the counterclaim the defendant claimed specific performance of the agreement for the purchase of the property. The defendant had remained in possession of the property, paying interest on the purchase money.

Cookson, Q.C., and *T. L. Wilkinson* for the plaintiff.
North, Q.C., and *Maidlow* for the defendant.
Fischer, Q.C., and *Procter* for the mortgagees.

FRY, J., stated the facts and the provisions of the lease to the plaintiff, and continued: There is no doubt that the effect of the notice of Feb. 28, 1877, was to constitute a contract between Green, on the one hand, and Sevin, on the other, for the purchase of the property at £5,000. Sevin has since paid the interest on that £5,000, and it appears to me, under the circumstances which are in evidence, that he has remained in possession in the character of purchaser under that notice. When the contract was so constituted difficulties arose about carrying it into effect in consequence of the complications that existed between Green, on the one hand, and the mortgagees, Farrer and Philpot, on the other. No doubt as

early as March, 1877, an abstract had been furnished to Sevin, and he had been informed that the deeds might be seen. It does not appear that they were investigated by him, but on Mar. 29, 1877, he sent a draft assignment to the vendor's solicitor.

That assignment, by reason of the complications I have referred to, remained in the hands of the vendor's solicitor from Mar. 29, 1877, to Mar. 25, 1879; but meanwhile, in March, 1878, Sevin had applied to Green's solicitors to know when he would be able to complete, an inquiry which, it seems to me, ought to have been answered if Mr. Green desired to drive Mr. Sevin on to an immediate performance of the contract after this delay. But the inquiry was never replied to in any other way than by suggesting that Sevin should pay the money into a joint account, but no indication was given—perhaps it could not be—as to when it was likely the question between the mortgagor and mortgagees could be so settled as to enable them to concur in the conveyance. The assignment was returned, as I have said, on Mar. 25, 1879, and with it was furnished a supplemental abstract of a new charge for £400 in favour of some mortgagees of the name of Lidiard. On April 1 Mr. Dollman, the solicitor of Sevin, wrote to the solicitor of Green suggesting that he should have some delay given him as he was very busy then, and, to use his own words, they had come down upon him all of a sudden. On April 3 the solicitor of Green wrote to the solicitor of Sevin giving notice that the defendant must complete at once.

It is to be observed that the contract limited no time for completion, and that, therefore, according to the rule in this country, each party was entitled to a reasonable time for doing the various acts which each party had to do. What right, then, had one party to limit a particular time within which an act was to be done by the other? It appears to me he had no right so to do unless there had been that delay on the part of the other contracting party which rendered it fair, if steps were not immediately taken to complete, that the person giving the notice should be relieved from his contract. It has been argued before me, in the first instance, that there is a right in either party to a contract, by notice, so to engraft time as to make it of the essence of the contract where it has not been of the essence of the original contract, independently of the question of delay on the part of him to whom the notice is given. In my view, there is no such right. It appears to me that both upon principle, and by the cases, it is plain that there is no such right. That which is not of the essence of the original contract is not to be made of the essence by the volition of one of the parties to it, unless one has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties, and, therefore, there must be that improper conduct on the part of the other which justifies the rescission of the contract sub modo, that is, if a reasonable notice is not complied with.

That that is the law appears abundantly plain. One of the earliest cases on this doctrine of engrafting notice is *Taylor* v. *Brown* (1), and there Lord Langdale, M.R., expressed the view on which he decided it in this way (2 Beav. at p. 183):

> "Where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract, in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other."

So in *King* v. *Wilson* (2), the same Master of the Rolls lays down the principle on which he proceeded in these words (6 Beav. at p. 126):

> "Though time may not be of the essence of a contract, yet where there is great and improper delay on the one side, the other party has a right to fix a reasonable time within which the contract is to be completed."

So, again, in *Pegg* v. *Wisden* (3), Sir John Romilly, M.R., said (16 Beav. at p. 244):

"I concur also in the decisions, that where time is not originally the essence of the contract, it may, in the case of improper delay, be made so by notice."

KNIGHT-BRUCE, L.J., in *Wells* v. *Maxwell* (4) expressed himself in these characteristic words (33 L.J.Ch. at p. 50):

"Now, whatever the form of the contract, if there had been in this case, on the part of the sellers, gross or vexatious or unreasonable delay, or delay not in conformity with the laws of necessity with regard to an English title in the present state of the English law upon this subject, there might have been ground for the purchaser to insist upon being delivered from his contract."

He goes on to point out that there was nothing of the kind in that case. Lastly, LORD ST. LEONARDS in his work upon VENDORS AND PURCHASERS (13th Edn.), p. 227, expresses the doctrine in these terms:

"Where time is not made of the essence of a contract by the contract itself, although a day for performance of it is named, of course, neither party can strictly make it so after the contract, but if either party is guilty of delay, a distinct written notice by the other that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given."

In my judgment, therefore, the law is perfectly clear on this point. Then I ask myself, was there, in April, 1879, any unreasonable delay on the part of the defendant Sevin, to whom this notice was given? As I have already pointed out, he had sent the draft assignment to the vendor's solicitor two years before it was returned, and within a week or a little more of its being returned to him he was told that if he did not complete the whole contract in seventeen or eighteen days the contract would be at an end, and that in a case in which no answer was given to his inquiry how soon was it likely to be completed so that he might have his purchase money ready to complete. It appears to me, therefore, there was no delay on the part of Mr. Sevin which justified the giving of that notice. If so the notice clearly fails.

Assume I am wrong in that, and there was such delay as justified the giving of the notice, there remains this important inquiry whether the time limited by the notice was reasonable having regard to all the circumstances of the case. In my opinion, it was not reasonable. As I have already pointed out the great delay which had taken place (I do not say improperly, but which took place of necessity), with the vendor would render it justifiable for the purchaser to invest his purchase money, which might render it less accessible than if this long delay had not taken place. A few weeks, therefore, it would seem to me, was somewhat a short time for raising the purchase money under those circumstances. But further than that, it must be borne in mind that the vendor had not done everything on his part to enable him to say nothing more had to be done. With the return of the draft assignment he had returned a fresh supplemental abstract, and that, of course, required looking into. I say nothing of the verification of the deeds of which an abstract had been furnished so long before, because I think probably the purchaser might have been required to do that at an earlier date, but the new deed he had no opportunity of verifying. No doubt that would require some, although not a long, time. Further than that he must have had the deed engrossed, and it is also to be borne in mind that the draft was not sent in a condition in which it could be engrossed, because, through the carelessness of the vendor, he had left a note which showed that further negotiation and arrangement had to take place between himself and the mortgagees before it could be ascertained finally what form the draft would assume. It appears that the arrangement was come to before the draft was sent, but the draft was sent in a form which left the question open. Although it might not have taken a long time to address an inquiry to the vendor to know what the arrangement was, still it is not a matter to pass over.

I hold, therefore, looking at the previous long delay on the part of the vendor, that he was not justified in the course which he took of limiting the time of the completion to so short an interval as is mentioned in his notice. I have come to the conclusion that the notice is not valid, for the two reasons I mentioned. It appears to me, then, a matter of course to decree that the defendant on the counterclaim is entitled to specific performance of this contract, and, therefore, I dismiss the original action, with costs, and give judgment for the defendant on his counterclaim with costs down to and including the hearing.

Solicitors: *J. Lidiard*; *F. Dollman*; *W. Elgood.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

GLOSSOP *v.* HESTON AND ISLEWORTH LOCAL BOARD

[Court of Appeal (James, Brett and Cotton, L.JJ.), May 5, 9, 1879]

[Reported 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111]

Injunction—Mandatory injunction—Grant to compel performance of duty by public authority—No actionable act committed.

Mandamus—Public authority—Mandamus to compel performance of public duty.

The Court of Chancery will not grant a mandatory injunction to compel a public body, who have committed no wrongful act, to perform their duty. If there is any neglect or refusal by a public authority to perform their public duties, the proper remedy is by an application for a mandamus to the Queen's Bench Division in the exercise of its prerogative jurisdiction over all public bodies.

Notes. Explained and Followed: *A.-G.* (*on the relation of Deverill*) v. *Dorking Union Guardians*, [1881–5] All E.R.Rep. 320. Explained: *Charles* v. *Finchley Local Board* (1883), 23 Ch.D. 767. Considered: *R.* v. *Staines Local Board* (1888), 60 L.T. 261; *Ainley* v. *Kirkheaton Local Board* (1891), 60 L.J.Ch. 734; *Ogilvie* v. *Blything Union R.S.A.* (1891), 65 L.T. 338. Followed: *A.-G.* v. *St. James and St. John, Clerkenwell Vestry* (1891), 60 L.J.Ch. 788. Considered: *Cowley* v. *Newmarket Local Board*, [1892] A.C. 345; *R.* v. *St. George-the-Martyr, Southwark Vestry* (1892), 61 L.J.Q.B. 398; *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority*, [1894] 2 Q.B. 842. Explained: *Dent* v. *Bournemouth Corpn.* (1897), 66 L.J.Q.B. 395. Applied: *Robinson* v. *Workington Corpn.*, [1897] 1 Q.B. 619. Considered: *Pasmore* v. *Oswaldtwistle U.D.C.*, [1895–9] All E.R.Rep. 191; *Lee District Board* v. *L.C.C.* (1899), 82 L.T. 306; *Foster* v. *Warblington U.D.C.*, [1904–7] All E.R.Rep. 366; *Dawson & Co.* v. *Bingley U.D.C.*, [1911–13] All E.R.Rep. 596. Distinguished: *Jones* v. *Llanrwst U.D.C.*, [1911] 1 Ch. 393; *Haigh* v. *Deudraeth R.D.C.*, [1945] 2 All E.R. 661; *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1953] 1 All E.R. 179. Referred to: *A.-G.* v. *Manchester* (*Dean and Canons*) (1881), 18 Ch.D. 596; *Holland & Dickson* (1888), 37 Ch.D. 669; *R.* v. *Parlby* (1889), 22 Q.B.D. 520; *Warwick* v. *Birmingham Canal Navigation Co.* v. *Burman* (1890), 63 L.T. 670; *A.-G.* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527; *R.* v. *St. Giles, Camberwell Vestry* (1897), 61 J.P. 217; *Smith* v. *Chorley District Council*, [1897] 1 Q.B. 532; *Durrant* v. *Branksome U.D.C.* (1897), 76 L.T. 739; *Wincanton Rural Council* v. *Parsons* (1905), 74 L.J.K.B. 533; *Harrington* v. *Derby Corpn.*, [1905] 1 Ch. 205; *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 248; *McClelland* v. *Manchester Corpn.*,

A [1911–13] All E.R.Rep. 562; *Hesketh* v. *Birmingham Corpn.*, [1922] All E.R.Rep. 243; *Blundy, Clark & Co.* v. *London and North Eastern Rail. Co.* (1931), 100 L.J.K.B. 401; *Read* v. *Croydon Corpn.*, [1938] 4 All E.R. 631; *Smeaton* v. *Ilford Corpn.*, [1954] 1 All E.R. 923.

As to injunctions against public bodies, see 21 HALSBURY'S LAWS (3rd Edn.) 371–375; and for cases see 28 DIGEST (Repl.) 840–849. As to mandamus, see 11 B HALSBURY'S LAWS (3rd Edn.) 84 et seq.; and for cases see 16 DIGEST (Repl.) 315 et seq.

Cases referred to:

(1) *Goldsmid* v. *Tunbridge Wells Improvement Comrs.* (1866), 1 Ch. App. 349; 35 L.J.Ch. 382; 14 L.T. 154; 30 J.P. 419; 12 Jur.N.S. 308; 14 W.R. 562, L.JJ.; 38 Digest (Repl.) 21, *94.*

C (2) *A.-G. and Dommes* v. *Basingstoke Corpn.* (1876), 45 L.J.Ch. 726; 24 W.R. 817; 27 Digest (Repl.) 874, *1019.*

(3) *Foreman* v. *Canterbury Corpn.* (1871), L.R. 6 Q.B. 214; 40 L.J.Q.B. 138; 24 L.T. 385; 35 J.P. 629; 19 W.R. 719; 26 Digest (Repl.) 435, *1340.*

(4) *Hartnall* v. *Ryde Comrs.* (1863), 4 B. & S. 361; 2 New Rep. 424; 33 L.J.Q.B. 39; 8 L.T. 574; 27 J.P. 599; 10 Jur.N.S. 257; 11 W.R. 963; 122 E.R. D 494; 26 Digest (Repl.) 418, *1281.*

Also referred to in argument:

Gibson v. *Preston Corpn.* (1870), L.R. 5 Q.B. 218; 10 B. & S. 942; 39 L.J.Q.B. 131; 22 L.T. 293; 34 J.P. 342; 18 W.R. 689; 26 Digest (Repl.) 390, *975.*

A.-G. v. *Sheffield Gas Consumers Co.* (1853), 3 De G.M. & G. 304; 22 L.J.Ch. E 811; 21 L.T.O.S. 49; 17 Jur. 677; 1 W.R. 185; 43 E.R. 119; sub nom. *Sheffield United Gas Co.* v. *Sheffield Gas Consumers Co.*, *A.-G.* v. *Sheffield Gas Consumers Co.*, 7 Ry. & Can. Cas. 650, L.C. & L.JJ.; 26 Digest (Repl.) 518, *1953.*

A.-G. v. *Kingston-on-Thames Corpn.* (1865), 7 New Rep. 248; 34 L.J.Ch. 481; 12 L.T. 665; 29 J.P. 515; 11 Jur.N.S. 596; 13 W.R. 888; 28 Digest (Repl.) F 782, *335.*

Appeal from a decision of MALINS, V.-C., in an action brought by the plaintiff, a landowner, against the defendants, a local board, for damages and an injunction to restrain the defendants from permitting sewage or water polluted with sewage or other offensive matter to pass through the drains or channels under their control into a river in such a manner as to render the water in the river at or near the G plaintiff's residence unfit for use by the plaintiff, or injurious to the health and comfort of the persons resident on such premises. MALINS, V.-C., granted the injunction asked for and the defendants appealed.

Higgins, Q.C., and *Method* for the defendants.

Glasse, Q.C., and *Decimus Sturges* for the plaintiff.

H **JAMES, L.J.**—I am of opinion that whatever may have led to this action, it was commenced through a misapprehension of what the plaintiff's legal rights were against the board. It is manifest from the form of the claim and the evidence that the action was not based upon any act whatever done by the defendants. It was based entirely upon their alleged neglect to perform Parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this I is a serious matter to the plaintiff and to the public generally. It appears to me that, if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any legal authority upon whom duties are cast for the benefit of the locality. If this action could be maintained I do not see why a similar action could not be maintained by every owner of land in a district, who could allege that, if there had been a proper system of sewage, his property would be much improved. I do not see why, if that is so, every owner of property in London who has not received the benefit he ought to have received from the complete system of sewage carried out by

the Metropolitan Board of Works may not say "my court or alley is not properly cared for," and may not bring an action against the Board of Works or any local board having duties in the district, nor do I see why he would not be entitled to bring it on the very day the boards were constituted and duties cast upon them. According to my view there is no sufficient principle to sustain that, and no authority which comes near it, except the authority of a case before HALL, V.-C., to which I will refer.

Let us see how the rights and liabilities stand under the Public Health Act, 1875. By s. 13 all existing and future sewers within the district of a local authority are vested in the local authority [see now Public Health Act, 1936, s. 20], and vested in them, to a certain extent, as owners. It is difficult to say whether the exact ownership is the same as it is with regard to the surface of a road as to persons having control of the roads. The sewers qua sewers are under their control and vested in them; and by that section alone, as it appears to me, they are under the same liabilities, and have the same defence in respect of any alleged liability, as any private owner of a sewer would have. But the case here is based, not upon any common law nuisance or any nuisance or damage existing irrespective of the Act of Parliament, but upon the alleged neglect to comply with the provisions of the Act. As far as I can make out, the greater part of the mischief alleged here is, mischief caused by a brewery, which we know historically to have existed from the time of the siege of Brentford in the time of Oliver Cromwell, and which, therefore, had apparently acquired a legal right that could not have been interfered with under ss. 14 and 18 of the Act. The rights are to be preserved if they require preservation. By s. 14 any person who

> "has acquired a right to use such sewer shall be entitled to use the same, or any sewer substituted in lieu thereof, to the same extent as he would or might have done if the purchase had not been made."

Then s. 18 [s. 22 and s. 31 of Act of 1936] provides that "any local authority may from time to time enlarge any sewer," and so on,

> "on condition of providing a sewer as effectual for the use of any person who may be deprived in pursuance of this section of the lawful use of any sewer, provided that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance."

Therefore, the authority were in this position. There were certain persons who had a lawful use of the sewer as the law then stood. If any person were using any existing sewer unlawfully as against the plaintiff in respect of his rights of property as they stood before this Act, he had his remedy against them, and was in no way deprived by the Act or by anything the defendants had done or permitted to be done of any right he had against any person who had not acquired a prescriptive right to throw the sewage water or foul matter so as to affect his property. That, as it appears to me, was the right, and that was really all that was determined in those cases to which we have been referred.

There are a long series of cases of which *Goldsmid* v. *Tunbridge Wells Improvement Comrs.* (1) may be considered as the principal example. That was a case in which what was done was itself a legal wrong—a legal nuisance not justifiable or excusable, unless it could have been justified or excused under the Act of Parliament and it was held that the Act did not justify or excuse it. The defendants, not being able to allege justification or excuse, were put in exactly the same position as any private person would have been of being restrained—not of having a mandatory injunction to make works or do anything of that kind —but put under an injunction to restrain the continuance of that which was, independently of the Act, a legal wrong and not justified or excused by the Act. That will be found to be exactly what occurred in every one of the cases referred to except *A.-G. and Dommes* v. *Basingstoke Corpn.* (2) before HALL, V.-C., in which, however, there may have been exactly the same thing because we have not the facts sufficiently clear before us to state positively that that was true in

A that case; but I see no reason to doubt that there the board had got a sewer vested in them, which according to the view that the vice-chancellor took of the facts, would have made them liable, as a private owner of that sewer would have been, unless they could escape from the jurisdiction of the court by reason of their particular character. The learned judge decided that they were not entitled to escape from the jurisdiction of the court which so fixed itself upon any private B person by reason of any particular character they possessed which was alleged as the ground of their immunity. That is the position upon the facts as to the transfer, and the vesting of the sewers.

What are the duties the board have to perform? Their main duty is described in s. 15 of the Act [s. 14 & s. 23 of Act of 1936] :

C "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

There are certain powers in s. 16 to take the sewer under carriage roads and so on, independently of rights; and then comes s. 17 [s. 30 of Act of 1936] which I read as being a proviso. It provides that

D "Nothing in this Act shall authorise any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse. . . ."

Supposing there had been a prior Act of Parliament authorising the board to make the sewer, or supposing, before this board was constituted or later, their pre-
E decessors or they themselves had acquired by grant from the absolute owner of a canal, pond, lake, or stream of water which nobody had a right to make a sewer, it appears to me impossible to say that this section would avoid any such grant, or deprive them of the right they had acquired under such grant. It would be equally impossible to say that the section applies to the defendants in this case unless they find it necessary to excuse or justify themselves in which they are doing under that Act of Parliament.

F They are in this position. They are to cause the whole district to be drained; that is to say, they have no particular duty cast upon them with reference to any particular individual, but it is a duty cast upon them for the effectual draining of the whole district. How is that to be done? It is impossible that that can be done except upon some deliberate scheme. It is a system of sewage which
G requires to be prepared and to be put into operation. They have practically no compulsory powers. They are to drain the whole district, and their duty is to the district, and the limitation of the exercise of that duty in s. 17 is a thing that affects, not only the district, but any running stream which may be affected by what they are doing. How are they to do it? It cannot be expected that the local board are to do it except by the employment of labour to be paid for out of the rates of the district. They cannot do it without going on somebody's property;
H it is utterly impossible that they could make a single drain or sewer without acquiring property for that purpose. We must consider how that property is to be acquired. By s. 173 of the Act they have power to enter into any contract necessary for carrying the Act into execution.

By s. 176 [see s. 306 of Act of 1936] :

I "With respect to the purchase of lands by a local authority for the purposes of this Act, the following regulations shall be observed."

The first sub-division of that section states that the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, shall be incorporated with the Act with a certain exception mentioned. Before they put in force any of the powers of the Act they must publish once, at least, in each of the consecutive weeks in the month of November in some local newspaper circulated in their district, an advertisement describing shortly the nature of the undertaking in respect of which the lands are proposed to be taken.

I believe that the defendant board was constituted in November, and, therefore, they could not have advertised in each of the consecutive weeks in that month. They are to serve a notice in the month of December on every owner or reputed owner, defining the particular lands intended to be taken. Then they are to present a petition, under their seal, to the Local Government Board, stating what they are going to do, and then [s. 176 (4)] the

> "Local Government Board shall take such petition into consideration, and may either dismiss the same, or direct a local inquiry as to the propriety of assenting to the prayer of such petition; but until such inquiry has been made no provisional order shall be made affecting any lands without the consent of the owners."

By sub-s. (5):

> "After the completion of such inquiry the Local Government Board may, by provisional order, empower the local authority to put in force, with reference to the lands referred to in such order, the powers of the Lands Clauses Consolidation Acts with respect to the purchase and taking of lands otherwise than by agreement. . . ."

It then provides:

> "that the notices by this section required to be given by the Act in the months of November and December may be given in the months of September and October or of October and November, but in either of such last-mentioned cases an inquiry preliminary to the provisional order to which such notices refer shall not be held until the expiration of one month from the last day of the second of the two months in which the notices are given. . . ."

That is to say, they are put in exactly the same position as a company is which requires to get the compulsory clauses. These local bodies are able to get the substitute for an Act of Parliament, that is to say, an order of the Local Government Board authorising them to acquire lands compulsorily, being satisfied, of course, that the whole thing is right. They cannot do anything of that kind until they have made a scheme which they can submit to the Local Government Board, and you cannot say that these persons were guilty of neglect up to the month of May, because, being only elected in November, 1875, they were powerless to comply with the provision that they should cause such sewers to be made as should be necessary for effectually draining the district for the purposes of the Act.

It appears to me they were not guilty of neglect; but if they had been guilty of any refusal, such as is necessary for the purpose of applying for a mandamus, or guilty of any mala fides, for it must be brought up to that to make it equivalent to a refusal to take steps, that is not the ground of an action by any proprietor in the district who is deprived of the benefit he expected to derive from the performance of their public duty. If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct action, or to file a distinct claim, because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisances at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening a door to litigiousness, or to persons who might be anxious to make profit and costs out of this Act of Parliament.

If there has been any neglect or refusal by such a board to perform its public duties it appears to me the proper remedy would be by an application for a mandamus. This suit is not, in substance or in form, an application for a mandamus. It is said to be an application which shall have the effect of a mandatory injunction; that is to say, the application is in form to restrain the defendants

> "from permitting sewage, or water polluted with sewage or other offensive matter, to pass through the drains or channels under their control into the

river Crane in such a manner as to render the water of the river injurious to the plaintiff."

That is an injunction to restrain them from doing that which is wrong—that is to say, if the thing itself were legally wrong, independent of the neglect to make an effectual system of drainage, it would be right to say: "You have got a sewer, and you are permitting the sewage to flow so as to be a legal wrong to me." Under colour of that it is said we are to grant what would be a mandatory injunction which would operate as a mandamus to compel them to take all the steps necessary for putting into force the provisions of the Act of Parliament. I am of opinion there is no ground for that. We are dealing with a matter of Chancery jurisdiction, and the Court of Chancery never granted a mandamus to a public body to compel it to do things for the benefit of private persons who might be benefited thereby. A mandamus to compel a man to erect a building was never granted except in one case, I think, where a railway company had to make a bridge when severing a man's land and did not do so. A mandamus might, on proper evidence of refusal, of which I can see none here, be applied for in the Queen's Bench Division for the exercise of its great prerogative jurisdiction to compel all bodies having an authority under an Act of Parliament to perform the duties the legislature has imposed on them. That mandamus might be applied for by any individual who could show a sufficient cause, and the court might grant it if it could see that something the public body ought to do was not done.

The statute that has created that duty has given a very special provision for enforcing it, a provision which is very material in considering what the court ought to do, and that is, that there is power to apply to the Local Government Board, and if it thinks the local authority has made default in providing the district with sufficient sewers, or in maintaining the existing sewers, or in providing the district with a supply of water, and so on, they can apply for a mandamus, or they may appoint some person (which is a very special additional duty) to do the duty, and to order the costs of doing that duty to be provided for at the expense of the district by its own authority. There is that remedy given which seems to me to make the whole system tolerably complete. The legislature has provided a particular duty and a mode by which that can be enforced.

It would not oust the jurisdiction of any court, either that of the old Court of Chancery, or any Division of the existing High Court, in the case of any legal wrong done. I use the words "legal wrong" as distinct from neglect to perform the duties cast upon them by this Act. If this board were to create a nuisance from which they were not excused; if they were, in the apparent exercise of their duties, using or making a sewer which would convey sewage or filthy water into any natural stream or watercourse, or any canal, pond, or lake, that would not prevent the jurisdiction attaching which existed before, or prevent it being exercised, to remedy the wrong being done. That again is the case of an actual legal wrong accompanied with a local damage such as in those cases at common law, where actions for damages have been maintained against such bodies. If the same thing had occurred here—if this local board, while in the course of exercising its duties and rights under this Act, were to make a hole or cut a drain in a public thoroughfare, or put a heap of stones or drain pipes unlighted, as in *Foreman* v. *Canterbury Corpn.* (3), if anything of that kind were done, and damage arose which could be attributed to the unlawful neglect of the persons they employed, they would be liable for it just as any person making a hole and not sufficiently lighting it, or putting a heap of stones or other matter and not sufficiently warning people against it, would be liable.

But those cases have no application to this case where all that can be alleged against the defendants, even if the allegation were sustained, which it does not appear to me to be, is that they have not, within a reasonable time, performed the public duty which they owed, not to the plaintiff, but to the district of which the plaintiff is an inhabitant, if the plaintiff had suffered any legal wrong. The

only case the plaintiff has alleged or attempted to prove, is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district. Under all these circumstances I am of opinion that the order of the vice-chancellor cannot be sustained, and that the action was brought upon an inaccurate view of the relations between the several landed proprietors in the district and the sanitary board.

BRETT, L.J.—It seems to me that in this case the defendants have not been guilty of any wrongful act or neglect which gives the plaintiff a right to a remedy of any kind; but if they had been guilty of any neglect the proper remedy has not been asked for, neither has the proper court been applied to. I should be very sorry to hold that this river was not in a state which gave reasonable cause of complaint to the plaintiff. There was conflicting evidence on the subject, but looking to the correspondence between the parties, and to the report made to the vice-chancellor by Colonel Hope, which it seems to me was only a report and not a binding decision, and, therefore, we might have disregarded it, though we ought not to disregard it unless convinced it was wrong—looking to the correspondence, the report, and the evidence I should be sorry to disagree with the vice-chancellor as to his holding that there was a substantial grievance with reference to the state of this river, and that it was a substantial grievance affecting the plaintiff. I should also be sorry to hold that the drainage of the district was in a satisfactory state. On the contrary, it seems to me to be made out as a matter of fact that the drainage of the district is in an unsatisfactory state, which requires remedying.

I should also be extremely sorry to hold that it is not the duty of the defendants to cure the unsatisfactory condition of the drainage of the district; and it seems to me that that duty is imposed upon them by s. 15 of the Public Health Act. No district can be said to be satisfactorily or effectually drained for the purposes of that Act where any part of the drainage causes a nuisance, as where the drainage running through an open ditch causes in that ditch a nuisance, or where the drainage running into a stream causes that stream to be offensive, then so long as that state of things exists, it seems to me the district cannot be said to be effectually drained for the purposes of the Act, which purposes are that the district may be in a sanitary condition. I agree with JAMES, L.J., that s. 17 of the Act of 1875 would not impose on the defendants any obligation on the mere ground that they turned sewage into a running stream, or that they allowed sewage to run into a stream or pond without having freed the sewage from excrementitious or other foul or noxious matter. But I still think, taking ss. 15, 17, 19, 91 and 92 together, that, although the owner of the stream or pond could not object to the mere fact of their draining sewage into his stream or pond, yet if the sewage is in a stream in the district so as to make that stream offensive and dangerous, that district is not effectually drained, and the local authority would be omitting to do their duty if they did not drain it.

These defendants, therefore, are, as it seems to me, in this position. They have a district which is not effectually drained, within the statute; they are bound to cure that defect, and to do so, among other instances, they should prevent the river Crane from being offensive to the inhabitants of the district, and among others, to the plaintiff. The defendants had a duty to perform, and they had certain powers given to them by and through which they were to perform that duty. It is obvious that the remedy they are called on to apply is one of the utmost difficulty. They have under their control only one district. They are not to be allowed to drain into a running stream so as to make it offensive; they are not to be allowed to drain into the Thames so as to make it offensive, and they have no right to make any works which shall create a nuisance to any individual, and yet it is said they are to drain their district effectually. How are they to do it? Where are they to take the sewage? I agree with what has been suggested, that it is most difficult for them to do it, although perhaps not

impossible, unless they can make arrangements with the authorities of other districts so as to have some combined effort by which to get the sewage away to a considerable and safe distance. They, therefore, have a very difficult duty to perform, and one that must naturally require a considerable time for its accomplishment, and anybody who has to deal with them, in finding fault with the ineffectiveness of what they have done, is bound to look at their conduct with the greatest indulgence.

It seems to me made out in fact, that they have never refused to endeavour to perform the duty which is imposed on them, but on the contrary they have always, when challenged, admitted their duty and have answered that they were endeavouring to perform it. Has there been any neglect so great as to enable anybody to say that by long and continuous negligence, they are refusing to perform their duty, although they do not refuse expressly? Taking into account the difficulty of their position and the magnitude of the operation they must perform, it would not be right to say so; and even up to the time of the hearing it is impossible to say they have been so negligent as to enable any court to hold that they were refusing to perform the public duty imposed upon them.

Under these circumstances what is their position with regard to the law? They have done no wrongful act. It is suggested that it might have been proved they have done some wrongful act, but I cannot accede to that argument. It seems to me that the statement of claim, which must have been drawn before any act of the defendants that could mislead the course of the litigation had occurred, assumes that the plaintiff could not state any act done by the defendants which was a wrongful act, but that his claim was founded solely upon a neglect by the defendants to perform their duty under the Act; and it also seems to me that the paragraphs alluded to in the statement of defence make the main defence of the defendants that they had never refused to perform their duty, but on the contrary had always been endeavouring to perform their duty. So they accepted the charge made against them in the statement of claim to be a charge of refusal or neglect to perform their duty.

The defendants having done no act, it seems to me that the Court of Chancery has never, without some act done by such a body as this, granted what is called a mandatory injunction. The Court of Chancery has never granted a mandatory injunction which could be in effect a mandamus against a public body, in order to force them merely to enter upon and to do their duty. There was a long list of cases cited to us, and I watched them carefully, and there was not one of them in which the defendants had not done an act which had caused an injury to a private individual and was unjustified by any statute, and was such an act as, if done by a private individual, would have given a cause of action at law. That being so, and that being done which might have given a claim for damages in a common law court, the Court of Chancery in those days gave a large remedy which it had the power to give, and which the common law courts had not. A common law court could only give damages, but the Court of Chancery could not only give damages if it thought right, but either with damages or instead of damages, they could grant a mandatory injunction against the defendants directing them to cease from continuing the act which was a wrongful act against the individual. That is the proper function of a mandatory injunction, and they never gave it in any other case.

Foreman v. *Canterbury Corpn.* (3) has been cited, but that comes within the category of all the other cases. There the servant of the defendants placed a heap of stones on the highway and left it without being lighted. There was an act done, but an act done which he was entitled to do, namely, the laying of the heap of stones on the road, if he did it with reasonable care; but he did it without reasonable care because he left it there in the dark without being lighted. That obviously would give a cause of action. The case in which no act was done, where it was mere negligence, was *Hartnall* v. *Ryde Comrs.* (4). That was an exceptional case. LORD BLACKBURN, one of the judges, put it upon the statute

which not only imposed on those commissioners the duty to keep the highway in repair, but contained an express enactment that, if they did not, they should be liable to an indictment. He founds his judgment upon that, and applies the well-known common law rule that if people do that which, as against the public, amounts to misdemeanour and lays them open to an indictment, and if besides the injury to the public, they do an injury to a private individual, that individual may maintain an action for damages for the breach of the statutory enactment which lays them open to an indictment.

With regard to *A.-G. and Dommes* v. *Basingstoke Corpn.* (2) before HALL, V.-C., my impression is, that the predecessors of the defendants there, had been the people who diverted sewage into artificial sewers, and by those artificial sewers diverted sewage into the drain which belonged to the plaintiff. If so, their predecessors had done an act which would bring the case within the ordinary principle of all the other cases; and, probably, in that case there was some enactment that carried down the obligation of what their predecessors had done to the defendants, and so made the defendants liable also under the ordinary rule, as indeed, I am inclined to think that, under this statute, if the former board had done an act that would have given the plaintiff here a right to damages or to a remedy, and the effect of that act continued in the defendants' time, the defendants would have been liable for the continuance of the consequence of that act, and would have been liable to an injunction. Therefore, it seems to me that the case is not brought within the rule that would enable the Court of Chancery to grant a mandatory injunction.

It is said that nevertheless the defendants are open to a mandamus to do their duty. Supposing they had neglected or refused to do their duty, then I think they would have been liable to a mandamus, but not to a mandamus to be granted by the Court of Chancery. It would have been a prerogative mandamus, as it is called, to a public body to enter upon and do their duty. That, under the Judicature Act, as it was before, is a matter that can be taken only in the Court of Queen's Bench. I think the mandamus spoken of in s. 25 (8) of the Supreme Court of Judicature Act, 1873, is not the prerogative mandamus, but only a mandamus which may be granted to direct the performance of something to be done which is the result of an action where an action will lie. Therefore, supposing the defendants here had refused to enter upon or to perform their duty, they would have been liable to a mandamus, but only to a mandamus granted by the Court of Queen's Bench, and not here. It seems to me their conduct has not laid them open to such a mandamus. They have never refused to perform their duty. They have done all acts towards performing their duty. They have not been guilty of any such negligence as amounts to a refusal to enter upon the jurisdiction that is given to them, and even, therefore, if a mandamus could have been asked for from this court, there are not materials on which the court ought to grant it. In every view, therefore, the defendants are right.

COTTON, L.J.—The plaintiff in the present action bases his case upon this, that a stream running through his grounds is in such a state as to be a nuisance, and in consequence of that he asks for relief against the defendants, not by way of damages, but for a decree which will relieve him from the nuisance he complains of. I agree with BRETT, L.J., that as regards the question of fact, if the right of the plaintiff would follow the decision on that, he has made out his case—that is to say, he has shown, in my opinion, that the water in this stream is in such a state that if that were the result of an act of an individual or of a body not having Parliamentary authority to put the stream in such a state, or to do acts which necessarily brought the stream into that state, he would have a ground of action against them; but although that is established, it is a very different thing and a very different consideration whether, as against these defendants, he is entitled either to the decree granted by the vice-chancellor or to any decree in this action. The decree made by the vice-chancellor went further than what has been con-

sidered in the argument, for the decree was against the defendants restraining them from causing or permitting any sewage to go into the river Crane, and also from causing or permitting any new outfall or sewer for the conveyance of sewage into the river Crane to be made. There is no evidence at all that the defendants have expressed any intention to make any new sewer which would have the effect of bringing fresh sewage into the Crane, nor is there anything to show that they had before the commencement of the action, or at any time, by their own act in any way brought any fresh sewage down the existing sewers which go into the river Crane, and I think that part of the decree which restrains them from causing or permitting any new outfall to be made, must have got into the decree per incuriam, without the attention of the vice-chancellor being directed to it.

I advert to that because it must not be supposed, although I concur in thinking that the plaintiff is not entitled to any decree, that I am of opinion—and I am sure that the rest of the court are not—that the defendants have a right under the Public Health Act, 1875, to make a new sewer and thereby to conduct any sewage matter into the river Crane. In my opinion, if they were intending to do so or had done so, there would have been a clear case on the part of the plaintiff for an injunction against the defendants, because that would be within the clear prohibition of the Public Health Act, 1875. The decree against them in substance, no doubt, was intended to be a decree to restrain them from permitting any sewage to go into the river Crane. It is not said they have done any act the consequence of which has been to bring the sewage down to the Crane. If that were so, unless they could show that that act, causing a nuisance to the plaintiff, as in my opinion it has done, was protected by the Act, then of course it would be the duty of this court, as it has done in many cases already, to restrain the defendants from creating a nuisance; and although they are a public body having public duties and powers to perform those duties, that would not exempt them from legal liability in consequence of a nuisance caused by them. On the evidence there is no ground for saying they have done that. I shall have to refer to the cases on this point on another part of the case, but it is sufficient to say here that those cases, for the present purpose, may be disregarded. There has been no act done by the defendants. It is not their act that has caused any nuisance to the plaintiff.

It is said that, although the decree asked for is in the form of a mandatory injunction to restrain them from permitting the sewage to fall into the Crane, that is done to enforce obedience to obligations imposed by the Act of 1875 under which they are constituted. It is necessary to consider what are the duties imposed by the Act which the plaintiff seeks to enforce, because the consideration would be very different if the Act, either directly or indirectly, contained that which amounted to a prohibition against them from doing a particular thing, of which the plaintiff complains as causing him a nuisance. In fact, that was felt by counsel for the plaintiff, who contended that there was in the Act that which amounted to a prohibition, either in the form of a direction, or in the form of a prohibition against their allowing any sewage to go down into the river Crane. Let us see whether there is any such prohibition. For the purpose of convenience I will take first of all s. 19, which is the last of those referred to on this point. It says:

> "Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied."

That was relied upon. I may dismiss it in a word. The complaint here is, not that injury is caused to the plaintiff by sewers constructed by the defendants being improperly constructed, or by their leaving sewers not constructed by them in a state to be offensive to him and his health, but that the sewers are constructed in such a way as independently of their being in a good or bad state, to bring down sewage into his stream. The complaint, therefore, is of the way in which the

sewer brings down sewage water, and not of the state of the sewers. That section has nothing to do with the present matter.

Section 17 was more relied upon. JAMES, L.J., has already referred to it. The section begins thus:

> "Nothing in this Act shall authorise any local authority to make or use any sewer . . ."

That is not a prohibition; it is a direction that nothing in the Act is to be supposed to give them the power of doing that which is afterwards mentioned in the section —it is not to authorise any local authority to make or use any sewer, drain or outfall, for the purpose of bringing sewage or filthy water into a running stream. It is said that they were using it by permitting it to be used. I cannot agree to that. "Making or using a sewer" means that you must not make a sewer which brings down the sewage into the river; you must not use existing sewers for bringing sewage which you by other means bring into the old sewer. The answer to the whole thing is that it is not prohibitive or directory of what they are to do unless they exercise, or before they exercise, the powers given by the Act, but only that in exercising the powers given by the Act they are not to continue that particular form of nuisance.

We then come to s. 15, and upon that the question must turn. It provides:

> "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

I think I may respectfully differ a little from what has been said by BRETT, L.J. I hardly think this can be considered as a direction that they shall make sewers for the purpose of diverting from running streams any sewage that then went into them. It is a direction that they shall effectually drain the district; that is, that they shall provide drainage for every house in the district. They are to provide sufficient and proper drains for the purpose of carrying off all the sewage and other matter that is to go through the district, and, no doubt, doing that in a proper way will have the consequence of making a series of drains, and a system of drainage which will have the result of not allowing any sewage to go down into the running water, and the natural streams in the district. That is the result of effectually draining a district by a proper system of drainage, and not the consequence of anything in the Act that can be looked upon as a direction that they shall divert sewage going into streams by drains. The result will be that, no doubt, but there is nothing in the Act that can be looked upon as a direction to that effect.

I ought to advert to ss. 91 and 92 which refer to the abatement of nuisances. In my opinion, those sections have no bearing on the present question. They refer really to this, that the local authority are to inspect their district, and to see what individuals in it are doing acts which are nuisances, as there defined, and then to take proper proceedings. A summary remedy is pointed out for those individuals to abate the nuisance, and power is given to them to remove it themselves if the individuals do not do it. What, then, is the result? By this decree the plaintiff says: "I am directing and causing the defendants to do their duty under the Act of Parliament—not to do their duty by restraining them from infringing a direct intimation in the statute by not doing a thing that they ought to do; but their having a duty and obligation under this Act of Parliament effectually to drain the district, I, indirectly, by this injunction, by restraining them from allowing the sewage to go into my stream, am compelling them to do that, because that is the only way by which they can do it." Putting aside for the present the difficulty of doing such a thing by means of an injunction of this nature, I will deal with it as if it were a question of a mandatory order, that is to say, a mandamus in the sense of a decree directing the defendants on proper

A grounds at the instance of the plaintiffs to perform the duties and obligations thrown upon them by the Act of Parliament in which he has a special interest.

Then comes this question: Ought we to do that unless we can see either something definite which the court can direct the defendants to do, or some practical way by which they can carry out that scheme of drainage by which the plaintiff will, he says, benefit? In my opinion, we ought not to do so. We are asked to B make a decree, something in the nature of a decree for specific performance, and the plaintiff says: "If the defendants will do their duty the result will be a consequential benefit to me practically, and therefore I have a right to call upon you as if it was a private claim I had against you, to perform that duty and to give that benefit to me." Granted, but it would be contrary to the practice of the court to make a decree of that nature against the defendants unless one was C satisfied that there was some particular mode by which they could carry into effect this scheme of drainage, and then direct them to do that, and in that way exercise the powers of this Act of Parliament.

It was said that that is not the way in which the Court of Chancery has dealt with cases of this sort, where a public body has been brought before it by an individual, or by the Attorney-General, complaining either of a private or public D nuisance; and it was argued that in such cases the Court of Chancery has said it had nothing to do with the question how these bodies can perform the duty of draining the district which the Act has thrown upon them. All they had to do was to relieve the plaintiff from the nuisance. But cases not at all analogous have been quoted in support of the plaintiff's contention. In those latter cases there was no complaint that the defendants were not carrying into execution the powers E of the Act; it was said that the defendants had caused a nuisance in the discharge and execution of their duties under the Act. The answer was: "No; the Act gave you, for the purposes of a particular district, certain powers of drainage; but it also said that, in doing this, you should not create any nuisance, or you should not do what you are doing, namely, draining the sewage into a stream." If once the proceeding has been established to be a nuisance, and not within the F protection of the statute, it is no answer to the plaintiffs to say: "We are doing this in discharge of a duty," when the Act that gave them the power and obligation of discharging that duty for the benefit of other persons, had expressly reserved the right of the plaintiff to complain of any act being done to his prejudice or wrong. Therefore, the court said, "We have nothing to do with how you are to perform the duties imposed by the Act, if this act, wrongful against the plaintiff, is stopped. G You have your powers on condition of not doing a wrongful act; the act is wrongful, and, therefore, is not protected by the statute, and you must be, as regards the district you are to drain, just as if you had no Parliamentary powers."

Therefore, those cases are entirely out of the question. Here it is not that the defendants have done a wrongful act and are seeking to protect that wrongful act by saying that, unless they do that, they cannot do something else; the plaintiff H asks that they may be called upon to exercise the powers of this Act, because that will consequentially relieve him from the nuisance and injury—an injury, not done by the act of the defendants, but which existed before the defendants came into existence. Those cases are not at all authorities for the suggestion that we should make a mandatory decree without seeing that there is a practical mode of carrying into effect the powers given by this Act of Parliament effectually I to drain the district. One may say, besides that, that the Court of Chancery ought not, and no branch of the High Court ought, to direct the defendants by its decree to exercise powers and to do their duty, without being satisfied that there has been something in the nature of a refusal on the part of the defendants to do their duty, and comply with the obligation of the Act. Here it is clear there has been no refusal. The delay of the defendants was only from November, when they were constituted, till the month of July, when the action was brought.

It is said that, if there has been no omission on the part of the defendants amounting to a refusal, one may take into consideration the delay of the previous

local board, and attribute that to the present defendants. For that purpose s. 12 of the Act was relied upon. Without looking at the special words of the section, it is obvious it could not be intended to apply to such a case, on any fair construction. The previous local board had to exercise the powers given to them by the then existing Act under which they were then constituted, and over a different area. The present board have to exercise powers under the Public Health Act, 1875, over their area; and how can neglect to perform duties imposed by the Public Health Acts of 1848, or of 1872, be neglect to perform the duties created by the Act of 1875 in a body existing only under that Act, and having duties to perform specified and defined by that Act? It comes to this, that as regards the property vested in the late board, the defendants take it subject to all the obligations and liabilities imposed upon it while under the control of the former board; and if the former board had, by any act done by them, given a right of action or incurred any liability—if by any contract they had incurred any debt, or if they had come under any obligation capable of being enforced by action, then that would have been enforced in the same way as if they were still the same persons who entered into the contract, or had done the act or incurred the obligation. It cannot be said, in my opinion, that the delay, if there were delay, on the part of the old board, can be imputed to the present board so as to make it a refusal to exercise the powers given by the Act of Parliament.

There are two other points. This is not a decree to direct them to perform certain duties imposed by the Act; it is a decree in the form of a mandatory injunction. In my opinion, if the court can order the defendants to carry into execution the powers given by the Act, it ought to do so directly, and not to do so by restraining them from permitting a thing to be done which it is not clear will necessarily be removed by their exercising the powers given by the Act. It ought to be to direct them what they are to do and how to exercise the powers of the Act. It certainly ought to be to direct them to exercise the powers of the Act, and not to put them under an injunction for breach of which there might be a sequestration, by enjoining them from permitting a thing to continue which they may not have power to remove under the Act.

There is one other matter to which I may refer. I mean with regard to s. 299. That section provides a mode by which steps shall be taken to compel a public body to discharge its duties under the Act. If they had done any act, it is impossible to say that that section could have taken away any jurisdiction of the court either to grant damages or an injunction to restrain them from continuing that act, if the act was one which the plaintiff could complain of as a legal wrong done to him. Nor do I suggest that the existence of that section takes away the power of the court to interfere by decree to compel them to do their duty. When it is at least doubtful how this scheme can be carried into effect, and the Local Government Board have great control over the manner in which the scheme is carried into effect and may say whether it is done reasonably or not, it would be the duty of the court not to grant a decree in such a case compelling them to do their duty, but it might interfere when there is a way pointed out, guiding the court to say whether under the circumstances, it ought, if the jurisdiction exists, to make a decree for the defendants to carry out such works and system of drainage as under the Act they might have power to carry into execution. On all these grounds I am of opinion the plaintiff fails, and the action must be dismissed.

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[*Reported by* E. S. Roche, Esq., *Barrister-at-Law*.]

A

EASTLAND *v.* BURCHELL AND WIFE

[Queen's Bench Division (Mellor and Lush, JJ.), May 8, 17, 1878]

[Reported 3 Q.B.D. 432; 47 L.J.Q.B. 500; 38 L.T. 563; 42 J.P. 502; 27 W.R. 290]

B *Husband and Wife—"Necessaries"—Right of wife to pledge husband's credit—Action for goods sold—Spouses separated under deed—Provision for payments to wife and covenant by her not to apply for further financial assistance—Authority of wife to pledge credit where her income insufficient for her maintenance—Husband's means—Evidence of husband's solicitor—Admissibility.*

C The plaintiff sued a husband and his wife for the price of butcher's meat supplied on the order of the wife. The plaintiff did not know that the parties were living apart under a separation deed. By this deed the wife was to enjoy the use of property settled upon her at the time of the marriage, and all the income therefrom, together with a small allowance from the husband so long as three of the children were under twenty-one years of age and continued D to reside with her. The wife covenanted that she would not apply for any further pecuniary assistance, and the trustee of the deed covenanted to indemnify the husband from all debts and liabilities contracted by her. The allowance payable by the husband under the deed was paid regularly. At the trial the wife gave evidence for the plaintiff, and the judge found that her income was insufficient for her maintenance and held that as a matter of law E she had authority to pledge her husband's credit for the meat supplied by the plaintiff. At the trial the husband's solicitor tendered himself as a witness to give evidence as to the husband's means, but the judge refused to hear that evidence.

Held: (i) the authority of a wife to pledge the credit of her husband was a delegated and not an inherent authority, and where spouses had separated by F mutual consent and made their own terms those terms were binding on both so long as they continued the separation; by the terms of the separation deed in the present case the wife was expressly excluded from applying to the husband for any further sums for her maintenance other than those expressly provided for in the deed and this excluded any authority to pledge the husband's credit; (ii) if, as was not the case, the means of the husband had been relevant, G there was no reason why the evidence offered should be rejected.

Notes. Applied: *Wilson* v. *Glossop*, [1886–90] All E.R.Rep. 1058. Referred to: *Chapman* v. *Knight* (1880), 5 C.P.D. 308; *Skeate* v. *Slaters*, [1914] 2 K.B. 429; *Balfour* v. *Balfour*, [1918–19] All E.R.Rep. 860; *Miss Gray, Ltd.* v. *Cathcart* (1922), 38 T.L.R. 562; *Sandilands* v. *Carus*, [1945] 1 All E.R. 374; *Tulip* v. *Tulip*, [1951] 2 All E.R. 91.

H As to the right of a wife to pledge her husband's credit for necessaries after a separation by agreement, see 19 Halsbury's Laws (3rd Edn.) 863 and 864; and for cases see 27 Digest (Repl.) 187 et seq.

Cases referred to:

I (1) *Johnston* v. *Sumner* (1858), 3 H. & N. 261; 27 L.J.Ex. 341; 31 L.T.O.S. 166; 4 Jur.N.S. 462; 6 W.R. 574; 157 E.R. 469; 27 Digest (Repl.) 189, *1457*.

(2) *Biffin* v. *Bignell* (1862), 7 H. & N. 877; 31 L.J.Ex. 189; 6 L.T. 248; 8 Jur.N.S. 647; 10 W.R. 322; 158 E.R. 725; 27 Digest (Repl.) 187, *1437*.

Also referred to in argument:

Manby v. *Scot* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Ex. Ch.; 27 Digest (Repl.) 192, *1509*.

Jolly v. *Rees* (1864), 15 C.B.N.S. 628; 3 New Rep. 473; 33 L.J.C.P. 177; 10 L.T. 298; 28 J.P. 534; 10 Jur.N.S. 319; 12 W.R. 473; 143 E.R. 931; 27 Digest (Repl.) 184, *1390*.

Cobbett v. *Hudson* (1852), 1 E. & B. 11; 22 L.J.Q.B. 11; 20 L.T.O.S. 109; 17 J.P. 39; 17 Jur. 488; 1 W.R. 54; 118 E.R. 341; 22 Digest (Repl.) 383, *4138*.

Hodgkinson v. *Fletcher* (1814), 4 Camp. 70, N.P.; 27 Digest (Repl.) 189, *1449*.

Nurse v. *Craig* (1806), 2 Bos. & P.N.R. 148; 127 E.R. 581; 27 Digest (Repl.) 188, *1443*.

Hunt v. *De Blaquiere* (1829), 5 Bing. 550; 3 Moo. & P. 108; 7 L.J.O.S.C.P. 198; 130 E.R. 1174; 27 Digest (Repl.) 195, *1542*.

Appeal by the defendant James Burchell from a decision of Tunbridge County Court in an action brought by the plaintiff against him and the defendant Emmeline Amicia Burchell to recover the sum of £38 6s. 7d. for butcher's meat supplied by the plaintiff to the second defendant on various dates between Mar. 13, 1877, and Oct. 3, 1877.

On Sept. 5, 1850, the defendant James Burchell was married to the defendant Emmeline Amicia Burchell, then Emmeline Amicia Hayne, and by a deed of settlement of the same date all the property then belonging to Emmeline Amicia Burchell, or into the possession of which she would come on the death of her mother, Ann Hayne, was settled on her the said Emmeline Amicia for life to her sole and separate use. James Burchell and Emmeline Amicia Burchell lived together for many years after the marriage, but differences arose between them, and on Jan. 6, 1875, they executed a deed of separation.

The parties to the deed were James Burchell, of the first part, Emmeline Amicia Burchell, of the second part, and Samuel Holditch Thomas Hayne, as trustee for Emmeline Amicia Burchell, of the third part. By the terms of the deed permission was granted to Emmeline Amicia Burchell to live separate from her husband, and to take and enjoy the separate use of all articles of personal ornament and dress, and all property and income of or to which she then was, or thereafter should become possessed or entitled, and the savings of such income, subject nevertheless to the provisions of the marriage settlement hereinabove referred to, so far as the same affected such property or any part thereof, and that she should be at liberty to dispose of the premises in her lifetime, or by her will as she should think proper; that she should have the custody and control of the three younger children of the marriage (the four elder children remaining with James Burchell), and that so long as the three children or any of them were under the age of twenty-one years, and continued so to reside with or under the control of Emmeline Amicia Burchell, James Burchell would pay to the said trustee the sum of £5 a quarter to be held in trust for Emmeline Amicia Burchell for her separate use, and to be applied by her towards the education of her children respectively. And by the deed it was covenanted that Emmeline Amicia Burchell should provide for and maintain herself and the three younger children while under the age of twenty-one years, and also duly educate the children respectively, with or out of her own separate income, together with the quarterly payment of £5 from James Burchell, and would not apply to James Burchell for any pecuniary assistance for or towards her maintenance, or that of any of the three children that might be under the age of twenty-one years. The trustee further covenanted to indemnify James Burchell from all debts and liabilities thereafter to be contracted by Emmeline Amicia Burchell, and against all actions, suits, proceedings, expenses, claims, and demands upon account or in respect of any such debts or liabilities, or upon account or in respect of the maintenance of Emmeline Amicia Burchell, or the maintenance or education of the three children, or any of them, so far as their education could not, or should not, be defrayed by means of the quarterly payments before referred to.

The defendants had ever since the execution of the deed of separation lived apart under the terms thereof; and it was while Emmeline Amicia Burchell was so living apart from the defendant that the goods, for the price of which the plaint was brought, were supplied to her by the plaintiff. It was admitted that the plaintiff had never known the defendant James Burchell, and had only dealt with

Emmeline Amicia Burchell subsequently to the deed of separation, and he had supplied the goods to her, supposing that she was a married woman, but without making any inquiries in the matter.

The plaint was tried before the judge of the county court without a jury, on Jan. 18, 1872, when the above facts were proved or admitted. The defendant Emmeline Amicia Burchell pleaded coverture, and judgment was given for her on that plea. The defence set up by the defendant James Burchell was a denial of his liability for the debts of his wife, and of her authority to pledge his credit for the goods in respect of which the plaint was brought. The defendant Emmeline Amicia Burchell, on being called as a witness for the plaintiff, and cross-examined on behalf of the defendant James Burchell, admitted that she had been ever since the execution of the deed of separation in the due receipt of the income of her property, which brought in £297 15s. 2d. or thereabouts per annum, and that the whole allowance made to her since the deed of separation at any time by her husband, the defendant James Burchell, out of his own money was £20 a year; she stated, however, that she found such income insufficient to enable her to maintain herself and such of her children as resided with her, and to educate them. One of the children in the deed of separation mentioned had recently ceased to reside with her, and had gone to the defendant James Burchell, his father; but it appeared that her eldest daughter resided with her instead.

The defendant Emmeline Amicia Burchell also gave evidence as to the position and income of the defendant James Burchell prior to her separation from him, and stated that he had, since one of the children had ceased to reside with her, taken away £20 a year from her. No evidence was given by or on behalf of James Burchell as to his income, but William George Wilde, the solicitor who was conducting the case for James Burchell, tendered himself as witness to give evidence, stating that he did so from personal knowledge of the exact income of James Burchell at the time; but the judge refused to allow him to be sworn or to take his evidence, on the ground that he was acting as advocate for James Burchell, and could only give hearsay evidence, and was, therefore, incompetent to give evidence, and he further refused to adjourn the case on any terms.

The judge decided that the income of Emmeline Amicia Burchell was insufficient for the maintenance and education of herself and the children under her care, and thereupon decided as a matter of law that she, therefore, had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her; and, accordingly, directed judgment to be entered for the plaintiff as against the defendant James Burchell with costs, and judgment for Emmeline Amicia Burchell as against the defendant James Burchell for her costs.

The defendant James Burchell appealed and contended that the judge improperly rejected the evidence of William George Wilde, and improperly refused to allow him to be examined as a witness to prove the defendant's actual income. He further contended that the judge had no jurisdiction to pronounce on the sufficiency or insufficiency of the income of Emmeline Amicia Burchell, and that he wrongfully decided that the insufficiency of such income rendered the defendant liable for necessaries supplied to his wife. He further contended that the judge wrongly decided that under the circumstances of the case Emmeline Amicia Burchell had by law an implied authority to pledge her husband's credit in respect of the goods so supplied to her. The respondent contended that the judge rightly refused to allow the said witness to be sworn or give evidence, and that the question of the sufficiency or insufficiency of the income of Emmeline Amicia Burchell was one for the judge's decision, and right in law. The question for the court was, whether the judge was right in rejecting the evidence of William George Wilde and in giving judgment against the defendant James Burchell for the sum of £38 6s. 7d. and costs on the grounds herein stated.

Watkin Williams, *Q.C.* (with him *Moulton*), for the defendant James Burchell.
Kingsford for the plaintiff.

Cur. adv. vult. A

May 17, 1878. **LUSH, J.,** read the following judgment of the court.—The questions arising in this appeal are, first, whether the defendant is liable for butcher's meat supplied to his wife between Mar. 13 and Oct. 3, 1877, under the circumstances stated in the Case; and, secondly, whether the county court judge was right in excluding the evidence of his solicitor who tendered himself to prove from his B personal knowledge what the exact income of the defendant was, the ground of rejection being that the solicitor was acting as advocate for him in the cause, and that he could only give hearsay evidence. [HIS LORDSHIP stated the facts, and continued:] The learned judge decided upon this evidence that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law that she had authority to C pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her.

We are of opinion that this ruling is erroneous. The authority of a wife to pledge the credit of her husband is a delegated not an inherent authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without his consent, she carries no implied D authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere; and if he makes no adequate provision for this purpose she becomes an agent of necessity to supply her wants upon his credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for E the jury. Where, however, the parties separate by mutual consent they may make their own terms, and so long as they continue the separation these terms are binding on both. Where the terms are as in this case, that the wife shall receive a specified income for her maintenance and shall not apply to the husband for anything more, how can any authority to claim more be implied? It is excluded by the express terms of the arrangement. It is obviously immaterial whether the F income is derived from the wife's separate property or from the allowance of the husband, or partly from the one source and partly from the other. It is enough that she has a provision which she agrees to accept as sufficient. She cannot avail herself of her husband's consent to the separation which alone justifies her in living apart from him, and repudiate the conditions upon which that consent was given. And it seems superfluous to add that no third person can claim to disturb G the arrangement made between the husband and the wife, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed; that is, the stipulated allowance. He can derive no authority from the wife which she is incompetent to give.

We are, therefore, of opinion that any inquiry into the husband's means was H irrelevant, and for that reason we abstain from saying more upon the second question than that, if evidence upon that point had been relevant, we see no reason why the evidence offered should be rejected. We do not think it necessary to go through the various cases cited. They are no guide to us, except so far as they exhibit the principle on which the authority of a wife to pledge the credit of her husband rests. Upon that point they are conclusive to show that the capacity of a I wife to contract debts upon the credit of her husband is derived from an authority either expressly or impliedly given by him. We need only refer to the more recent cases of *Johnston* v. *Sumner* (1) and *Biffin* v. *Bignell* (2). We are not concerned to inquire whether in this or that particular case this principle has been rightly applied. We have only to deal with the facts of this case, and applying the principle to them we hold that the defendant James Burchell is not liable for the debt contracted with the plaintiff. Being satisfied that we have all the materials before us necessary for the determination of the question, it would be a

useless expense to the parties to send the case back for a new trial. We, therefore, act on the wholesome provision of R.S.C., 1875, Ord. 40, r. 10, and direct that the judgment for the plaintiff below be set aside, and judgment be entered for the appellant.

Judgment for defendant.

Solicitors: *Prior, Bigg, Church & Adams*; *W. G. Wilde.*

[*Reported by* M. W. McKellar, Esq., *Barrister-at-Law.*]

PAUL AND ANOTHER *v.* SUMMERHAYES

[Queen's Bench Division (Lord Coleridge, C.J., and Mellor, J.), November 16, 1878]

[Reported 4 Q.B.D. 9; 48 L.J.M.C. 33; 39 L.T. 574; 43 J.P. 188; 27 W.R. 815; 14 Cox, C.C. 202]

Trespass—Land—Trespass to land—Defence—Entry in fresh pursuit of fox.

A huntsman or the field in fresh pursuit of a fox has no right to force an entry upon land against the will of the owner.

The appellants, while in fresh pursuit of a fox, came to land managed by the respondent for his father. The respondent warned them off, and endeavoured to prevent their going upon the land. The appellants attempted to force an entry, and, in so doing, assaulted the respondent, for which they were convicted and fined.

Held: the respondent had a right to stop the appellants entering upon the land in pursuit of pleasure, and, as they persisted in so doing, was justified in endeavouring to prevent their entry; the conviction of the appellants was, therefore, right.

Notes. Distinguished: *Calvert* v. *Gosling* (1889), 5 T.L.R. 185.

As to defences to an action for trespass, see 38 Halsbury's Laws (3rd Edn.) 749 et seq.; and for cases see 43 Digest 411, 412. For the Game Act, 1831, ss. 2, 31 and 35, see 10 Halsbury's Statutes (2nd Edn.) 683, 697, 698.

Cases referred to:

(1) *Gundry* v. *Feltham* (1786), 1 Term Rep. 334; 99 E.R. 1125; 43 Digest 411, *343.*

(2) *Earl of Essex* v. *Capel* (1809), Locke on Game Laws, 5th Edn. 45; Chitty on Game Laws, 2nd Edn. 31, n.; 43 Digest 411, *344.*

Also referred to in argument:

Mitten v. *Faudrye* (1626), Poph. 161; 79 E.R. 1259; sub nom. *Millen* v. *Fawtrey*, W.Jo. 131; Lat. 119; sub nom. *Millen* v. *Hawery*, Lat. 13; 43 Digest 373, *5.*

Anon., 21 Hen. 7, pl. 28.

Baker v. *Berkeley* (1827), 3 C. & P. 32.

Case Stated by Somerset justices.

An information preferred by Thomas Summerhayes, the respondent, against Henry Paul and Charles George Elers, the appellants, charging them together in the same summons with assaulting and beating him at Curry Mallett, in the county of Somerset, was heard at a petty sessions held at Ilminster on Nov. 2, 1877.

The respondent lived with his father and attended to his business for him (the father being afflicted), and that a portion of the farm occupied by the father con-

sisted of a field called "The Nineteen Acres," in the parish of Curry Mallett. On Nov. 2, 1877, about midday, the respondent was alone at work in that field when the appellants, who were out with the Taunton Vale foxhounds, were on horseback and riding slowly across an adjoining field, in the occupation of Thomas Zouch, towards "The Nineteen Acres." "The Nineteen Acres" was east of that adjoining field, and separated from it by a hedge, a bank about two feet high, and a shallow ditch outside the bank, all which belonged to "The Nineteen Acres." Hounds crossed Thomas Zouch's field as far as the bank, and then turned into a covert which skirted "The Nineteen Acres" and Thomas Zouch's field on the north side. The respondent got on the bank of "The Nineteen Acres" at a gap near the covert, and, when the appellants were within ten yards of him, said, "Gentlemen, I forbid you to come on this land." The appellant Henry Paul said, "Come on, gentlemen, it is the Prince of Wales's land," and tried to ride up the bank, and the respondent put his hand against the horse, and turned the horse back. Henry Paul tried a second time to ride up the bank, and again the respondent pushed the horse back. Henry Paul upon that struck the respondent on his head with a riding whip more than once. The respondent then took up a stone, and Henry Paul got off his horse, went into "The Nineteen Acres," caught hold of the respondent, and a struggle ensued. During the struggle the appellant Charles George Elers came into "The Nineteen Acres," rode up to and against the respondent, and said: "If you throw that stone I will knock you down." The respondent then caught hold of the bridle of Elers's horse (to protect himself), and Elers struck at the respondent with his hunting whip. The respondent let go the bridle, and thus avoided the blow. There was no evidence to satisfy the justices that a fox had been seen on the day in question in "The Nineteen Acres."

It was contended on behalf of the appellants (inter alia), that they were, with others, in fresh pursuit of a fox started on other land, and were entitled, under the Game Act, 1831, s. 35, to ride over "The Nineteen Acres" without interruption, and that the respondent, therefore, committed the first assault. They also contended that they were in the exercise of a bona fide claim of right or interest to enter "The Nineteen Acres" as Prince of Wales's land, and also by force of the aforesaid statute, and that consequently jurisdiction of the justices was ousted. They, therefore claimed that, under the circumstances of the case, the respondent was not justified in using force to prevent the appellants entering "The Nineteen Acres."

The justices were of opinion that the Game Act, 1831, s. 35, did not make a forcible entry on land lawful, but merely declared that under certain circumstances a person shall not be liable to be summoned under that Act for trespass in pursuit of game. They thought that was no colour of title or interest in the appellants to oust their jurisdiction, and that an occupier of land was justified in using such force as might be necessary to remove a person from such land after he has been forbidden to enter. They, therefore, convicted the appellant Henry Paul in the penalty of twenty shillings and costs, and the appellant Charles George Elers in the penalty of ten shillings and costs.

The questions of law submitted by the justices for the opinion of the court were: (i) whether s. 35 of the Game Act, 1831, prevented an occupier resisting an entry on his land of persons hunting after they have been forbidden by him; (ii) whether the appellants had such a reasonable claim of title or interest as would oust the jurisdiction of the justices; (iii) whether the respondent was, under the circumstances, justified in resisting the entry on "The Nineteen Acres" after he had forbidden the entry and it was persisted in. If the court should be of opinion that the conviction was legally and properly made, and the appellants were liable, then the conviction should stand; but if the court should be of opinion otherwise, then the information should be dismissed.

The Game Act, 1831, contains provisions against trespassing in pursuit of game. By s. 2 "game" is defined for the purposes of the Act to include hares, pheasants, partridges, grouse, heath or moor game, black game [and bustards: repealed by

A Protection of Birds Act, 1954]; and by s. 31 are added woodcocks, snipe [quails, landrails: repealed by ibid.] or conies. Then the following exception is made by s. 35:

"Provided always, and be it enacted, that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in
B fresh pursuit of any deer, hare, or fox already started upon any other land, nor to any person bona fide claiming and exercising any right or reputed right of free warren or free chase. . . ."

Cole, *Q.C.*, for the appellants.
A. Charles, *Q.C.*, for the respondent.

C **LORD COLERIDGE, C.J.**—This is an appeal against a conviction upon a summons for beating and assaulting the respondent at Curry Mallett. It appears that the respondent managed his father's business of a farmer, and on the day in question he was managing his father's business in a field called "The Nineteen Acres." On that day the neighbouring foxhounds were hunting close by "The Nineteen Acres," over which the two appellants, in company with other gentle-
D men, proposed to ride while in pursuit of the fox. The respondent tried to prevent this, whereupon one of the appellants struck him upon the head with a riding whip more than once; a struggle then took place, and the other appellant came up. The respondent seized hold of the second appellant's horse, in order to prevent being knocked down, when the second appellant struck at him with his hunting whip, but did not hit him. On these facts the magistrates convicted both the
E appellants, and inflicted fines upon them. The question for us to decide is whether, under the circumstances, such conviction was right.

One of the first points raised is as to the effect of the Game Act, 1831; but I must confess I do not quite understand the meaning of the question, for it seems to me that that statute has really no application to this case. Section 35 merely provides that certain of the foregoing provisions shall not extend to persons in
F fresh pursuit of a fox; but, as the exception is limited to the previous provisions of the Act, and as those provisions contain nothing about foxes, but relate only to game, and as s. 31 has no application here, the point supposed to arise under s. 35 cannot arise at all. It is not argued now that the appellants had any reasonable claim of interest in the land such as would oust the magistrates' jurisdiction, so we come to what is the real question in this case—viz., whether the respondent
G was, under the circumstances, justified in resisting the entry on "The Nineteen Acres" after he had forbidden the entry and it was persisted in.

It has been popularly supposed that foxhunting may be exercised over the lands of any person without his consent and even against his will, and, in support of this argument, *Gundry* v. *Feltham* (1) has been cited. I am of opinion that no such right exists. Foxhunting is, no doubt, a most valuable and interesting sport, but
H it must be carried on in subordination to the general rights of mankind and the ordinary and well-established laws of property, according to which you cannot go on to a man's land without his leave and against his will. Questions of this kind do not often arise, because in the great majority of cases reasonable terms are made with those upon whose land it is necessary to go, and compensation is provided for any damage done; but when such questions do arise they must be
I treated according to the ordinary rules of law. As far as I am aware, there is no law which allows a whole field of foxhunters to ride over a man's grounds or fields against his will. Such a supposition arises from a misunderstanding of *Gundry* v. *Feltham* (1); but that case is different to the present one, for there the plaintiff admitted upon the pleadings that what was done was "the only way and means" of killing and destroying the fox, and, indeed, BULLER, J., bases his judgment upon that very ground. That is the only point which *Gundry* v. *Feltham* (1) decides, and, no doubt, where it is admitted that no other means exist for destroying the fox, such a defence may prevail.

That decision afterwards came under the consideration of a very great authority in *Earl of Essex* v. *Capel* (2), decided by LORD ELLENBOROUGH when sitting at nisi prius, but he had had his attention called to the case previously, and so had had an opportunity of looking into the authorities upon the subject. In *Earl of Essex* v. *Capel* (2) the evidence showed clearly that foxhunting was pursued for the excitement and accompaniments of the chase, although incidentally a fox might be killed; and LORD ELLENBOROUGH, during the course of the case, pointed out that there was a very great distinction between foxhunting pursued as a pleasure and foxhunting pursued for the good of the common weal and in order merely to destroy a noxious animal. He goes on to say that there is very considerable doubt whether that even would justify a trespass, as it was a doctrine that was probably based on a mere obiter dictum of BROOKE, J., in the YEAR BOOK 12 Hen. 8, pl. 9, which was supposed to decide a point upon which it had no bearing whatever. The dictum of LORD ELLENBOROUGH appears to me to be perfectly correct, but it is not necessary for me to decide now whether the pursuit of a fox for the sole purpose of killing a noxious animal would justify a trespass; it is enough for me to show that the supposed authority of the case in the YEAR BOOK, 12 Hen. 8, pl. 9, and of *Gundry* v. *Feltham* (1) does not conflict with the decision of LORD ELLENBOROUGH.

For these reasons, I am of opinion that a man has a perfect right to forbid a field of foxhunters entering upon his land in pursuit of pleasure, and if they persist in doing so he is justified in endeavouring to prevent their entry. In this case the conviction was right, and the appeal must be dismissed.

MELLOR, J.—I am of the same opinion. I was unaware that the Game Act, 1831, had defined game for the purposes of that Act. If the word "game" had included foxes the application of s. 31 might have had unpleasant consequences, from which foxhunters could only have been extricated by the terms of s. 35; but, under any circumstances, s. 35 could only apply to the previous provisions of the Act, and could not justify a trespass in the course of hunting a fox. That question has been fully discussed by LORD COLERIDGE, and with his observations I entirely agree. Counsel for the appellants did not argue that the sole object, or the main object, of foxhunting was to destroy a noxious animal, and no one can suppose that ladies and gentlemen of position go down to Melton to kill vermin. I entirely concur with LORD COLERIDGE, that the authority of LORD ELLENBOROUGH is not only consistent with law, but with all experience and common sense. We are justified, therefore, in saying the conviction must stand.

Appeal dismissed.

Solicitors: *Kingdon & Cotton*, for *Joliffe*, Crewkerne; *Reed & Lovell*, for *Reed & Cook*, Bridgwater.

[*Reported by* A. H. POYSER, ESQ., *Barrister-at-Law.*]

A

MULLINS *v.* COLLINS

[Court of Queen's Bench (Blackburn, Quain and Archibald, JJ.), January 24, 1874]

B [Reported L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 297]

Licensing—Offence—Sale of liquor to police officer while on duty—Sale by licensee's servant—Lack of knowledge by licensee—Liability of licensee—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 16.

C By s. 16 (2) of the Licensing Act, 1872: "If any licensed person . . . supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable . . . he shall be liable to a penalty . . .".

The servant of the appellant, a licensed person, supplied brandy to a constable on duty and in uniform. The appellant contended that it was necessary for him to have personal knowledge of the offence before he could be convicted.

D **Held:** personal knowledge on the part of the appellant was not necessary to constitute the offence under the section, and the appellant was, therefore, liable for the act of his servant.

Notes. The Licensing Act, 1872, s. 16, was replaced by the Licensing Act, 1953, s. 142 (33 Halsbury's Statutes (2nd Edn.) 270), itself replaced as from Jan. 1, E 1965, by the Licensing Act, 1964, s. 178.

Considered: *Bosley* v. *Davies* (1875), 33 L.T. 528; *Somerset* v. *Hart* (1884), 12 Q.B.D. 360; *Newman* v. *Jones* (1886), 17 Q.B.D. 132; *Bond* v. *Evans*, [1886–90] All E.R.Rep. 1035. Referred to: *R.* v. *Holland*, *Lincolnshire Justices* (1882), 46 J.P. 312; *Chisholm* v. *Doulton* (1889), 58 L.J.M.C. 133; *Roberts* v. *Woodward* (1890), 63 L.T. 200; *Massey* v. *Morris* (1894), 63 L.J.M.C. 185; *Sherras* v. *De* F *Rutzen* (1895), 15 R. 388; *Coppen* v. *Moore*, [1895–9] All E.R.Rep. 926; *Allen* v. *Whitehead*, [1929] All E.R.Rep. 13; *Linnett* v. *Metropolitan Police Comr.*, [1946] K.B. 290.

As to offences in relation to constables on licensed premises, see 22 Halsbury's Laws (3rd Edn.) 687, 688; and for cases see 30 Digest (Repl.) 103.

G Cases referred to in argument:

Chaney v. *Payne* (1841), 1 Q.B. 712; 1 Gal. & Dav. 348; 10 L.J.M.C. 114; 7 L.T. 568; 6 Jur. 79; 113 E.R. 1304; 41 Digest 905, *7988*.

R. v. *Stephens* (1866), L.R. 1 Q.B. 702; 7 B. & S. 710; 35 L.J.Q.B. 251; 14 L.T. 593; 30 J.P. 822; 12 Jur.N.S. 961; 14 W.R. 859; 10 Cox, C.C. 340; 44 Digest 128, *1043*.

H *Hearne* v. *Garton* (1859), 2 E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 5 Jur.N.S. 648; 7 W.R. 566; 121 E.R. 26; 14 Digest (Repl.) 37, *76*.

Nichols v. *Hall* (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37 J.P. 424; 21 W.R. 579; 14 Digest (Repl.) 37, *66*.

Case Stated by Devon justices.

At a petty sessions held at Cullompton, Devon, on May 26, 1873, an information I was preferred by Richard George Collins, superintendent of police for the division of Cullompton (hereinafter called the respondent), against William Mullins (hereinafter called the appellant), under s. 16 of the Licensing Act, 1872, charging the appellant William Mullins, being a person duly licensed to sell by retail excisable liquors in his house and premises with unlawfully supplying brandy, by way of sale, to a constable on duty, without the authority of some superintendent officer of such constable.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the constable was on duty in Cullompton on May 7, 1873,

on the occasion of the fair there, having been specially ordered there from his regular station for special duty commencing at nine o'clock in the morning. The appellant's house, the Railway Hotel, was in the constable's district of duty for such day, and while on duty and in uniform at about three o'clock in the afternoon he visited the appellant's house and was there supplied by a female, whether the wife or servant of the appellant he did not know, with some brandy, for which he paid 3d. He had no authority from any superior officer to be supplied with any liquor or refreshment, and did not state to the person who supplied him with the brandy that he had any such authority, and was not asked whether he had any such authority. It was also proved that he had read and signed written instructions as to his district of duty on the day in question, and that such instructions contained the following words:

> "Any constable found drinking at any public-house during the hours appointed for his being on duty will be reported."

The constable was not called into the appellant's house in the execution of his duty by any person while on duty, and had voluntarily gone into the house. Neither he nor his superior officer gave any notice to the appellant that he was on duty at Cullompton on the day in question, and he was not asked by anyone in the house whether he was on duty or not.

The appellant called no witnesses, but admitted that the brandy was sold and supplied to the constable at his house by his servant. He contended, however, (i) that before he could be convicted of any offence under s. 16 of the Licensing Act, 1872, it must be proved that such offence was committed either by himself personally or with his knowledge, and that he must be actually present at the time the liquor was supplied to the constable, or that the same must be supplied under his express authority; (ii) that even assuming it was not necessary to prove that the offence was committed by the appellant personally, or with his knowledge or express authority, before he could be convicted of the said offence, it must be proved that he or his servants knew the constable to be on duty at the time, when the liquor was supplied; (iii) that notwithstanding s. 35 of the Licensing Act, 1872, [s. 151 of Licensing Act, 1953; s. 186 of Licensing Act, 1964], and notwithstanding the appellant's house being in the district allotted to the constable, the constable was not on duty at all when he entered the appellant's house, and that in fact he had deserted his duty at the time he entered the said house.

The justices were of the opinion that the evidence given before them brought the case within the operation of the Licensing Act, 1872, s. 16, and decided that the offence was proved. The appellant appealed.

Poland for the appellant.

The respondent did not appear and was not represented.

BLACKBURN, J.—I think it quite clear that on the Case as stated to us the justices were perfectly right in convicting the appellant. The Licensing Act, 1872, s. 16, says, among other things, that

> "if any licensed person . . . supplies any liquor or refreshment, whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable . . . he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second or any subsequent offence twenty pounds."

Taking the very words of the statute, "supplies any liquor or refreshment, whether by way of gift or sale to any constable on duty"; that was exactly what was done here. The constable being on duty and in uniform, which would tell every one that he was on duty, was supplied in the bar by a barmaid with brandy for which he paid. It has been contended that from the nature of the offence there must be knowledge that the person supplied is a constable. I do not say anything as to that, and wish carefully to avoid expressing any opinion. But here there is ample

A evidence to show that the barmaid knew what he was; and no such point as this was attempted to be made before the justices.

What was contended for before the justices was that the owner of the house could not be guilty of the offence created by the statute unless he personally knew that the person supplied was a constable, and on duty at the time he was supplied with the liquor. Such a construction as that would make the Act a dead letter. B Whether the liquor be supplied by himself or by his servant, if supplied to a constable on duty, the licensee is guilty. Our judgment must, therefore, be for the respondent.

QUAIN, J.—I am of the same opinion. The statute says that if a licensed person

C "supplies any liquor or refreshment, whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable,"

he shall be liable to a penalty. We must look at the nature of the Act which the legislature is dealing with. How does a licensed victualler usually carry on his business? Does he carry it on in person or by means of servants? We know D that for the most part, such a business is carried on by means of servants. Some licensed victuallers have several public houses in different places at the same time. Bearing in mind, then, the nature of the business of a licensed victualler, does the supply of brandy to a constable on duty by a servant, come within the mischief intended to be remedied by the statute? I think it clearly does. A barmaid supplied it to him at the counter in the ordinary way of her business, and knowing E that he was a constable. If this is not an offence within the Act, the Act would be wholly inoperative. We carefully abstain from deciding what would be the case if she had been tricked into believing that he was not a constable, or that he was not on duty, or if a servant had given him drink secretly at the back door. I am clearly of opinion that the master would not be liable in such a case. If the master could show that express orders had been given not to supply any constable F on duty, that might have been gone into in a rebutting case. But nothing of that kind appears here. The conviction, therefore, was right.

ARCHIBALD, J.—I am of the same opinion. In putting the only safe construction on the Act we are, I think, doing nothing contrary to the general principle contended for by counsel for the appellant, that in order to constitute a criminal G offence there must be a mens rea. It is not immaterial to see what was the object which the legislature had in mind in making these provisions. That is shown by the general name given to the offences of which this is one—"offences against public order." As to harbouring constables, or suffering them to remain on the premises, the legislature has expressly said that this must be done "knowingly"; but in s. 16 (2) the word is simply "supplies," the word "knowingly," H which was twice used before, being omitted. The intention must have been that the owner of the house should be answerable for the ordinary acts of his servants. If the servant had been tricked into the belief that the person supplied was not a constable, it lay on the appellant to show that. There is nothing whatever in the case to show that this was done. The servant had full notice that the person whom she was supplying was a constable on duty.

I *Appeal dismissed.*

Solicitors: *Stretton*, for *Loosemore*, Tiverton.

A

Re FLORENCE. Ex Parte WINGFIELD

[Court of Appeal (Sir George Jessel, M.R., James and Bramwell, L.JJ.), February 6, 1879]

[Reported 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 346]

B

Bankruptcy—Property available for distribution—Property in reputed ownership of bankrupt—Goods on sale or return—Custom in the trade.

Goods sent to a dealer on sale or return in accordance with well established custom in the trade which were in the possession of the bankrupt at the commencement of the bankruptcy **held** not to pass to the trustee as goods in the reputed ownership of the bankrupt within s. 15 (5) of the Bankruptcy Act, 1869 [now s. 38 (c) of Bankruptcy Act, 1914].

C

On Aug. 15, 1878, S., a horse-dealer sent the debtor a horse on sale or return in accordance with the well-known custom in that trade, and the horse was in the debtor's possession when he was adjudicated a bankrupt on Aug. 22, 1878. The trustee claimed that the horse had been in the reputed ownership of the bankrupt, and, accordingly, passed to him under s. 15 (5) of the Bankruptcy Act, 1869.

D

Held: the well-known custom in the trade excluded possession as reputed owner, and, as the bankrupt had not taken upon himself the sale or disposition of the horse as owner, the property in the horse did not pass to the trustee.

Notes. Section 15 (5) of the Bankruptcy Act, 1869, has been replaced by s. 38 (c) of the Bankruptcy Act, 1914 (2 Halsbury's Statutes (2nd Edn.) 373).

E

Referred to: *Watson, Ex parte Atkin*, [1904] 2 K.B. 753; *Janesich* v. *Attenborough* (1910), 102 L.T. 605; *Lamb* v. *Wright & Co.*, [1924] All E.R.Rep. 220; *Simeons* v. *Durand's Trustee*, [1928] 2 K.B. 66.

As to the rebuttal of reputed ownership and goods on sale or return not vesting in the trustee in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 445, 446; and for cases see 5 Digest (Repl.) 863 et seq.

F

Cases referred to in argument:

Livesay v. *Hood* (1809), 2 Camp. 83, N.P.; 5 Digest (Repl.) 855, *7184.*

Whitfield v. *Brand* (1847), 16 M. & W. 282; 16 L.J.Ex. 103; 153 E.R. 1195; 5 Digest (Repl.) 854, *7179.*

Hamilton v. *Bell* (1854), 10 Exch. 545; 24 L.T.O.S. 118; 18 Jur. 1109; 3 W.R. 62; 3 C.L.R. 308; 156 E.R. 554; sub nom. *Bell* v. *Hamilton*, 24 L.J.Ex. 45; 5 Digest (Repl.) 855, *7188.*

G

Re Bell, Ex parte Clarke (1877), 47 L.J.Bcy. 33; 37 L.T. 509; 5 Digest (Repl.) 814, *6883.*

Appeal by the trustee in bankruptcy from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy, holding that the custom in the horse-dealing trade of sending horses on sale or return was sufficient to exclude the operation of reputed ownership within s. 15 (5) of the Bankruptcy Act, 1869, and ordering the trustee to deliver up the horse to the respondent, Sewell, the horse-dealer.

H

At his adjudication of bankruptcy on Aug. 22, 1878, Florence, a horse-dealer, had in his possession a horse which had been sent to him a week before on sale or return by another horse-dealer, named Sewell. The trustee refused to deliver up the horse to Sewell, claiming to be entitled to it under s. 15 (5) of the Bankruptcy Act, 1869, as being in the reputed ownership of the bankrupt at the commencement of the bankruptcy with the consent of the true owner. Sewell applied to the Court of Bankruptcy for an order that the trustee should deliver up the horse to him. Evidence was adduced that it was a well-known custom in the horse-dealing trade to send horses in this way on sale or return. The trustee in bankruptcy appealed.

I

De Gex, Q.C., and *W. H. Clay* for the trustee in bankruptcy.

Winslow, Q.C., and *Creed* for the respondent, were not called on to argue.

SIR GEORGE JESSEL, M.R.—This is an attempt, in the year 1879, to induce the court to act contrary to the universal opinion which has prevailed for many years as to the meaning of s. 15 (5) of the Bankruptcy Act, 1869, which has always been known as the "reputed ownership" clause. That clause is intended to meet the case of a man obtaining credit from his being seen in the possession of property as his own, and it imposes on the true owner of the property the penalty of losing it if he has allowed such delusive credit to be obtained. What is the position of a man who has goods sent to him on sale or return? The owner sends the goods to him with the option of keeping them, and that option the person to whom they are sent may exercise in one of three ways—he may say that he accepts them at the price named, or he may sell them, or he may keep them so long that it would be unreasonable that he should afterwards return them to the sender. If he attempts to sell the goods, he does so not as owner, but only as having an option to sell or return. If by the custom of the trade possession does not raise a reputation of ownership, then the case does come within the purview of s. 15 (5). The evidence in this case shows that by a well-known custom of the horse-dealing trade, horses are sent on sale or return. If a horse is kept for months, then it is regarded as the property of the horse-dealer, but possession for six or seven days is not sufficient to raise a reputation of ownership. I am of opinion that the registrar's decision was quite right, and that the appeal must be dismissed with costs.

JAMES, L.J.—I am of the same opinion. It is said that the reputed ownership clause is so absolute that it cannot be countervailed. It is said that even if a horse-dealer put over his door these words, "I sell horses which I hold on sale or return," that would not be sufficient to exclude the operation of the clause. If the circumstances of a case are not such as to raise a delusive reputation of ownership, and to enable the person having possession to make a false representation thereby, the reason of the provision fails, and cessante ratione cessat ipsa lex.

BRAMWELL, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Denton, Hall & Fox*; *A. Leslie.*

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

A

LAWRENCE *v.* FLETCHER AND OTHERS

[Chancery Division (Fry, J.), July 18, 1879]

[Reported 12 Ch.D. 858; 41 L.T. 207; 27 W.R. 937]

B

Solicitor—Lien—London agent—General lien as against country solicitor—Particular lien as against country solicitor's client.

With regard to any agency business, the London agent's lien, whether a charging or retaining lien, is general as against the country solicitor in respect of any fund to be paid; but as between the London agent and the country solicitor's client the lien is only particular.

C

Notes. Referred to: *Re Johnson and Weatherall* (1888), 37 Ch.D. 433; *Re Jones and Roberts*, [1905] 2 Ch. 219.

As to the relations between London agent and country solicitor and as between London agent and country solicitor's client, see 36 Halsbury's Laws (3rd Edn.) 214 et seq.; and for cases see 42 Digest 389 et seq.

D

Cases referred to:

(1) *Ward* v. *Hepple* (1808), 15 Ves. 297; 33 E.R. 767, L.C.; 42 Digest 389, *4366*.

(2) *Bray* v. *Hine and Fox* (1818), 6 Price, 203; 146 E.R. 786; 42 Digest 389, *4367*.

(3) *Waller* v. *Holmes* (1860), 1 John. & H. 239; 30 L.J.Ch. 24; 25 J.P. 483; 6 Jur.N.S. 1367; 9 W.R. 32; 70 E.R. 735; sub nom. *Waller* v. *Holmes*, *Re Mead and Daubeny*, 3 L.T. 289; 42 Digest 389, *4371*.

E

Also referred to in argument:

Ex parte Warren (1812), 19 Ves. 162.

Farewell v. *Coker* (1728), 2 P.Wms. 460; 24 E.R. 814; 42 Digest (Repl.) 389, *4365*.

Redfearn v. *Sowerby*, *Bolton* v. *Tate* (1818), 1 Swan. 84; 1 Wils. Ch. 96; 36 E.R. 307, L.C.; 42 Digest (Repl.) 265, *2997*.

F

Shafto v. *Powell*, cited 2 Fowler's Exch. Pr. 382.

Stevens v. *Avery* (1753), 1 Dick. 224.

Chaloner v. *Chaloner* (1759), cited 2 Dick. at p. 804.

Potter v. *Hyatt* (1836), 2 Y. & C.Ex. 112.

Dicas v. *Stockley* (1836), 7 C. & P. 587; 173 E.R. 258, N.P.; 42 Digest 389, *4368*.

White v. *Royal Exchange Assurance* (1822), 1 Bing. 20; 7 Moore, C.P. 249; 130 E.R. 9; 42 Digest 390, *4375*.

G

Cockayne v. *Harrison* (1873), L.R. 15 Eq. 298; 42 L.J.Ch. 660; 21 W.R. 520; 42 Digest 390, *4380*.

Tardrew v. *Howell* (1861), 3 Giff. 381; 66 E.R. 458; sub nom. *Tardrew* v. *Howell*, *Parry* v. *Howell*, 31 L.J.Ch. 57; 5 L.T. 276; 7 Jur.N.S. 1120; 10 W.R. 32; 42 Digest 392, *4400*.

H

Peatfield v. *Barlow* (1869), L.R. 8 Eq. 61; 38 L.J.Ch. 310; 20 L.T. 217; 17 W.R. 516; 42 Digest 390, *4379*.

Bozon v. *Bolland*, *Husband* v. *Bolland* (1839), 4 My. & Cr. 354; 9 L.J.Ch. 123; 4 Jur. 763; 41 E.R. 138, L.C.; 42 Digest 259, *2925*.

Shaw v. *Neale* (1858), 6 H.L.Cas. 581; 27 L.J.Ch. 444; 31 L.T.O.S. 190; 4 Jur.N.S. 695; 6 W.R. 635; 10 E.R. 1422, H.L.; 42 Digest 227, *2624*.

I

Ex parte Thompson (1860), 3 L.T. 317; 42 Digest 297, *3309*.

Wilson v. *Round* (1863), 4 Giff. 416; 3 New Rep. 288; 9 L.T. 675; 10 Jur.N.S. 34; 12 W.R. 402; 66 E.R. 769; 42 Digest 291, *3260*.

Motion by the applicants, Messrs. Stokes, Saunders and Stokes, for an order declaring that they as the London agents of Thomas Gould, deceased, the country solicitor of W. Fletcher and Thomas Gould, the defendants in the action, were entitled to a charge on so much of the money raised by R. Walker and J. Hutchinson, the trustees of the marriage settlement under the court order of May 15, 1877,

and then in their hands, as was directed to be paid to Thomas Gould and also on the costs of the defendants in the action which by the order was directed to be raised and paid by the settlement trustees which had been taxed at £395 16s. 11d. for the costs, charges and expenses incurred by the applicants as London agents for T. Gould, amounting to £454 7s. 3d. and that the settlement trustees be ordered to pay the applicants that sum or so much as was in their hands.

The action was commenced in March, 1874, by the plaintiff being the beneficial devisee and legatee under the will of H. D. Lawrence against the defendants, William Fletcher and Thomas Gould, the executors and trustees of the will, for the administration of the testator's estate and other purposes. The plaintiff was married in November, 1874, to W. Bathew; and R. Walker and J. Hutchinson, the trustees of the marriage settlement, and W. Bathew, were added as defendants in the action. Thomas Gould, one of the defendants, was a member of the firm of Jervis and Gould, solicitors, of Uttoxeter, who were solicitors for the defendants in the action. The partnership between Jervis and Gould was dissolved on May 1, 1874, from which time Gould alone acted for the defendants. Messrs. Stokes, Saunders, and Stokes were the London agents of Jervis and Gould, and acted as such in the action. They continued to act as London agents for Gould alone in this matter and others after the dissolution of the partnership, but ceased to act as London agents for Jervis.

The action was heard on further consideration, before Malins, V.-C., on May 15, 1877, and an order was then made declaring that Gould and Jervis had a lien for £499 8s. 2d. for principal, and of £4 15s. for interest totalling £504 3s. 2d. upon a sum of consols then lately in court, and it was ordered that the consols then remaining in court should be sold, and that out of the proceeds of sale and dividends, and a certain sum of cash in court, certain payments be made, and that the residue of the money realised by the sale, and the dividends, and cash, which ultimately amounted to £263 4s. 10d., should be paid to the defendant Gould in part discharge and satisfaction of what was due to Gould and Jervis in respect of their lien. It was further ordered that the costs of the plaintiff and defendant should be taxed, including in the defendant's costs any charges and expenses of administering the testator's estate, and it was declared that the balance remaining due in respect of the lien, after such payment in part satisfaction thereof, and also the costs when taxed, were a charge upon the hereditaments comprised in the marriage settlement, and the defendants, R. Walker and J. Hutchinson, as the settlement trustees, were ordered to raise and pay the same accordingly. The costs of the defendants were taxed, and the balance remaining due to them was certified by the taxing master to amount to £395 16s. 11d. The sum of £263 4s. 10d., arising as mentioned, was received out of court, under power of attorney from Gould, by Stokes, Saunders, and Stokes, and one half, £131 12s. 5d., was paid on account to Jervis, and the other half to or on the account of Gould. After deducting from the sum of £504 3s. 2d., in respect of which the lien was declared, the sum of £263 4s. 10d. so divided, the sum of £240 18s. 4d. still remained due to Jervis and Gould in respect of their lien, or £120 9s. 2d. to each of them. In compliance with the order of court, the trustees of the marriage settlement sold a part of the settled property to raise a sum sufficient to defray the sums of £395 16s. 11d., and £240 18s. 4d. which were charged upon them by the order, and this they retained in their hands.

In January, 1879, before matters were settled, Gould died insolvent and no one proved his will. After his death Jervis acted as the solicitor for the defendants in the action, and employed Messrs. Stokes, Saunders, and Stokes as his London agents. Various claims were made in respect of Gould's interest in the sums of £395 16s. 11d. and £240 18s. 4d. Messrs. Stokes, Saunders and Stokes claimed to be entitled to the sum of £454 7s. 3d., in which sum they then alleged that Gould was indebted to them in respect of their agency charges in the action and payments made for him in that action and other matters, but Jervis alleged that £31 10s. 7d., part of this sum, had been already paid by him, Jervis, as the surviving member of the firm of Jervis and Gould. Jervis claimed to be entitled to sums of

£29 7s. 8d., £21 12s., and £33 0s. 5d., which he alleged were costs, charges and expenses of the defendants due to the firm of Jervis and Gould during the existence of the partnership, and were included in the sum of £395 16s. 11d., though this was claimed by Messrs. Stokes, Saunders and Stokes, Jervis also claimed to be entitled to £20 due to him from Gould under a promissory note of July 26, 1878, and a memorandum in writing of the same date by which Gould authorised the trustees of the settlement to pay the £20 out of money coming to him in respect of his costs in the action and otherwise. The defendant W. Fletcher claimed to be entitled to £160 16s. 10d. together with interest on £150 part thereof, from Nov. 28, 1878, secured by a mortgage of Gould's share of money under the decree in the action, and his share of costs, and costs, charges, and expenses in the action. Notice of Jervis's promissory note and memorandum and of Fletcher's security had been given to the trustees.

North, Q.C., and *Farwell* for the applicants.
Heath for the defendants in the action.
W. Barber for the settlement trustees.

FRY, J.—In this case everything has become pretty clear by the discussion, except one point on which counsel for the defendants in the action has addressed me, namely, whether the lien of the town agent on the fund to be paid is, as against the country solicitor, general or particular.

It appears to me to be plain that the lien of the town agents on deeds is, as against the country solicitor, general. *Ward* v. *Hepple* (1) and *Bray* v. *Hine and Fox* (2) seem to be distinct authorities for that, and I am unable to find any reason why there should be a difference in the extent of the charging lien and of the retaining lien. It seems to me that there would be great inconvenience in introducing a distinction as to the extent to which the two liens should go, and further than that, I must bear in mind the observation of Lord Hatherley, L.C., when Vice-Chancellor, [Sir William Page Wood] in *Waller* v. *Holmes* (3), in which he says (1 John. & H. at p. 242):

> "The court has given all possible assistance to the agent for enforcing any lien which the country solicitor was capable of giving."

There can be no doubt whatever that the country solicitor is capable of giving to the town agent a lien upon any costs coming to the country solicitor for everything which may be due on the agency account between the country solicitor and the town agent. I think, therefore, that that is the more reasonable view to take of the rights of the town agent. I think that the law is correctly laid down by Whitley Stokes, in the passage in his work on Lien of Solicitors to which my attention has been drawn. He says (p. 180):

> "As against the country attorney the agent's lien is general, as against the client his lien is only particular. In other words, as between the country attorney and the agent, the latter's lien extends to all costs for all agency business and disbursements due to him from the former, but, as between the client and the agent, the latter's lien only extends to the cost of the particular suit."

I will give effect to that by declaring the lien of the present applicants in respect of their agency charges—not going to other matters—all their agency charges as town agents, whether in the present suit or in other proceedings (and I think I must include in that sums paid for the renewing of the certificate of Gould) against the three sums, that is, the £120 9s. 2d., Gould's moiety of the £240 18s. 4d., Gould's moiety of any portion of the £395 16s. 11d., which on inquiry may be found to be payable to Jervis and Gould, and also the entirety of the balance of the £395 16s. 11d., or the whole thereof, according as the inquiry goes.

Then there will be an inquiry, if it is desired, by the present representative of Jervis and Gould, and at his risk, as to what portion of the £395 16s. 11d. was

for costs payable to Jervis and Gould, the costs of the inquiry to abide the results thereof. Messrs. Stokes & Co. must pay the trustee's costs; add them to their own, and add both those costs to their security. I will make an order appointing Jervis to represent Gould for the purpose of this application.

Order accordingly.

Solicitors: *Stokes, Saunders & Stokes*; *Ashurst, Morris, Crisp & Co.*, for *P. O. Jervis*, Uttoxeter; *T. White & Sons.*

[*Reported by* FRANK EVANS, ESQ., *Barrister-at-Law.*]

COULTHART *v.* CLEMENTSON AND ANOTHER

[QUEEN'S BENCH DIVISION (Bowen, J.), December 4, 9, 1879]

[Reported 5 Q.B.D. 42; 49 L.J.Q.B. 204; 41 L.T. 798; 28 W.R. 355]

Guarantee—Continuing guarantee—Death of guarantor—Liability of estate for advances made after knowledge of death by creditor.

In a written guarantee to a bank for advances to a customer it was provided that the guarantee should be a "continuing guarantee" and should not be withdrawn until three months after notice in writing to the manager of the bank. The guarantor died without having given any notice, and the manager almost immediately became aware of his death and the devolution of his estate to others.

Held: in the absence of any express provision in the guarantee for continuance of the liability of the guarantor's estate after his death and of any trusts in his will for that purpose, the guarantor's estate was not liable for advances made by the bank after the manager's knowledge of his death.

Notes. Distinguished: *Lloyd's* v. *Harper* (1880), 16 Ch.D. 290. Considered: *Beckett* v. *Addyman* (1882), 9 Q.B.D. 783; *Re Silvester*, [1895] 1 Ch. 573. Referred to: *Re Crace, Balfour* v. *Crace*, [1902] 1 Ch. 733; *Ascherson* v. *Tredegar Dry Dock and Wharf Co., Ltd.*, [1908–10] All E.R.Rep. 510.

As to revocation of guarantee by death of guarantor, see 18 HALSBURY'S LAWS (3rd Edn.) 526; and for cases see 26 DIGEST (Repl.) 508 et seq.

Cases referred to:

(1) *Harriss* v. *Fawcett* (1873), 8 Ch. App. 866; 42 L.J.Ch. 502; 29 L.T. 84; 21 W.R. 742, L.JJ.; 26 Digest (Repl.) 216, *1658*.

(2) *Offord* v. *Davies* (1862), 12 C.B.N.S. 748; 31 L.J.C.P. 319; 6 L.T. 579; 9 Jur.N.S. 22; 10 W.R. 758; 142 E.R. 1336; 26 Digest (Repl.) 13, *26*.

Action by the plaintiff bank on a continuing guarantee against the defendant, executor of the deceased guarantor, tried at Liverpool Assizes with a jury and reserved for further consideration by BOWEN, J.

Channell for the plaintiff.

C. Russell, Q.C., and *Crompton* for the defendants.

Cur. adv. vult.

Dec. 9, 1879. **BOWEN, J.**—This is an action brought by a bank upon a continuing guarantee against the executor of a deceased guarantor. Messrs. E. and J. Clementson, cotton brokers and spinners in the county of Chester, had a banking account with the bank, of which the plaintiff is the registered officer (viz.,

the Stalybridge, Hyde, and Glossop Bank). In 1867 the bank required security for the advances which were likely to be made to Messrs. E. and J. Clementson, and on Aug. 24, 1867, a written guarantee was executed by Nathaniel Lawton, the deceased, and the defendant, Joseph M. Clementson, who is now Nathaniel Lawton's executor and sued as such. The material part of the guarantee was as follows:

> "We the undersigned, Joseph Moxon Clementson, of Dukinfield, in the county of Chester, cotton spinner, and Nathaniel Lawton, of Micklehurst, flannel manufacturer, do hereby jointly and severally undertake and agree to guarantee to the proprietors of or partners in the banking co-partnership for the time being the due and punctual payment when required of all such sums of money as may have been or may be from time to time advanced or paid by or from the banking co-partnership, or which the same co-partnership may have already paid or become liable to pay, or may hereafter pay or become liable to pay for or on account of Edward and John Clementson or their order, or any account whatsoever, with interest, commission, and other banking charges upon such sums. . . . and we jointly and severally further agree as follows, namely, that this guarantee or engagement shall be considered a continuing guarantee, and shall not be withdrawn, but shall continue in full force until three months after notice to the manager of the banking co-partnership in Ashton-under-Lyne, in writing under our hands of our intention to discontinue or determine the same."

Advances were duly made by the bank under this guarantee down to the death of the testator, Nathaniel Lawton, on Dec. 19, 1875, at which date Messrs. E. and J. Clementson were considerably indebted to the bank. It was admitted, however, that sufficient sums of money, after notice of the death, had been paid into the account, and generally appropriated to the current account to cover any balance, which was in fact owing at the date either of the death or of such notice. Upon the other hand, if the guarantee was not determined in law by death or notice of the death of the testator, it was admitted that the bank, who continued their advances up to May, 1878, to Messrs. E. and J. Clementson, was entitled to recover under this guarantee a large sum of £3,000 or thereabouts, which in case of difference is to be settled hereafter by a referee. The cause was tried before myself and a special jury at Liverpool, when it was agreed that the jury should be discharged, and that the court should have power to draw all reasonable inferences of fact.

The evidence as to what had passed between the bank and the defendant as Nathaniel Lawton's executor, after Nathaniel Lawton's death, is not very clear.

From a feeling of mutual courtesy the parties refrained from cross-examination of one another at the trial. It appeared that the bank knew of the death of Nathaniel Lawton, but had received no written notice of it addressed specially to themselves. On Feb. 12, 1876, however, the defendant, as executor, had published in the proper newspapers advertisements requiring the creditors of the deceased Nathaniel Lawton to send in particulars of claims to the solicitors of the executors on or before May 14, 1876. The bank and their officers were cognisant of this advertisement as well as of Nathaniel Lawton's death. Under the testator's will one-third of his estate was to be in trust for the children of the testator's sister Sarah who should attain twenty-one years in equal shares, one-third for the children of his deceased brother John Lawton who should attain twenty-one, and the remaining one-third to the brother of the testator, M. H. Lawton. Some of the children were minors. M. H. Lawton, before any claim was made by the bank, got his share and spent it. It was admitted that the bank knew who were the executors, and that without knowing the terms of the will the bank knew that the estate was going, one-third of it, to the children of the testator's brother and sister, some of whom were infants.

The defendant, who was a brother of the partners in the guaranteed firm, Messrs. E. and J. Clementson, had become liable to the bank as a guarantor jointly and

A severally with Nathaniel Lawton under the guarantee in question. He called at the bank shortly after the appearance of the advertisement, and saw the manager, Mr. Coulthart. The following is the account given by the defendant of the interview:

> "I went to the bank to see if they could advance some money on a large building, the Conservative Hall, and Mr. Coulthart agreed to do so. Then he
B said, 'I see by the notice in the paper that your brother-in-law is dead. Do you know that you are responsible for £3,000?' and I said I was not aware of it, but was quite agreeable to be so, knowing my brothers to be in good circumstances. He asked me how they were doing. I told him I knew all their affairs, and told him they were doing as well as they could be doing at the time. That is all that passed, to the best of my recollection. We should never
C have paid the share out if we had thought it was subject to liability."

The defendant was not cross-examined, but it was stated on behalf of the bank that Mr. Coulthart's recollection of the conversation differed from the defendant's, and by consent a written memorandum of the interview made by Mr. Coulthart at the time was put in as containing the substance of the evidence which Mr. Coulthart was prepared to give, and was to be taken as if he had actually deposed to it.
D The memorandum was as follows:

> "Mr. Clementson called and said he would sign a new letter of guarantee for £4,000, or allow the existing ones to continue, as might be most agreeable to the directors."

In May, 1878, the guaranteed firm, Messrs. E. and J. Clementson, fell, as I have
E stated, into difficulties. The bank, to whom they were indebted heavily for advances, exceeding the amount of the guarantee, claimed under the guarantee to be repaid the same by the defendant as executor of the testator, and brought this action.

For the defendant it was contended that the testator's estate was not liable for any advances made after the testator's death, or, at all events, after the bank
F received notice of his death. For the bank it was argued that no notice was given which was equivalent to a notice of the withdrawal of the guarantee; and that the proper inference to be drawn from these facts was that the bank had a right to and did still suppose that the guarantee was to continue. If it were established that after the death of the testator the parties had dealt together on the footing that the guarantee was at an end, *Harriss* v. *Fawcett* (1) would apply,
G and the bank would not be liable. But I do not decide this case on that ground, though I am not convinced on the present materials alone that the bank may not, after the testator's death, have been looking to the defendant's liability as joint and several guarantor on the guarantee, and have considered the guarantee determined as regards the testator and his estate. It is possible, on the other hand, that the executor himself supposed the guarantee to be at an end, while the
H bank entertained no definite opinion on the subject. It would be difficult for me to express any clear view about the matter, as the evidence leaves me still in some doubt about it. It is not necessary, if my judgment be well founded, to decide the point.

I am of opinion that the notice with which the bank in the present case was affected amounted to a discontinuance, so far as future advances were concerned,
I of the guarantee. A guarantee like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantor. It is a contract, and the question from what time and on what notice it ceases to cover advances is a question of construction of the contract itself. In the case of such continuing guarantees as the present it has long been understood that they are liable in the absence of anything in the guarantee to the contrary to be withdrawn on notice. Various explanations have been offered of this reasonable though implied limitation. The guarantee, it has been said, is divisible as to each advance, and ripens as to each advance into an irrevocable promise or guarantee only when the advance is made.

This explanation has received the sanction of the Court of Common Pleas in *Offord* v. *Davies* (2). Whether the explanation be the true one or not, it is now established by authority that such continuing guarantees can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract.

But what is to happen on his death? Is the guarantee irrevocable, and to go on for ever? It would be absurd to refuse to read into the lines of the contract, in order to protect the dead man's estate, a limitation which is read into it to protect him while he is alive. On the argument of the present case it was virtually conceded that the provision as to the three months' notice relating only to the guarantor's life, and there being no corresponding provision as to the notice to be given on his death, the guarantee could be legally determined at any time after the guarantor's death by a proper notice to that effect.

But there remains the question. What is the proper notice to be given? To answer this question we must consider the change which the guarantor's death has effected in the situation. The notice cannot any longer be given by the guarantor. He is dead. The executor of his will is guardian of his estate, and if notice is to be given by anyone the executor would seem the person to give it. But must the executor give special notice that the guarantee is withdrawn? or is it enough that the bank should be warned of the death of the testator and the devolution of his estate to others? In many cases the executor has no option to elect to continue the guarantee. Surely it would in such cases be idle to insist on special forms of withdrawal of a guarantee which nobody has a right to continue. Notice of the death and of the existence of a will is notice of the existence of trusts which may be incompatible with the continuance of the guarantee. If indeed, under the testator's will, the executor has the option of continuing the guarantee, then from the absence of any specific notice of withdrawal the bank may perhaps, in spite of notice of the death, properly assume as against the estate that the guarantee is not to be determined. But if the executor has no option of the sort, then in my opinion the notice of the death of the testator and the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guarantee by notice cannot any longer be a giver of notices; that his estate has passed to others who have trusts to fulfil, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guarantee, then the bank has constructive notice that the guarantee is withdrawn. If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee they can so provide in the guarantee itself, and such a provision will of course bind the estate. Here there is no such provision. Judgment will, therefore, be entered for the defendants with costs.

Judgment for defendants.

Solicitors: *Milne, Riddle & Mellor*; *Johnson & Weatherall.*

[*Reported by* M. W. McKellar, Esq., *Barrister-at-Law.*]

FOURTH CITY MUTUAL BENEFIT BUILDING SOCIETY *v.* WILLIAMS AND ANOTHER

MARSON AND ANOTHER *v.* COX AND OTHERS

[CHANCERY DIVISION (Sir George Jessel, M.R.), May 22, November 24, 1879]

[Reported 14 Ch.D. 140; 49 L.J.Ch. 245; 42 L.T. 615; 28 W.R. 572]

Building Society—Mortgage—Discharge of mortgage—Statutory receipt endorsed on mortgage—Successive encumbrancers—Legal estate vesting in person best entitled to equity of redemption—Not necessarily person who paid off mortgage.

When a mortgage to a building society is paid off and the society endorses the statutory receipt on the mortgage under s. 42 of the Building Societies Act, 1874, the effect of such receipt is to vest the legal estate in the person who is best entitled to the equity of redemption and not necessarily to the person who actually paid off the mortgage money.

Where there are successive equitable mortgages and the mortgagor pays off the mortgage, the effect of the statutory receipt is to vest the legal estate in the first in time of the successive mortgagees; but where a later mortgagee pays off the mortgage without notice of any prior equitable mortgage, the legal estate vests in him.

Notes. Section 42 of the Building Societies Act, 1874, has been replaced by s. 37 of the Building Societies Act, 1962 (42 HALSBURY'S STATUTES (2nd Edn.) 92).

Considered: *Robinson* v. *Trevor* (1883), 12 Q.B.D. 423; *Sangster* v. *Cochrane* (1884), 28 Ch.D. 298; *Crosbie-Hill* v. *Sayer*, [1908] 1 Ch. 866; Referred to: *Hosking* v. *Smith* (1888), 13 App. Cas. 582.

As to discharge of mortgage by a building society and the effect of the statutory receipt, see 3 HALSBURY'S LAWS (3rd Edn.) 608 et seq.; and for cases see 7 DIGEST (Repl.) 508 et seq.

Case referred to:

(1) *Pease* v. *Jackson* (1868), 3 Ch. App. 576; 37 L.J.Ch. 725; 32 J.P. 757; 17 W.R. 1, L.C.; 7 Digest (Repl.) 508, *192*.

Actions to determine the priority among mortgagees, the first action—*Fourth City Mutual Benefit Building Society* v. *Williams*—being between the mortgagees of two freehold properties at Dulwich, called respectively Summerfield and Glenmore House, and the second action—*Marston* v. *Cox*—being by Frederick and Thomas Marston, as first mortgagees of the Glenmore House property, against subsequent encumbrancers, including the General Credit Co. who had not been made parties to the first action.

The facts in the first action were that by a deed dated Nov. 9, 1872, the Summerfield property was conveyed by the British Land Co. to Edward Downs in fee simple, and on the same day Edward Downs mortgaged the property to the trustees of the Liberator Permanent Benefit Building Society. On Dec. 7, 1875, Edward Downes mortgaged the same property to Colman by a deed which contained no reference to the previous mortgage to the Liberator Society. Shortly afterwards Downs paid off the mortgage to the Liberator Society out of the money advanced to him by Colman, and a statutory receipt under the seal of the society, dated Dec. 30, 1875, was endorsed on such mortgage, and the deed was handed over to Downs without Colman having any knowledge of the transaction. On Jan. 29, 1876, Downs mortgaged the Summerfield property to the Fourth City Mutual Benefit Building Society, the plaintiff society, and at the same time handed over to the plaintiff society what purported to be a conveyance to him of the property by the British Land Society, but which was in fact a forgery. The plaintiff society

had no notice of the mortgage to Colman. On Aug. 4, 1876, Downs paid off Colman's mortgage, and also a further charge in his favour made on Feb. 9, 1876, and a conveyance to Downs was executed by Colman. On Feb. 2, 1877, Downs mortgaged the Summerfield property to Glyn, who on Aug. 13, 1877, transferred his mortgage to the defendants, Williams and Bowerman. At this time neither Glyn nor the defendants Williams or Bowerman had any notice of the mortgage to the plaintiff society. The genuine conveyance of the Summerfield property was in the possession of subsequent mortgagees, who had disclaimed all interest in the property.

By a deed dated Feb. 15, 1873, the British Land Co. conveyed certain other land known as the Glenmore House property to Downs in fee simple. On April 3, 1873, Downs mortgaged this property to the Liberator Society, and subsequently gave them further charges on it. On Apr. 20, 1875, Downs mortgaged the same property to the plaintiff society, concealing the fact of there having been any prior mortgage, and handed to them a forged conveyance, and subsequently he gave them further charges upon the property. On Dec. 19, 1876, Downs mortgaged the Glenmore House property to the defendants, Frederick and Thomas Marson, but before the execution of their mortgage they became aware of the mortgage to the Liberator Society, and accordingly, as soon as Downs had executed their mortgage, they at Down's request paid the Liberator Society all sums due to them on their mortgage and further charges, and that society thereupon endorsed on their mortgage deed a statutory receipt, and handed over to the Marsons such deed so endorsed, and also the original conveyance from the British Land Co. The plaintiff society, on discovering the frauds practised on them by Downs, brought the first action against the other mortgagees of both properties to establish their claim to rank as first mortgagees of the Summerfield property, with the right of consolidating therewith their charges on the Glenmore House property. With regard to both properties the plaintiff society alleged that the seal of the Liberator Society had not been affixed to the statutory receipts with the proper formalities, but, as they were not able to show that the society did not receive the money, Sir George Jessel, M.R., held that the seal was properly affixed. As to the Summerfield property the plaintiff society contended that, if the statutory receipt did pass the legal estate, it vested in Downs and then in the plaintiff society by means of his mortgage to them. The defendants Williams and Bowerman, by their statement of defence, contended that the legal estate in the Summerfield property had become vested in them, as the effect of the statutory receipt given by the Liberator Society was to vest the legal estate in Colman, from whom it passed to Downs under the re-conveyance to Colman, and thence to Glyn, who transferred his mortgage to them, the defendants Williams and Bowerman.

Chitty, Q.C., and *Charles Walker* for the plaintiff society.
Davey, Q.C., and *B. B. Rogers* for the defendants Williams and Bowerman.
Davey, Q.C., and *Bardswell* for the defendants Frederick and Thomas Marson.
Marten, Q.C., and *S. Dickinson* for other defendants.

SIR GEORGE JESSEL, M.R.—The first question is: What is the meaning of the Building Societies Act, 1874? Of course the persons who framed the Act and copied into it sections from previous Acts had no precise idea as to what an equity of redemption meant. They no doubt thought it was very easy to find out, but it is not easy to find out at all. The equity of redemption is sometimes vested in such a manner that until you get a decision of one or more courts on a variety of obscure instruments you cannot tell where it is; therefore, it is simply a mistake to suppose it is a matter quite easy to find out.

All the Act of 1874 says in s. 42 is, in the first place, that when all the moneys intended to be secured by any mortgage have been paid off, the society may endorse upon or annex to the mortgage "a re-conveyance of the mortgaged property to the

then owner of the equity of redemption." To whom then ought they to convey by law as the owner of the equity of redemption? Clearly, if there were several successive mortgages each one framed as a conveyance with a proviso for redemption, the owner of the equity of redemption to whom the society ought to convey is that one of the several owners who is entitled to call for the conveyance; that is to say, where the ownership of the equity of redemption is split up the conveyance must be to the man entitled to call for it. Where, of course, there is only one owner there is no question, but the ownership may be split up in a great variety of ways. Where the ownership is split up by successive mortgages, the mortgagee of the equity of redemption is the real owner of the equity of redemption, subject to redemption. Then the ownership may be split up in another way, namely, through the property being held in undivided shares; and it may be split up in a third way, the commonest of all, namely, by settlement. A tenancy for life, portions, charges, jointures, remainders over, and so on; there may be a splitting up of the equity of redemption in that way. You must, in each case, ascertain who is entitled to call for a conveyance of the mortgaged property. Then s. 42 says that the society may re-convey to the then owner of the equity of redemption "or to such persons and to such uses as he may direct." Does not that assume that he has a command of the estate, that he has a right to direct the conveyance?

Therefore, when you come to see to whom the mortgaged property is to be conveyed, you have a guide to the interpretation of the section as to the person or persons in whom it is to vest without conveyance. I do not think any lawyer would say that the re-conveyance authorised by the Act of 1874 is authorised to be made to anybody but the person who at law is entitled to call for it. "May endorse" merely means that the society may endorse a proper re-conveyance upon the mortgage deed. But there is an alternative mode of proceeding. Instead of a re-conveyance to the then owner of the equity of redemption, the society may endorse a receipt, and then that receipt is to vacate the mortgage and vest the estate in the property "in the person for the time being entitled to the equity of redemption." Surely that is the same person as the owner of the equity of the redemption in the former part of the section. They are equivalent words; the re-conveyance is not to be to one person, and the vesting to be in another. They are alternative modes of getting the legal estate into the same person; that is, in the owner for the time being of the equity of redemption. As I said before, when the equity of redemption is split up the owner must be the person entitled by law to call for a conveyance. There always is such a person; there may be a difficulty in finding him out, but as a general rule it is not very difficult. This is, in my opinion, the meaning of the Act of 1874; and, consequently, I have here to ascertain who was the person to whom the Liberator Society on being paid off ought to have conveyed under the first part of the section, and when I have ascertained that, then that is the person in whom the legal estate vested under the second part of the section.

In the case of the Summerfield property, of course they ought to have conveyed to Colman; he was the person entitled to call for a conveyance, and, therefore, he was the person entitled to the benefit of the legal estate. In the case of the Glenmore House property, as the Marsons furnished the money to pay off the mortgage, they, under the doctrine well known in equity, had the best title to call for a conveyance. That, in my opinion, makes the whole thing sensible, and, in fact, renders the case quite free from any real difficulty beyond the inseparable difficulties which attend all dealings with real estate subject to the complicated law of this country relating to real estate.

I, therefore, decide that the legal estate in the Summerfield property is now vested in the defendants Williams and Bowerman, and that the legal estate in the Glenmore House property is now vested in the defendants the Marsons.

Order accordingly.

The facts in the second action were that on July 25, 1873, the General Credit Co. made an advance to Downs taking as security from him the deposit of a deed purporting to be the conveyance to him by the British Land Co. of the Glenmore House property, but which was in fact a forgery, and on Nov. 24, 1873, Downs, upon receiving a further advance, executed a mortgage to them of that property. As these advances were prior in date to the mortgage to the Marsons, the General Credit Co. claimed that the legal estate had, by virtue of the receipt given by the Liberator Society, become vested in them.

Davey, Q.C., and *Bardswell* for the plaintiffs, Frederick and Thomas Marson.
Ince, Q.C., and *Phear* for the defendants, the General Credit Co.
Everitt, Cozens-Hardy, Beale and *H. A. Smith* for other defendants.

SIR GEORGE JESSEL, M.R.—As I understand the decision in *Pease* v. *Jackson* (1), it means this: The second mortgagee is asked to advance money to pay off the first mortgage. The second mortgagee says, "Very well; I will pay the money due to the first mortgagee direct to him, and I will take the deeds and the legal estate direct from him." He goes to the first mortgagee with the assent of the mortgagor. The first mortgagee happens to be a building society, and says, "The way we convey a legal estate is by a receipt endorsed"; and thereupon the second mortgagee pays the money and takes away the deeds. It turns out afterwards that there is a secret mortgagee and equitable owner claiming under a security prior in date to the second mortgage. As I understand it, Lord Cairns, L.C., says that by the transaction between the building society and the second mortgagee there is an implied, if not an express contract between the society or their trustees and the mortgagee, that if he gives them the money they will give him the legal estate. Through something unknown to either the society or the second mortgagee, there may be a question on the statute, but the delivery of the deeds to the second mortgagee is intended to operate in pursuance of that contract or arrangement, and the man who pays his money to the owner of the legal estate under such a contract, expressed or implied, has a better right to call for it than the man who paid and got nothing. That appears to me intelligible. I do not suppose that anybody would doubt that, if the second mortgagee went to the first mortgagee and actually paid him money with the express contract to convey the legal estate, he would have a better right to call for it in respect of the money so paid than the man who paid and got nothing; and so, if it is implied by the contract that he is to have the legal estate, as I understand it was in *Pease* v. *Jackson* (1), he has the better title.

Then there is a second point which I understand was not argued at all on the part of the respondents in *Pease* v. *Jackson* (1), and was certainly assumed by me, as counsel for the appellants, namely, that if the second mortgagee was entitled to the legal estate he was entitled to it altogether. If he were entitled to call for it at all, and it had not been conveyed, I can quite understand such an equity as Lord Cairns, L.C., points out—that his title was to call for it and hold his security pro tanto; but if the legal estate passes by statute to the person who has the best title to call for it, then the legal estate is in him, and all the consequences must follow. Then the legal estate being outsanding, and there being only a contract to convey, it might be said, "You are only entitled to call for it to the extent of securing what you are to pay," and then there would be no equity to take it from the first mortgagee, except on the terms of consolidation. That is the point which seems to me not to have received sufficient consideration in *Pease* v. *Jackson* (1), and which certainly was not argued. I am satisfied that what Lord Cairns, L.C., meant in *Pease* v. *Jackson* (1) was, that he relied on the intention of the parties to the transaction that the second mortgagee should pay the money to the first mortgagee and get the legal estate, and consequently the statute gave the second mortgagee the legal estate. That being so, it appears to me that in this

case the Marsons get the legal estate for all purposes. Not only do I not complain that counsel for the General Credit Co. has argued the question, but I am very glad he has done so. I, therefore, decide that the legal estate in the Glenmore House property is vested in the plaintiffs, the Marsons, as first mortgagees.

Order accordingly.

Solicitors: *H. R. G. Fowkes*; *T. F. Martin*; *Wilkinson & Drew*; *Marson & Dadley*; *Worthington Evans*; *J. E. Carter*; *J. Best*; *S. B. Booth.*

[*Reported by* G. WELBY KING, ESQ., *Barrister-at-Law.*]

TAYLOR *v.* GOODWIN

[QUEEN'S BENCH DIVISION (Mellor and Lush, JJ.), March 25, 1879]

[Reported 4 Q.B.D. 228; 48 L.J.M.C. 104; 40 L.T. 458; 43 J.P. 653; 27 W.R. 489]

Highway—Driving on—Furious driving—"Carriage"—Bicycle—Highway Act, 1835 (5 *& 6 Will.* 4, *c.* 50), *s.* 78.

A bicycle is within the meaning of the words "any sort of carriage" in s. 78 of the Highway Act, 1835, and, accordingly, a person riding a bicycle on a highway at such a pace as to be dangerous to passengers thereon can be convicted of furiously driving a carriage under that section.

Notes. The Highway Act, 1835, s. 78, was partially repealed by the Statute Law Revision (No. 2) Act, 1882, and the Highways Act, 1959, but not so as to effect this case.

Considered: *Simpson* v. *Teignmouth and Shaldon Bridge Co.*, [1903] 1 K.B. 405. Applied: *Corkery* v. *Carpenter*, [1950] 2 All E.R. 745. Referred to: *Williams* v. *Ellis* (1880), 5 Q.B.D. 175; *Parkyns* v. *Preist* (1881), 7 Q.B.D. 313; *Hoddinott* v. *Newton, Chambers*, [1901] A.C. 49; *Pollard* v. *Turner* (1912), 11 L.G.R. 42; *Kain* v. *Norfolk*, [1949] 1 All E.R. 176.

As to furious driving on the highway, see 33 HALSBURY'S LAWS (3rd Edn.) 633, 634; and for cases see 26 DIGEST (Repl.) 501, 502. For the Highway Act, 1835, s. 78, see 11 HALSBURY'S STATUTES (2nd Edn.) 84.

Case referred to in argument:

Williams v. *Evans* (1876), 1 Ex.D. 277; 35 L.T. 864; 41 J.P. 151; 26 Digest (Repl.) 501, *1835.*

Case Stated by justices.

At a court of summary jurisdiction sitting at Highgate on July 31, 1878, the respondent, a police inspector, preferred an information against the appellant, charging that, on July 3, 1878, he unlawfully and furiously drove a carriage called a bicycle on a highway at Muswell Hill so as to endanger the lives and limbs of passengers thereon, contrary to s. 78 of the Highway Act, 1835.

It was contended on behalf of the appellant that a bicycle was not a "carriage" within the meaning of s. 78 of the Act of 1835, which was passed before the introduction of bicycles. That Act only applied to carriages of any kind drawn by horses or other animals, but not to such as were automatic. Other Acts of Parliament referring to carriages showed that that kind of carriages was not contemplated.

The justices convicted the appellant and fined him 40s., and the appellant now appealed.

John Rose (*Poyser* with him) for the appellant.
Gorst, Q.C. (*C. Bowen* with him), for the respondent.
Paterson (amicus curiæ).

MELLOR, J.—We have to interpret the meaning of s. 78 of the Highway Act, 1835, and it seems to me that the magistrates were right in the construction they put on it. After going through a number of provisions, the section says:

> "if any person riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life or limb of any passenger,"

then he is to be liable to a penalty. The words "any sort of carriage" is the largest description of the word carriage that can be given, and I confess that I myself think that, although the bicycle was probably unknown at the time of the passing of the Act, yet clearly it was the intention of the legislature to prohibit riding or driving of any carriage of any description whatever in such a manner as to endanger life. It does not seem necessary even that the carriage should be on wheels, for the words are wide enough to embrace anything that might be drawn along a road in the manner of a sledge; but beyond a doubt the words "any sort of carriage" are large enough to include the machine which gives a seat to a person riding on it, which goes on wheels and which the person on it guides and propels, and, therefore, drives, just in the way that an engine driver guides and drives a train, although the motive power is supplied from a different source. I do not think that it is necessary for us to deal with the numerous cases that have been suggested to us as illustrations to show that a machine of this kind is not within the purview of the Act. The word "drive" has abundant applications to things similar to that with which we are dealing. I, therefore, am of opinion that the magistrates were right in holding that the appellant was liable under the section because, whether a bicycle may be said to be ridden or driven, the mischief is the same. I think that the bicycle was a carriage driven, and driven at such a pace as to endanger life, by the person seated on it, and, therefore, that it came within s. 78. The magistrates, therefore, were right, and the conviction must be affirmed.

LUSH, J.—I am also of opinion that the magistrates were right. The mischief the Highway Act, 1835, s. 78, was intended to prevent was furious riding or driving on highways, and it was immaterial whether that which was ridden or driven was an animal or a vehicle if it was propelled along the highway at a great pace. Although at the time the Act was passed bicycles were not invented, it is quite clear that the legislature intended to include every kind of vehicle which could do the mischief contemplated by the Act. [His Lordship read the relevant part of s. 78, and continued:] Those words are large enough, and intentionally large enough, to include every kind of vehicle that could be propelled along a highway. This particular bicycle was going at the rate of fourteen miles an hour, and well might be dangerous to the public. It clearly comes within the description of "carriage," it carries its rider and is propelled by the driver, and it is utterly immaterial what may be the motive power. The conviction must be affirmed.

Appeal dismissed.

Solicitors: *S. F. Langham*; *Solicitor to the Treasury.*

[*Reported by* A. H. Poyser, Esq., *Barrister-at-Law.*]

NORTH OF ENGLAND PURE OIL-CAKE CO. *v.* ARCHANGEL MARITIME INSURANCE CO.

[Court of Queen's Bench (Cockburn, C.J., Lush and Quain, JJ.), April 30, 1875]

[Reported L.R. 10 Q.B. 249; 44 L.J.Q.B. 121; 32 L.T. 561; 24 W.R. 162; 2 Asp.M.L.C. 571]

Insurance—Marine insurance—Policy—Assignment—Insurance of cargo "including all risks of lighters"—Discharge—Sinking of lighter filled with part of cargo—Subsequent assignment of policy by owners to consignees—Liability of insurers.

A cargo of linseed oil, then on board ship at Constantinople to be carried to England, was insured for the voyage by the sellers with the defendants "including all risks of . . . lighters to and from the brig, each lighter . . . being considered as if separately insured." On Feb. 17, 1872, the floating cargo was sold to the plaintiffs. On Feb. 28, 1872, at the port of discharge when only part of the cargo had been discharged a lighter loaded with part of the cargo sank. The sellers made a claim upon the policy of insurance in respect of the loss of cargo and this was endorsed on the policy. On Oct. 17, 1872, the sellers purported to assign the policy by endorsement to the plaintiffs who claimed under its terms against the defendants for the loss of the cargo in the lighter.

Held: the policy expired when the linseed was delivered to the plaintiffs on board the lighter, and, therefore, it was not assigned to them until after the interest therein of the sellers had ceased; accordingly, the sellers could pass no interest in the policy to the plaintiffs, and the claim failed.

Notes. Considered: *Rayner* v. *Preston* (1881), 18 Ch.D. 1.

As to the availability of policy of marine insurance by assignment, see 22 Halsbury's Laws (3rd Edn.) 108 and 109; and for cases see 29 Digest (Repl.) 111 et seq.

Case referred to:

(1) *Powles* v. *Innes* (1843), 11 M. & W. 10; 12 L.J.Ex. 163; 152 E.R. 695; 29 Digest (Repl.) 112, *570.*

Also referred to in argument:

Lloyd v. *Fleming*, *Lloyd* v. *Spence* (1872), L.R. 7 Q.B. 299; 41 L.J.Q.B. 93; 20 W.R. 296; sub nom. *Loyd* v. *Fleming*, *Loyd* v. *Spence*, 25 L.T. 824; 1 Asp.M.L.C. 192; 29 Digest (Repl.) 112, *574.*

Hurry v. *Royal Exchange Assurance Co.* (1801), 2 Bos. & P. 430; 126 E.R. 1367; 29 Digest (Repl.) 158, *949.*

Tamvaco v. *Lucas* (1861), 1 B. & S. 185; sub nom. *Tanvaco* v. *Lucas*, 30 L.J.Q.B. 234; affirmed sub nom. *Tamvaco* v. *Lucas* (1862), 3 B. & S. 89; 3 F. & F. 110; 31 L.J.Q.B. 296; 6 L.T. 697; 10 W.R. 733; 1 Mar.L.C. 231; 122 E.R. 34, Ex. Ch.; 39 Digest 577, *1808.*

Ralli v. *Universal Marine Insurance Co.* (1861), 2 John. & H. 159; 31 L.J.Ch. 207; 5 L.T. 390; 8 Jur.N.S. 227; 10 W.R. 150; reversed (1862), 4 De G.F. & J. 1; 31 L.J.Ch. 313; 6 L.T. 34; 8 Jur.N.S. 495; 10 W.R. 278; 1 Mar.L.C. 194; 45 E.R. 1082, L.JJ.; 29 Digest (Repl.) 113, *581.*

Ebsworth v. *Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596; 42 L.J.C.P. 305; 29 L.T. 479; 2 Asp.M.L.C. 125; reversed by consent (1874), 43 L.J.C.P. 394, n., Ex. Ch.; 29 Digest (Repl.) 136, *771.*

Anderson v. *Morice*, L.R. 10 C.P. 609; 44 L.J.C.P. 341; 33 L.T. 355; 24 W.R. 30; 3 Asp.M.L.C. 31, Ex. Ch.; affirmed (1876), 1 App. Cas. 713; 46 L.J.Q.B. 11; 35 L.T. 566; 25 W.R. 14; 3 Asp.M.L.C. 290, H.L.; 29 Digest (Repl.) 120, *651.*

Special Case stated after issue had been joined in an action brought by the plaintiffs against the defendants upon a policy of marine insurance for the sum of £77 4s. with 5 per cent. interest thereon from Nov. 18, 1872, to judgment.

The plaintiffs carried on the business of seed crushers and oil-cake and cattle-food manufacturers at Stockton-on-Tees, one of the ports of the United Kingdom, and having a landing-wharf therein, and the defendants carried on the business at Athens of marine insurance on ships and cargoes, and also had offices and a local board of direction situate in London for conducting and carrying on such business. On Nov. 24, 1871, Vagliano Bros. insured with the defendants a cargo of 2,950 chetwerts of linseed belonging to them of the value of £6,200 for the sum of £1,500 at a premium of £52 10s. 0d., which Vagliano Bros. then paid to the defendants, the linseed then being on board the brig *Fanny* at Constantinople, for a voyage from Constantinople to a port of call and discharge in the United Kingdom to be named including all risks of craft or lighters to and from the brig, each lighter and craft being considered as if separately insured, the policy of insurance being with Vagliano Bros. or their assigns. The linseed had been duly shipped on board the brig which then commenced the voyage therewith in conformity with the terms of the policy under a bill of lading dated Nov. 29 (10), 1871, whereby the linseed was to be delivered at a safe port in the United Kingdom unto Vagliano Bros. or their assigns.

While the brig was still on her voyage, Edwards & Co., who then acted as the agents of Vagliano Bros. in England, on Feb. 17, 1872, sold to the plaintiffs the cargo of linseed, it being a term of the contract that the vessel should go to any safe floating port in the United Kingdom, and there deliver her cargo to the plaintiffs. The plaintiffs paid Vagliano Bros. through Edwards & Co., the price of the linseed in cash as hereinafter mentioned less 2½ per cent. discount in conformity with the sold note, and on Feb. 21, 1872, Vagliano Bros. accordingly endorsed the bill of lading to the order of the agents, Edwards & Co., who thereupon duly endorsed the same to the plaintiffs, both which endorsements appeared on the said document. The sellers of the cargo did not exercise their option mentioned in the contract note. The plaintiffs duly notified Stockton-on-Tees (the same being a safe floating port within the terms of the policy), as the destined port of discharge of the cargo, and on Feb. 26, 1872, the brig duly arrived at the said port with her cargo, the same being then intact.

The cargo was landed by means of public lighters employed by the plaintiffs to unload the said cargo from the brig, and to load the same at the plaintiffs' wharf. The employment of the lighters was within the terms of the policy, and was necessary for unloading and right delivery ashore of the cargo. On Feb. 28, 1872, one of the lighters filled with part of the cargo arrived safely alongside of the plaintiffs' wharf, and was there sunk by perils within the terms of the policy, and thereby the same was partly lost and partly damaged. The above-named loss occurred, when a part only of the cargo had been discharged, and before the plaintiffs had paid the price of the cargo, and upon payment being asked for a correspondence ensued between the plaintiffs and Edwards & Co., which was to be taken as part of the case.

On Mar. 4, 1872, Vagliano Bros. made a claim on the defendants for the loss of the linseed in the lighter, and on Mar. 5, 1872, claimed and received from them a sum of money as return of premium on the ground that the brig had arrived at Stockton-on-Tees. They retained the same and no demand for the same had ever been made by the plaintiffs. This return of premium was endorsed on the policy. Such return of premium did not by the usage at Lloyd's, preclude the assured from afterwards claiming a loss upon the policy if any loss has in fact occurred. On May 11, 1872, a claim for £77 4s. 0d. in respect of the loss, was made by Vagliano Bros. and was endorsed on the policy. The policy was in June, 1872, handed over to the plaintiffs by Vagliano Bros., and on Oct. 17, 1872, Vagliano Bros. endorsed on the policy what purported to be an assignment of it by them to the plaintiffs.

The court was to have power to draw inferences. The question for the opinion of the court was whether upon the above facts the plaintiffs were entitled to recover from the defendants the loss. If the court should be of opinion in the affirmative then judgment was to be entered up for the plaintiffs for £77 4s. 0d. with five per

A cent. interest thereon from Nov. 18, 1872, to judgment, together with their costs of suit. If the court should be of opinion in the negative then judgment with costs of defence was to be entered up for the defendants.

The pleadings, policy of insurance, bill of lading, sold note, correspondence, and assignment of the policy from Vagliano Bros. to the plaintiffs were to be taken as part of the Case. The sold note dated Feb. 17, 1872, contained the following terms:

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"Sold this day to the North of England Pure Oil-cake Co. the following Taganrog linseed, viz.: the cargo per *Fanny* consisting of about 2,448 quarters, and now at Scilly at 62s. 3d. per 424 lb. The seed is to be delivered at destined port in sound merchantable condition, and to be worked in thirteen days, and paid for in fourteen days from being ready for delivery by cash less 2½ per cent. discount, or at sellers' option handing shipping documents less interest at

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five per cent. per annum. If any cargo amount to or exceed 650 tons seven extra days to be allowed for payment, and receivers to have the privilege of using any unexpired lay days. . . . The vessel to go to any safe floating port in the United Kingdom."

Butt, Q.C. (*Bohn* with him), for the plaintiffs.

D *Watkin Williams, Q.C.* (*C. Crompton* with him), for the defendants.

COCKBURN, C.J.—We are all agreed on one point in this case, which renders it unnecessary to decide the other. The policy here not having been assigned until after the interest of the assignors had ceased, the assignment could pass no interest, and, therefore, the plaintiffs are not entitled to recover. Here the assignors had the policy at the time of the sale of the cargo, and if by the terms of the contract

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it had been agreed to sell the policy, then no doubt the policy would have been assigned so far as it was co-extensive with the interest transferred to the vendees. But there are no terms to that effect in the contract of sale, and the facts are such as to lead to the opposite conclusion. This is not like the case of a floating cargo sold subject to all risks, where it is a part of the contract that the policy shall be assigned over to the purchaser; in such a case there is no hardship on the

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insurers, and it is a great convenience to the buyer, for there is no necessity for him to take out a fresh policy where it is expressly stipulated, or must be taken to be part of the contract of sale that the conditions of the existing policy are to enure for the benefit of the vendee.

Here there was not an absolute sale of the cargo to the plaintiffs in the same sense as in the case I have just referred to; it is true that there was a sale to them,

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and, I think, a transfer of the property, but it is an essential part of the contract that payment was to be made fourteen days after the cargo was ready for delivery, and until the cargo was delivered the real substantial interest would remain in the sellers, who, therefore, would not be likely to wish to part with the policy. The policy then ceases to be operative as soon as the sellers cease to have any interest. After the loss they assign the policy to the plaintiffs, but, inasmuch as before the

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loss their interest had entirely ceased, it is clear that before the assignment the policy had dropped; it follows that the assignment was ineffectual, and the policy is of no avail in the hands of the plaintiffs. Our judgment must, therefore, be for the defendants.

LUSH, J.—I am of the same opinion. It is clear to my mind that the contract

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of sale did not transfer the interest in the policy to the plaintiffs. It is perfectly clear that there are no words to which that effect could possibly be ascribed except the words "shipping documents," and I am of opinion that the words "shipping documents" in this contract could not be taken to include the policy of insurance. When the linseed was delivered to the plaintiffs on board the lighter the policy expired, and the assignment could not afterwards create an interest.

QUAIN, J.—I am of the same opinion. I have always understood it to be settled since the decision in *Powles* v. *Innes* (1) that where the property insured

was transferred the policy would lapse unless it were kept alive for the benefit of the transferee. I cannot here find any words showing that the policy was expressly assigned by the contract of sale, nor does it appear from the terms of the contract that any such assignment was contemplated. There was no agreement to that effect express or implied, and the law is clear that after the interest of the holder of the policy has come to an end a subsequent assignment cannot give an interest to the assignee.

Judgment for defendants.

Solicitors: *Sharp & Ullithorne*; *Courtenay & Croome.*

HOWELL *v.* COUPLAND

[Court of Appeal (Lord Coleridge, C.J., James and Mellish, L.JJ., Baggallay, J.A., and Cleasby, B.), January 18, 1876]

[Reported 1 Q.B.D. 258; 46 L.J.Q.B. 147; 33 L.T. 832; 40 J.P. 276; 24 W.R. 470]

Contract—Frustration—Sale of Goods—Implication of term—Continued existence of thing—Impossibility of performance—Contract to deliver quantity of potatoes of specific crop—Crop destroyed by disease through reasons over which seller had no control.

By a contract in writing the defendant agreed to sell to the plaintiff "200 tons of Regent potatoes, grown on land belonging" to the defendant, at a certain rate per ton payable when the potatoes were taken away. At the time of the making of the contract the defendant had sufficient acres sown to raise the required quantity of potatoes, but before the time for delivery the crop was attacked by a disease which no amount of skill, care, or diligence on the part of the defendant could have prevented, and it was impossible for the defendant to deliver the requisite quantity of potatoes. At the time the disease was discovered the defendant had no other land suitable for sowing other potatoes so as to make up the deficiency. On a claim by the plaintiff for damages for non-delivery.

Held: the contract was not an absolute contract to deliver under all circumstances, but was a contract to deliver a certain quantity of potatoes of a specific crop, and as at the time of delivery such quantity was not forthcoming through reasons over which the defendant had no control, the defendant was exempted from performance of the contract.

Taylor v. *Caldwell* (1) (1863), 3 B. & S. 826, and *Appleby* v. *Myers* (2), (1867), L.R. 2 C.P. 651, applied.

Notes. Explained and Distinguished: *Ashmore* v. *Cox*, [1899] 1 Q.B. 436. Considered: *Nickoll and Knight* v. *Ashton*, [1900–3] All E.R.Rep. 928. Distinguished: *Lebeaupin* v. *Richard Crispin & Co.*, [1920] All E.R.Rep. 353. Explained: *Re Wait* (*Trading as Wait and James*), *The Trustee* v. *Humphries and Bobbett*, [1926] All E.R.Rep. 433. Considered: *Podar Trading Co., Bombay* v. *Francois Tagher, Barcelona*, [1949] 2 All E.R. 62. Referred to: *Clark* v. *Lindsay* (1903), 88 L.T. 198; *Krell* v. *Henry*, [1903] 2 K.B. 740; *Re Hull and Meux*, [1905] 1 K.B. 588; *Re Shipton, Anderson and Harrison*, [1915] 3 K.B. 676; *Horlock* v. *Beal*, [1916–17] All E.R.Rep. 81; *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.*, *The Kingswood*, [1941] 2 All E.R. 165.

As to impossibility of performance of a contract in general, see 8 HALSBURY'S LAWS (3rd Edn.) 178 et seq.; and for cases see 12 DIGEST (Repl.) 414 et seq.

Cases referred to:

(1) *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242.*

(2) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, *5334.*

Also referred to in argument:

Walton v. *Waterhouse* (1672), 2 Wm. Saund. 415 c.

Jones v. *St. John's College, Oxford* (1870), L.R. 6 Q.B. 115; 40 L.J.Q.B. 80; 23 L.T. 803; 19 W.R. 276; 12 Digest (Repl.) 432, *3317.*

Lord Clifford v. *Watts* (1870), L.R. 5 C.P. 577; 40 L.J.C.P. 36; 22 L.T. 717; 18 W.R. 925; 12 Digest (Repl.) 429, *3302.*

Barker v. *Hodgson* (1814), 3 M. & S. 267; 105 E.R. 612; 12 Digest (Repl.) 439, *3347.*

Hall v. *Wright* (1859), E.B. & E. 765; 29 L.J.Q.B. 43; 1 L.T. 230; 6 Jur.N.S. 193; 8 W.R. 160; 120 E.R. 695, Ex. Ch.; 12 Digest (Repl.) 426, *3281.*

Robinson v. *Davison* (1871), L.R. 6 Exch. 269; 40 L.J.Ex. 172; 24 L.T. 755; 19 W.R. 1036; 12 Digest (Repl.) 426, *3278.*

Appeal by the plaintiff from a decision of the Court of Queen's Bench (BLACKBURN, QUAIN and ARCHIBALD, JJ.), reported L.R. 9 Q.B. 462, making absolute a rule to enter the verdict for the defendant in an action tried by BOVILL, C.J., in which the plaintiff, John Howell, claimed damages from the defendant, Robert Coupland, for non-delivery of a quantity of potatoes.

The defendant was a farmer at Whaplode, Lincolnshire, and he had appropriated 68 acres of land at Whaplode, and about 20 acres at Holbeach for the growth of potatoes. In March of the same year the defendant entered into the following contract with the plaintiff who was a potato merchant:

"Memorandum of agreement made this day of , 1872, between Robert Coupland, of Whaplode, and John Howell, of Holbeach, whereby Robert Coupland agrees to sell, and the said John Howell agrees to purchase, 200 tons of Regent potatoes, grown on land belonging to the said Robert Coupland, of Whaplode, at and after the rate of £3 12s. 6d. per ton, to be riddled on a $1\frac{5}{8}$ in. riddle, and delivered at Holbeach Railway Station good and marketable ware during the months of September or October, as the said John Howell may direct, and under his directions. The purchaser to find riddles. And it is further agreed between the said Robert Coupland and the said John Howell that the said potatoes shall be paid for when and as they are taken away."

At the time of making the contract out of the 68 acres in Whaplode, 25 were actually sown with potatoes, and the remaining 43 acres were ready for sowing. The 43 acres were afterwards sown in due course. The whole 68 acres together were amply sufficient in an ordinary season, and in the ordinary course of cultivation, to produce a much larger quantity than 200 tons, the land producing on an average 7 tons to the acre. In July and August, without any default on the part of the defendant, a disease, which no skill or care on the part of the defendant could have prevented, attacked the crop, and caused it to fail, and when the time for taking it up arrived the whole marketable produce of the crop of the lands of the defendant, both in Whaplode and Holbeach, together amounted to no more than 79 tons 8 cwt., and this quantity the defendant delivered to the plaintiff. The rest of the crop had perished from the disease. If the defendant had had other land to plant with potatoes at the time when the disease was discovered, which, in fact, he had not, it would have been too late to sow it. The present action was brought to recover damages for the non-delivery of the residue of the 200 tons, and the verdict at the trial was entered for £432 5s., leave being reserved to the defendant

to move to enter the verdict for him on the ground that he was not liable to deliver the ungrown potatoes.

At the trial before Bovill, C.J., at the Lincoln Spring Assizes, a verdict was found for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him. The defendant subsequently obtained a rule which was made absolute by the Court of Queen's Bench and the plaintiff appealed.

Digby Seymour, Q.C., and *Waddy, Q.C.*, for the plaintiff.
Herschell, Q.C., and *Beasley* for the defendant.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. The contract here is a contract between the plaintiff and the defendant, that the defendant shall sell and the plaintiff shall buy 200 tons of Regent potatoes, grown on land belonging to the defendant in Whaplode, at a certain rate per ton. From the facts found in the case, it appears that at the time of making the contract the defendant had sixty-eight acres ready for potatoes, twenty-five acres had been already sown, the other forty-three acres were afterwards sown, an amount which by ordinary calculation would be enough to raise the stipulated quantity of potatoes. Before the time for delivery it is found that the potato disease had appeared—a disease which it is expressly found no amount of skill, care, or diligence on the part of the defendant could prevent. The crop is attacked by this disease, and by it reduced so low as to make it impossible for the defendant to deliver the requisite quantity of potatoes; and it is also found that at the time the disease was discovered to have made its appearance, the defendant had no other land suitable for the purpose of sowing other potatoes so as to supply, if possible, the deficiency in the quantity contracted to be delivered. Under these circumstances the Court of Queen's Bench have held that the principle of *Taylor* v. *Caldwell* (1) and *Appleby* v. *Myers* (2) applies, and the defendant is excused from the performance of his contract.

It appears to me that the true ground of construction on which this contract should be interpreted, and I believe the ground on which the Court of Queen's Bench have decided, is that by the clear and simple construction of the contract both parties agreed there should be a condition that the potatoes should be or have been in existence at the time named for the performance of the contract. They had been in existence, and had been destroyed by causes over which the defendant had no control, and, therefore, it became impossible for him to perform his contract, and according to the law in such case, as applicable to the condition both parties agreed to be bound by, he is excused. It was not an absolute contract to deliver under all circumstances, but it was a contract to deliver a certain quantity of potatoes of a specific crop, and if at the time of delivery such quantity is not forthcoming through reasons over which the defendant has no control, such condition will exempt the defendant from performance of the contract. I am, therefore, of opinion that the judgment of the Court of Queen's Bench should be affirmed.

JAMES, L.J.—I am of the same opinion, and I think the question was rightly considered in the court below. The question entirely turns upon the construction of the contract; is it a contract including a warranty to deliver the goods which are contracted to be sold? or is it a contract to deliver 200 tons of potatoes out of a specific crop? I am of opinion that it is a contract to deliver 200 tons of potatoes out of a specific crop, and if so, the defendant is excused if by causes over which he has no control he is prevented from delivering.

MELLISH, L.J.—I am of the same opinion. The words of the contract are that

> "Coupland agrees to sell and Howell to purchase 200 tons of Regent potatoes grown on land belonging to Coupland in Whaplode."

That does not mean that the potatoes shall be forthcoming, or that the defendant warrants that they shall be forthcoming at the time fixed for the performance of the contract; it means that the potatoes shall be grown, and then, according to

A the rule of law, and the authority of the Court of Queen's Bench, if he is prevented by the act of God from the further performance of the contract he is excused. No doubt there is this distinction between the present case and others, that here the thing, which is the subject-matter of the contract, is not in existence at the time of making the contract, but, assuming the potatoes to have been full grown at the time of making the contract, and that then the disease had come on B them and destroyed them, it is clear that the performance of the contract is excused, and it can make no difference that the potatoes were not in existence. It is not like a case where no specific goods are to be sold, but here the parties agree to sell and buy specific goods, and if those goods are destroyed by vis major then the party who contracts to deliver is excused. Such is the principle of law as decided by the cases referred to. It would seem also from the fact of sixty-eight acres and C twenty acres being sown that a sufficient proportion of land was appropriated for the purpose.

BAGGALLAY, J.A.—I am of the same opinion.

CLEASBY, B.—I am of the same opinion. I put the case not so much on the ground that by the act of God the defendant is excused from performance of his D contract, as upon the positive contract. There was no absolute contract to deliver, but an agreement to sell a specific crop, to be grown on a particular piece of land, and if the defendant is prevented from performing his part of the contract by circumstances over which he had no control, he is excused. If the goods had existed at the time of making the contract, it is clear he would have been excused, and I see no difference in the fact of their not being in existence at the time of making the contract.

E Solicitors: *Monckton & Co.*, for *Ayliffe*, Holbeach; *Wright, Bonner & Wright*, for *Bonner & Calthrop*, Spalding.

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R. *v.* PRINCE

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Cockburn, C.J., Kelly, C.B., Bramwell, B., Blackburn, Mellor and Lush, JJ., Cleasby, B., Brett, G Grove, Denman, Quain and Archibald, JJ., Pollock and Amphlett, BB., Field and Lindley, JJ.), May 29, June 12, 1875]

[Reported L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 24 W.R. 76; 13 Cox, C.C. 138]

Criminal Law—Abduction—Girl under 16*—Defence—Bona fide and reasonable* H *belief that girl over* 16.

By s. 55 of the Offences against the Person Act, 1861: "Whosoever shall unlawfully take . . . any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour . . ."

I **Held** (BRETT, J., dissentiente): it was no defence to a charge under this section that the defendant believed, bona fide and reasonably, that the girl was older than sixteen.

Notes. Section 55 of the Offences against the Person Act, 1861, has been replaced by s. 20 of the Sexual Offences Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 227), the words "without lawful authority" being substituted for "unlawfully" in the earlier Act.

Distinguished: *R.* v. *Moore* (1877), 13 Cox, C.C. 544. Considered: *R.* v. *Tolson*, [1886–90] All E.R.Rep. 26; *Sherras* v. *de Rutzen*, [1895–9] All E.R.Rep. 1167;

R. v. *Maughan* (1934), 24 Cr. App. Rep. 130. Referred to: *Cundy* v. *Le Cocq*, [1881–5] All E.R.Rep. 412; *Chisholm* v. *Doulton* (1889), 60 L.T. 966; *Derbyshire* v. *Houliston*, [1897] 1 Q.B. 772; *Burrows* v. *Rhodes*, [1895–9] All E.R.Rep. 117; *Hobbs* v. *Winchester Corpn.*, [1910] 2 K.B. 471; *R.* v. *Wheat*, *R.* v. *Stocks*, [1921] All E.R.Rep. 602; *R.* v. *Denyer*, [1926] 2 K.B. 258; *R.* v. *St. Margaret's Trust, Ltd.*, [1958] 2 All E.R. 289.

As to abduction, see 10 Halsbury's Laws (3rd Edn.) 756–759; and for cases relating to girls under 16, see 15 Digest (Repl.) 1030–1032.

Cases referred to:

(1) *R.* v. *Robins* (1844), 1 Car. & Kir. 456; 15 Digest (Repl.) 1031, *10,117*.

(2) *R.* v. *Olifier* (1866), 10 Cox, C.C. 402; 15 Digest (Repl.) 1030, *10,116*.

(3) *R.* v. *Forbes and Webb* (1865), 10 Cox, C.C. 362; 15 Digest (Repl.) 854, *8220*.

(4) *R.* v. *Sleep* (1861), Le. & Ca. 44; 30 L.J.M.C. 170; 4 L.T. 525; 25 J.P. 532; 7 Jur.N.S. 979; 9 W.R. 709; 8 Cox, C.C. 472, C.C.R.; 15 Digest (Repl.) 863, *8295*.

(5) *R.* v. *Mycock* (1871), 12 Cox, C.C. 28; 15 Digest (Repl.) 1031, *10,127*.

(6) *R.* v. *Booth* (1872), 12 Cox, C.C. 231; 15 Digest (Repl.) 1032, *10,136*.

(7) *R.* v. *Greenhill* (1836), 4 Ad. & El. 624; 6 Nev. & M.K.B. 244; 111 E.R. 922; 28 Digest (Repl.) 621, *1240*.

(8) *R.* v. *Howes* (1860), 3 E. & E. 332; 30 L.J.M.C. 47; 25 J.P. 23; 7 Jur.N.S. 22; 121 E.R. 467; sub nom. *Ex parte Barford*, 3 L.T. 467; 9 W.R. 99; 8 Cox, C.C. 405; 15 Digest (Repl.) 1028, *10,095*.

(9) *Ratcliff's Case* (1592), 3 Co. Rep. 37a; 76 E.R. 713; 28 Digest (Repl.) 652, *1461*.

(10) *Lady Fulwood's Case* (1638), Cro. Car. 484.

(11) *R.* v. *Marsh* (1824), 2 B. & C. 717; 4 Dow. & Ry.K.B. 260; 2 Dow. & Ry.M.C. 182; 107 E.R. 550; 14 Digest (Repl.) 37, *73*.

(12) *Lee* v. *Simpson* (1847), 3 C.B. 871; 4 Dow. & L. 666; 16 L.J.C.P. 105; 8 L.T.O.S. 340; 11 Jur. 127; 136 E.R. 349; 13 Digest (Repl.) 118, *592*.

(13) *Morden* v. *Porter* (1860), 7 C.B.N.S. 641; 29 L.J.M.C. 213; 1 L.T. 403; 25 J.P. 263; 8 W.R. 262; 141 E.R. 967; 25 Digest (Repl.) 387, *145*.

(14) *R.* v. *Hicklin* (1868), L.R. 3 Q.B. 360; 37 L.J.M.C. 89; 16 W.R. 801; 11 Cox, C.C. 19; sub nom. *R.* v. *Wolverhampton* (*Recorder*), 18 L.T. 395; sub nom. *Scott* v. *Wolverhampton Justices*, 32 J.P. 533; 15 Digest (Repl.) 895, *8625*.

(15) *Fowler* v. *Padget* (1798), 7 Term Rep. 509; 101 E.R. 1103; 4 Digest (Repl.) 78, *668*.

(16) *Hearne* v. *Garton* (1859), 2 E. & E. 66; 28 L.J.M.C. 216; 33 L.T.O.S. 256; 23 J.P. 693; 5 Jur.N.S. 648; 7 W.R. 566; 121 E.R. 26; 14 Digest (Repl.) 37, *76*.

(17) *Taylor* v. *Newman* (1863), 4 B. & S. 89; 2 New Rep. 275; 32 L.J.M.C. 186; 8 L.T. 424; 27 J.P. 502; 11 W.R. 752; 9 Cox, C.C. 314; 122 E.R. 393; 2 Digest (Repl.) 302, *95*.

(18) *Buckmaster* v. *Reynolds* (1862), 13 C.B.N.S. 62; 143 E.R. 25; 33 Digest (Repl.) 324, *1474*.

(19) *R.* v. *Hibbert* (1869), L.R. 1 C.C.R. 184; 38 L.J.M.C. 61; 19 L.T. 799; 33 J.P. 243; 17 W.R. 384; 11 Cox, C.C. 246, C.C.R.; 15 Digest (Repl.) 1031, *10,131*.

(20) *R.* v. *Green* (1862), 3 F. & F. 274; 15 Digest (Repl.) 1031, *10,130*.

(21) *R.* v. *Tinkler* (1859), 1 F. & F. 513; 15 Digest (Repl.) 1032, *10,137*.

(22) *R.* v. *Cohen* (1858), 8 Cox, C.C. 41; 15 Digest (Repl.) 863, *8294*.

(23) *R.* v. *Turner and Reader* (1830), 1 Mood.C.C. 239; 1 Lew.C.C. 9; sub nom. *R.* v. *Reader*, 4 C. & P. 245; 2 Man. & Ry.M.C. 297, C.C.R.; 15 Digest (Repl.) 1207, *12,276*.

(24) *R.* v. *Ryan and Connor* (1837), 2 Mood.C.C. 15.

A Also referred to in argument:

R. v. *Kipps* (1850), 4 Cox, C.C. 167; 15 Digest (Repl.) 1030, *10,112.*

R. v. *Meadows* (1844), 1 Car. & Kir. 399; 15 Digest (Repl.) 1030, *10,111.*

R. v. *Timmins* (1860), Bell, C.C. 276; 30 L.J.M.C. 45; 3 L.T. 337; 25 J.P. 453; 6 Jur.N.S. 1309; 9 W.R. 36; 8 Cox, C.C. 401, C.C.R.; 15 Digest (Repl.) 1031, *10,125.*

B *A.-G.* v. *Lockwood* (1842), 9 M. & W. 378; 152 E.R. 160; affirmed sub nom. *Lockwood* v. *A.-G.*, 10 M. & W. 464; 152 E.R. 552, Ex. Ch.; 39 Digest 235, *103.*

Case Reserved for the opinion of the court by DENMAN, J.

At the assizes for Surrey held at Kingston-on-Thames on Mar. 24, 1875, Henry Prince was tried before DENMAN, J., on the charge of having unlawfully taken one C Annie Phillips, an unmarried girl being under the age of sixteen years, out of the possession, and against the will of her father, contrary to s. 55 of the Offences against the Person Act, 1861. He was found guilty, but judgment was respited in order that the opinion of the Court for Crown Cases Reserved might be taken. All the facts necessary prima facie to support a conviction existed and were found by the jury to have existed, but the defendant pleaded in defence that the girl D Annie Phillips, though proved by her father to be fourteen years old on April 6, 1875, looked very much older than sixteen, and the jury found upon reasonable evidence that before the defendant took her away she had told him that she was eighteen, that the defendant bona fide believed that statement, and that such belief was reasonable. If the court were of the opinion that under those circumstances a conviction was right, the defendant was to appear for judgment at the next assizes E for Surrey; otherwise the conviction was to be quashed: see *R.* v. *Robins* (1); *R.* v. *Olifier* (2).

No counsel appeared for the prisoner.

Lilley for the prosecution.

Cur. adv. vult.

F June 12, 1875. **BRAMWELL, B.,** read the following judgment, to which KELLY, C.B., CLEASBY, B., GROVE, J., POLLOCK, B., and AMPHLETT, B., assented.—The question in the case depends on the construction of the statute under which the prisoner is indicted. Section 55 of the Offences against the Person Act, 1861, enacts that:

G "Whosoever shall unlawfully take . . . any unmarried girl being under the age of sixteen years, out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanour . . ."

The word "unlawfully" means "not lawfully," "otherwise than lawfully" "without lawful cause"—such as would exist for instance on a taking by a police officer H on a charge of felony or a taking by a father of his child from her school. The statute, therefore, may be read thus: "Whosoever shall take etc. without lawful cause." The prisoner had no such cause, and consequently except in so far as it helps the construction of the statute, the word "unlawfully" may, in the present case, be left out, and then the question is: Has the prisoner taken an unmarried girl under the age of sixteen out of the possession of and against the I will of her father? In fact he has; but it is said not within the meaning of the statute, and that that must be read as though the word "knowingly" or some equivalent word was in.

The reason given is that as a rule mens rea is necessary to make any act a crime or offence, and that, if the facts necessary to constitute an offence are not known to the alleged offender, there can be no mens rea. I have used the word "knowingly," but it will perhaps be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner

did not say to himself: "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen; and that though, if he had done what he did, knowing or believing neither way, but hazarding it, there would be a mens rea, there is not one when he believes he knows that she is over sixteen. It is impossible to suppose that a person taking a girl out of her father's possession against his will is guilty of no offence within the statute unless he, the taker, knows she is under sixteen—that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be then that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," etc. Those words are not there, and the question is whether we are bound to construe the statute as though they were, on account of the rule that mens rea is necessary to make an act a crime.

I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons. The act forbidden is wrong in itself, if without lawful cause. I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female, with a good motive. Nevertheless, though there may be cases which are not immoral in one sense, I say that the act forbidden is wrong. Let us remember what is the case supposed by the statute. It supposes that there is a girl—it does not say a woman, but a girl something between a child and a woman—it supposes she is in the possession of her father or mother, or other person having lawful care and charge of her, and it supposes there is a taking, and that that taking is against the will of the person in whose possession she is. It is, then, a taking of a girl in the possession of someone, against his will. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of the taker, whether or not the girl was under sixteen. I do not say that taking a woman of fifty from her brother's or even father's house is wrong. She is at an age when she has a right to choose for herself; she is not a girl, nor of such tender age that she can be said to be in the possession of or under the care or in the charge of anyone. If I am asked where I draw the line, I answer at when the female is no longer a girl in anyone's possession. But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, and can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if anyone does this wrong act he does it at the risk of the girl turning out to be under sixteen. This opinion gives full scope to the doctrine of mens rea. If the taker believed he had the father's consent, though wrongly, he would have no mens rea. So if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute, an act which, if he knew she was in the possession and care or charge of anyone, he would know was a crime or not according as she was under sixteen or not. He would know he was doing an act wrong itself, whatever was his intention, if done without lawful cause. In addition to these considerations one may add that the statute does use the word "unlawfully," and does not use the words "knowingly or not believing to the contrary." If the question was whether his act was unlawful there would be no difficulty as it clearly was not lawful.

This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute. Section 50 makes it a felony unlawfully and carnally to know a girl under the age of ten. Section 51 enacts (when she is above ten and under twelve) that unlawfully and carnally to know her is a misdemeanour. Can it be supposed in the former case, a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve,

A and so that he had only committed a misdemeanour, or that he believed her over twelve, and so had committed no offence at all; or that in a case under s. 51, he could claim to be acquitted, because he believed her over twelve? In both cases the act is intrinsically wrong. For the statute says if "unlawfully" done. The act done with mens rea is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would B be mischievous to hold otherwise. So s. 56 by which whoever shall take away any child under fourteen, with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say I did take away the child to steal its clothes, but I believed it to be over fourteen? If not, then neither could he say I did take the child with intent to deprive the parent of its possession, but I believed it over C fourteen. Because if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where intent is to take the child out of the possession of the parent. If these words cannot be introduced in s. 56, why can they be in s. 55?

The same principle applies in these cases. In *R.* v. *Forbes and Webb* (3) a man was held liable for assaulting a police officer in the execution of his duty, D though he did not know he was a police officer. Why? because the act was wrong in itself. So also in the case of burglary; could a person charged claim an acquittal on the ground that he believed it was past 6 a.m. when he entered, or in housebreaking that he did not know the place broken into was a house. As to the case of marine stores it was held properly that there was no mens rea where the person charged with the possession of naval stores with the Admiralty mark did not E know the stores he had bore the mark: *R.* v. *Sleep* (4); because there is nothing prima facie wrong or immoral in having naval stores unless they are so marked. But suppose someone told him there was a mark, and he had said he would chance whether or not it was the Admiralty mark. So in the case of the carrier with game in his possession, unless he knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitriol senders F there was nothing wrong in sending such packages as were sent unless they contained vitriol: *Hearne* v. *Garton* (16). Take also the case of libel where the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong. He would not be entitled to be acquitted, because there was no mens rea. Why? Because the act of publishing written defamation is wrong where there is no lawful cause. Further, there have been four decisions G on this statute in favour of the construction I contend for. I say it is a question of construction of this particular statute no doubt bringing thereto the common law doctrine of mens rea being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty, and equally impossible when he believes, but erroneously, that she is old enough for H him to do a wrong act with safety. I think the conviction should be affirmed.

BLACKBURN, J., read the following judgment to which COCKBURN, C.J., MELLOR, QUAIN, LUSH, ARCHIBALD, FIELD and LINDLEY, JJ., assented.—In this case we must take it as found by the jury that the prisoner took an unmarried girl out of the possession, and against the will of her father, and that the girl was in fact I under the age of sixteen, but that the prisoner bona fide, and on reasonable grounds, believed that she was above sixteen, viz., eighteen years old. No question arises as to what constitutes a taking out of the possession of her father, nor as to what circumstances might justify such taking as not being unlawful, nor as to how far an honest though mistaken belief that such circumstances as would justify the taking existed, might form an excuse, for as the Case is reserved we must take it as proved that the prisoner knew that the girl was in the possession of her father, and that he took her knowing that he trespassed on the father's rights and had no colour of excuse for so doing.

The question, therefore, is reduced to whether the words in s. 55 of the Offences against the Person Act, 1861, that whosoever shall unlawfully take "any unmarried girl being under the age of sixteen, out of the possession of her father" are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are contained in the statute, nor is there the word "maliciously," "knowingly," or any other word used that can be said to involve a similar meaning. The argument in favour of the prisoner must, therefore, entirely proceed on the ground that in general a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime the intention of the legislature should be presumed to be to include "knowingly" in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not inquire at present whether the canon of construction goes quite so far as above stated, for we are of opinion that the intention of the legislature sufficiently appears to have been to punish the abductor unless the girl, in fact, was of such an age as to make her consent an excuse irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen.

The section in question is one of a series of enactments beginning with s. 50 forming a code for the protection of women and the guardians of young women. These enactments are taken with scarcely any alteration from the repealed statute. the Offences against the Person Act, 1828, which had collected them into a code from a variety of old statutes all repealed by it. Section 50 enacts that:

> "Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years, shall be guilty of felony."

By s. 51:

> "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanour."

It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl in reality not quite ten years old, but whom he, on reasonable grounds, believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour because she was, in fact, not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was, in fact, old enough to give a valid consent. The man who has connection with a child relying on her consent does it at his peril if she is below the statutable age.

Section 55, on which the present case arises, uses precisely the same words as those in ss. 50 and 51, and must be construed in the same way, and if we refer to the repealed statute 4 & 5 Phil. & Mary, c. 8 [Abduction Act, 1557], from s. 3 of which the words in s. 55 are taken with very little alteration, it strengthens the inference that such was the intention of the legislature. The preamble states as the mischief aimed at, that female children, heiresses, and others having expectations, were, unawares of their friends, brought to contract marriages of disparagement "to the great heaviness of their friends," and then to remedy this enacts by the first section that it shall not be lawful for anyone to take an unmarried girl being under sixteen out of the custody of her father or the person to whom he either, by will or by act in his lifetime, gives the custody, unless it be bona fide done by or for the master or mistress of such child, or the guardian in chivalry or in socage of such child. This recognises a legal right to the possession of the child depending on the real age of the child, and not on what appears. The object

of the legislature, being as it appears by the preamble to protect this legal right to the possession, would be baffled if it was an excuse that the person guilty of the taking thought the child above sixteen. The words "unlawfully take" as used in s. 3 of 4 & 5 Phil. & Mary, c. 8 [Abduction Act, 1557], mean without the authority of the master, or mistress, or guardian mentioned in the immediately preceding section.

There is not much authority on the subject, but it is all in favour of this view. In *R.* v. *Robins* (1) ATCHERLY, SERJT., then acting as a judge of assize, so ruled (apparently though the report leaves it a little ambiguous) with the approval of TINDAL, C.J. In *R.* v. *Olifier* (2) BRAMWELL, B., so ruled at the Central Criminal Court, apparently arriving at the conclusion independently of *R.* v. *Robins* (1). In *R.* v. *Mycock* (5) WILLES, J., without *R.* v. *Olifier* (2) being brought to his notice, acted on *R.* v. *Robins* (1), saying that a person who took a young woman from the custody of her father, must take the consequences if she proved under age. And QUAIN, J., followed this decision in *R.* v. *Booth* (6). We think those rulings were right, and consequently that the conviction in the present case should stand.

BRETT, J.—In this case the prisoner was indicted under s. 55 of the Offences against the Person Act, 1861, for that he did unlawfully take an unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father. According to the statement of the Case, we are to assume that it was proved on the trial that he did take an unmarried girl out of the possession and against the will of her father, and that when he did so the girl was under the age of sixteen years. But the jury found that the girl went with the prisoner willingly, that she told the prisoner that she was eighteen years of age, that he believed that she was eighteen years of age, and that he had reasonable grounds for so believing.

The question is whether upon such proof and such findings of the jury, the prisoner ought or ought not, in point of law, to be pronounced guilty of the offence with which he was charged. He, in fact, did each and everything which is enumerated in the statute as constituting the offence to be punished, if what he did was done unlawfully within the meaning of the statute. If what he did was not unlawful within the meaning of the statute, it seems impossible to say that he ought to be convicted. The question, therefore, is whether the findings of the jury, which are in favour of the prisoner, prevent what he is proved to have done from being unlawful within the meaning of the statute. It cannot, as it seems to me, properly be assumed that what he did was unlawful within the meaning of the statute, for that is the very question to be determined. On the one side it is said that the prisoner is proved to have done every particular thing which is enumerated in the Act as constituting the offence to be punished, and that there is no legal justification for what he did, and, therefore, that it must be held, as matter of law, that what he did was unlawful within the meaning of the statute, and that the statute was, therefore, satisfied, and the crime completed. On the other side, it is urged, that if the facts had been as the prisoner believed them to be, and as by the findings of the jury he might reasonably believe them to be, and he was deceived into believing them to be, he would have been guilty of no criminal offence at all, and, therefore, that what he did was not criminally unlawful within the meaning of the criminal statute under which he was indicted.

It has been said that, even if the facts had been as the prisoner believed them to be, he would still have been doing a wrongful act. The first point, therefore, to be considered would seem to be what would have been the legal position of the prisoner, if the facts had been, as he believed them to be, that is to say: What is the legal position of a man who, without force, takes a girl of more than sixteen years of age, but less than twenty-one years of age, out of the possession of her father, and against his will? The statute 4 & 5 Phil. & Mary, c. 8 [Abduction Act, 1557] has been said to recognise the legal right of a father to the possession

of an unmarried daughter up to the age of sixteen. The statute 12 Car. 2, c. 24 [Tenures Abolition Act, 1660], seems to recognise the right of a father to such possession up to the age of twenty-one. MR. HARGRAVE in notes 12 and 15 to Co. LITT. 88 b, seems to deduce a right in the father to possession up to the age of twenty-one from those two statutes, and that such right is to be called in law a right jure naturæ. If the father's right be infringed, he may apply for a habeas corpus. When the child is produced in obedience to such writ, issued upon the application of a father, if the child be under twenty-one, the general rule is that

> "if [the child] be of an age to exercise a choice, the court leaves him to elect where he will go. If he be not of that age, and a want of discretion would only expose him to dangers or seductions, the court must make an order for his being placed in the proper custody . . . and that undoubtedly is the custody of the father": LORD DENMAN, C.J., in *R.* v. *Greenhill* (7), 4 Ad. & El. at p. 640.

But if the child be a female under sixteen, the court will order it to be handed over to the father, in the absence of certain objections to his custody, even though the child object to return to the father. If the child be between sixteen and twenty-one, and refuse to return to the father, the court, even though the child be a female, gives to the child the election as to the custody in which it will be.

In *R.* v. *Howes* (8) COCKBURN, C.J., says (3 E. & E. at pp. 336, 337):

> "Now the cases which have been decided on this subject show that, although a father is entitled to the custody of his children till they attain the age of twenty-one, this court will not grant a habeas corpus to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion, for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide which we may safely follow in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue, and short of which such a child has no discretion to consent to leaving him."

But if a man takes out of her father's possession without force, and with her consent, a daughter between sixteen and twenty-one, the father would seem to have no legal remedy for such taking. It may be that the father, if present at the taking, might resist such taking by necessary force, so that to an action for assault by the man he might plead a justification. But for a mere taking, without seduction, there is no action which the father could maintain. There never was a writ applicable to such a cause of action. The writ of "ravishment of ward" was only to such as had the right to the marriage of the infant, and was, therefore, only applicable where the infant was an heir to property, whose marriage was, therefore, valuable to the guardian: see *Ratcliff's Case* (9). No such action now exists, and if it did, it would not be applicable to any female child, at all events, not to any who was heir apparent. Neither can a man who, with her consent, and without force, takes a daughter, who is more than sixteen years old, but less than twenty-one, out of her father's possession or custody, be indicted for such taking. There never has been such an indictment.

The statute 3 Hen. 7, c. 2 [Abduction of Women Act, 1487], was enacted against

> "the taking any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, etc., be felony."

It was held in *Lady Fulwood's Case* (10), that the indictment must further charge that the defendant carried away the woman with intent to marry or defile her. Two things, therefore, were necessary which are not applicable to the point now under discussion, namely, that the taking should be against the will of the person

taken, and that there should be the intent to marry or defile. The statute 4 & 5 Phil. & Mary, c. 8 [Abduction Act, 1557], deals with the taking out of or from the possession, custody, or government of the father, etc., any maid or woman child, unmarried, being under the age of sixteen years. For a mere unlawful taking the punishment is imprisonment for two years; for a taking and marriage five years, and the girl if she be more than twelve years old, and consents to the marriage, forfeits her inheritance. The Offences against the Person Act, 1861, s. 19, is enacted against "the taking of a woman against her will with intent to marry or defile her," etc. The same statute, s. 20, is as to an unmarried girl being under the age of sixteen years. It follows from this review that if the facts had been as the prisoner, according to the finding of the jury believed them to be, he would have done no act which has ever been a criminal offence in England; he would have done no act in respect of which any civil action could have ever been maintained against him; he would have done no act for which, if done in the absence of the father, and done with the continuing consent of the girl, the father could have had any legal remedy.

We have, then, next to consider the terms of the statute, and what is the meaning in it of the word "unlawfully." The usual system of framing criminal Acts has been to specify each and every act intended to be subjected to any punishment (CRIMINAL LAW CONSOLIDATION ACTS, by GREAVES, Introduction, p. xli), and then in some way to declare whether the offence is to be considered as a felony or as a misdemeanour, and then to enact the punishment. It seems obvious that it is the prohibited acts which constitute the offence, and that the phraseology which indicates the class of the offence does not alter or affect the facts, or the necessary proof of those facts, which constitute the offence. There are several usual forms of criminal enactment. "If anyone shall, with such or such an intent, do such and such acts, he shall be guilty of felony, or misdemeanour, as the case may be." Whether the offence is declared to be a felony or a misdemeanour depends upon the view of the legislature as to its heinousness. But the class in which it is placed does not alter the proof requisite to support a charge of being guilty of it. Under such a form of enactment there must be proof that the acts were done, and done with the specified intent. Other forms are: "If anyone shall feloniously do such and such acts, he shall be liable to penal servitude," etc., or "if anyone shall unlawfully do such and such acts, he shall be liable to imprisonment," etc. The first of these forms makes the offence a felony by the use of the word "feloniously"; the second makes the offence a misdemeanour by the use of the word "unlawfully." The words are used to declare the class of the offence; but they denote also a part of that which constitutes the offence. They denote that which is equivalent to, though not the same as, the specific intent mentioned in the first form to which allusion has been made. Besides denoting the class of the offence, they denote that something more must be proved than merely that the prisoner did the prohibited acts. They do not necessarily denote that evidence need in the first instance be given of more than that the prisoner did the prohibited acts; but they do denote that the jury must find, as matter of ultimate proof, more than that the prisoner did the prohibited acts.

What is it that the jury must be satisfied is proved beyond merely that the prisoner did the prohibited acts? It is suggested that they must be satisfied that the prisoner did the acts "with a criminal mind"; that there was mens rea. The true meaning of that phrase is to be discussed hereafter. If it be true that this must be proved, the only difference between the second form and the first form of enactment is that in the first the intent is specified, but in the second it is left generally as a criminal state of mind. As between the two second forms the evidence either direct or inferential to prove the criminal state of mind must be the same. The proof of the state of mind is not altered or affected by the class in which the offence is placed.

Another common form of enactment is: "If any person knowingly, wilfully, and maliciously do such or such acts, he shall be guilty of felony"; or "If any person

knowingly and wilfully do such or such acts he shall be guilty of misdemeanour"; or "if any person knowingly, wilfully, and feloniously do such or such acts, he shall be liable," etc.; or "if he knowingly and unlawfully do such and such acts, he shall be liable," etc. The same explanation is to be given of all these forms as between each other as before. They are mere differences in form. And though they be all, or though several of them be in one consolidating statute, they are not to be construed by contrast.

> "If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was re-written; on the contrary, each contains enactments taken from different Acts passed at different times, and with different views, and frequently varying from each other in phraseology, and for the reasons stated in the introduction, these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout": GREAVES ON CRIMINAL LAW CONSOLIDATION ACTS, p. 3.

I have said that as between each other the same explanation is to be given of these latter forms of enactments as of the former mentioned in this judgment. But as between these latter and the former forms there is the introduction in the latter of such words as knowingly, wilfully, maliciously. Wilfully is more generally applied when the prohibited acts are in their natural consequences, not necessarily or very probably, noxious to the public interest, or to individuals, so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a prima facie case, than evidence that the prisoner did the prohibited acts. So as to the word "maliciously." It is used where the prohibited acts may or may not be such as in themselves import, prima facie, a malicious mind. In the same way the word "knowingly" is used where the noxious character of the prohibited acts depends upon a knowledge in the prisoner of their noxious effect, other than the mere knowledge that he is doing the acts; the presence of the word calls for more evidence on the part of the prosecution. But the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury, that the mens rea to be prima facie inferred from his doing the prohibited acts, did not in fact exist.

In *R.* v. *Marsh* (11) the measure of the effect of the presence in the enactment of the word "knowingly," is explained. The information and conviction were against a carrier for having game in his possession, contrary to the statute 5 Anne, c. 14, which declared

> "that any carrier having game in his possession is guilty of an offence, unless it be sent by a qualified person."

The only evidence given was that the defendant was a carrier, and that he had game in his wagon on the road. It was objected that there was no evidence that the defendant knew of the presence of the game, or that the person who sent it was not a qualified person. The judges held that there was sufficient prima facie evidence, and that it was not rebutted by the defendant by sufficient proof on his part of the ignorance suggested on his behalf. The judgments clearly import that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute. In other words,

A that its presence or absence in the statute, only alters the burden of proof. BAYLEY, J., said (2 B. & C. at p. 722):

> "Then, as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecution; but under this enactment the party charged must show
B a degree of ignorance sufficient to excuse him. Here there was prima facie evidence that the game was in his possession as carrier. Then it lay on the defendant to rebut that evidence."

LITTLEDALE, J., said (ibid, at pp. 723, 724):

> "The game was found in his wagon employed in the course of his business as a carrier. That raises a presumption prima facie that he knew it, and that
C is not rebutted by the evidence given on the part of the defendant."

From these considerations of the forms of criminal enactments, it would seem that the ultimate proof necessary to authorise a conviction is not altered by the presence or absence of the word "knowingly," though by its presence or absence the burden of proof is altered; and it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind or mens rea in every
D offence really charged as a crime. In some enactments, or common law maxims of crime, and, therefore, in the indictments charging the committal of those crimes, the name of the crime imports that a mens rea must be proved, as in murder, burglary, etc. In some the mens rea is contained in the specific enactment as to the intent, which is made a part of the crime. In some the word "feloniously" is used, and in such cases it has never been doubted but that a felonious mind must
E ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanour, the word "unlawfully" is used, instead of the word "feloniously." What reason is there why in like manner a criminal mind or mens rea must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed that in some cases the proof of the committal of the acts may prima facie, either by reason of
F their own nature, or by reason of the form of the statute, import the proof of the mens rea. But even in those cases it is open to the prisoner to rebut the prima facie evidence, so that if in the end the jury are satisfied that there was no criminal mind or mens rea there cannot be a conviction in England for that which is by the law considered to be a crime.

There are enactments which by their form seem to constitute the prohibited acts
G into crimes, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a mens rea. Such are the cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of the statutes passed to protect the revenue. But the decisions have been based upon the judicial declaration that the enactments do not constitute the
H prohibited acts into crime, or offences against the Crown, but only prohibit them for the purpose of protecting the individual interests of individual persons, or of the revenue. Thus in *Lee* v. *Simpson* (12), in an action for penalties for the representation of a dramatic piece, it was held that it was not necessary to show that the defendant knowingly invaded the plaintiff's right. But the reason of the decision given by WILDE, C.J. (3 C.B. at p. 883), is:

I

> "The object of the legislature was to protect authors against the piratical invasion of their rights. In the sense of having committed an offence against the Act, of having done a thing that is prohibited, the defendant is an offender. But the plaintiff's rights do not depend upon the innocence or guilt of the defendant."

So the decision in *Morden* v. *Porter* (13) seems to be made to turn upon the view that the statute was passed in order to protect the individual property of the landlord in game reserved to him by his lease against that which is made

a statutory trespass against him, although his land is in the occupation of his tenant. There are other cases in which the ground of decision is that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent, which is a part of every crime. Such is the case of the possession and distribution of obscene books. If a man possesses them and distributes them, it is a necessary inference that he must have intended that their first effect must be that which is prohibited by statute, and that he cannot protect himself by showing that his ultimate object or secondary intent was not immoral: *R.* v. *Hicklin* (14). This and similar decisions go rather to show what is mens rea than to show whether there can or cannot be a conviction for crime proper without mens rea.

As to that last question, it has become very necessary to examine the authorities. In BLACKSTONE'S COMMENTARIES, by STEPHEN (2nd Edn.), vol. 4, book vi., OF CRIMES, p. 98, it is said:

> "And as a vicious will, without a vicious act, is no civil crime, so, on the other hand, an unwarrantable act without a vicious will, is no crime at all. So that to constitute a crime against human laws there must be—first, a vicious will, and secondly, an unlawful act, consequent upon such vicious will. Now, there are three cases in which the will does not join with the act—first, where there is a defect of understanding, etc.; secondly, where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it."

And at p. 105:

> "Ignorance or mistake is another defect of will, when a man intending to do a lawful act does that which is unlawful. For here the deed and the will, acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder."

In *Fowler* v. *Padget* (15), the jury found that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors; but that delay did actually happen to some creditors. LORD KENYON said (7 Term Rep. at p. 514):

> "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender, but it is a principle of natural justice and of our law, that actus non facit reum, nisi mens sit rea. The interest and the act must both concur to constitute the crime."

Again:

> "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for."

In *Hearne* v. *Garton* (16), the respondents were charged upon an information for having sent oil of vitriol by the Great Western Railway without marking or stating the nature of the goods. By the Great Western Railway Act, 1835 [a private Act], s. 168, every person who shall send, or cause to be sent by railway any oil of vitriol, shall distinctly mark or state the nature of such goods on penalty of being fined or imprisoned. By s. 206, such penalty is recoverable in a summary way before justices, with power to imprison, etc. The respondents had sent oil of vitriol unmarked, but the justices found that there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly

described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. It must be observed in that case, as in the present, the respondents did the prohibited acts, and that in that case as in this, it was found as the ultimate proof that they were deceived into the belief of a different and non-criminal state of facts, and had used all proper diligence. The case is stronger perhaps than the present by reason of the word "unlawfully" being absent from that statute. The court upheld the decision of the magistrates, holding that the statute made the doing of the prohibited acts a crime, and, therefore, that there must be a criminal mind, which there was not. LORD CAMPBELL, C.J., said (2 E. & E. at p. 74):

> "As to the latter reason, I think the justices were perfectly right; actus non facit reum, nisi mens sit rea. The act with which the respondents were charged is an offence created by statute, for which the person committing it is liable to a penalty or to imprisonment. Not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised on them . . . I am inclined to think they were civilly liable . . ."

ERLE, J., said (ibid. at pp. 75, 76):

> "I was inclined to think, at first, that the provision was merely protective, but if it create a criminal offence, which I am not prepared to deny, then the mere sending by the respondents, without a guilty knowledge on their part, would not render them criminally liable; although as they took Nicholas's word for the contents of the parcels . . . they would be civilly liable . . ."

In *Taylor* v. *Newman* (17) the information was under s. 23 of the Larceny Act, 1861, which provides: "Whosoever shall unlawfully and wilfully kill . . . any pigeon," etc. The appellant shot on his farm pigeons belonging to a neighbour. The justices convicted on the ground that the appellant was not justified by law in killing the pigeons, and, therefore, that the killing was unlawful. In other words, they held that the only meaning of "unlawful," in the statute, was without legal justification. The court set aside the conviction, MELLOR, J., saying (4 B. & S. at p. 94):

> "I think that [the statute] was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right."

In *Buckmaster* v. *Reynolds* (18), an information was laid for unlawfully, by a certain contrivance, attempting to obstruct or prevent the purposes of an election of a vestry. The evidence was that the defendant did obstruct the election because he forced himself and others into the room before eight o'clock, believing that eight o'clock was past. The question asked was whether an intentional obstruction by actual violence was an offence, etc. This question the court answered in the affirmative, so that there, as here, the defendant had done the prohibited acts.

But ERLE, J., continued:

> "I accompany this statement [i.e., the answer to the question] by a statement that upon the facts set forth, I am unable to see that the magistrate has come to a wrong conclusion. A man cannot be said to be guilty of a delict unless, to some extent, his mind goes with the act. Here it seems that the respondent acted on the belief that he had a right to enter the room, and that he had no intention to do a wrongful act."

In *R.* v. *Hibbert* (19) the prisoner was indicted under the section now in question. The girl, who lived with her father and mother, left her home in company with another girl to go to a Sunday school. The prisoner met the two girls, and induced them to go to Manchester. At Manchester he took them to a public house, and there seduced the girl in question, who was under sixteen. The prisoner made

no inquiry, and did not know who the girl was or whether she had a father or mother living or not, but he had no reason to, and did not believe, that she was a girl of the town. The jury found the prisoner guilty, and LUSH, J., reserved the case. In the Court for Crown Cases Reserved, BOVILL, C.J., CHANNELL and PIGOTT, BB., BYLES and LUSH, JJ., quashed the conviction. BOVILL, C.J., said (L.R. 1 C.C.R. at p. 185):

"In the present case there is no statement of any finding of fact that the prisoner knew, or had reason to believe, that the girl was under the lawful care or charge of her father or mother, or any other person. In the absence of any finding of fact on this point the conviction cannot be supported."

This case was founded on *R.* v. *Green* (20) before MARTIN, B. The girl there was under fourteen, and lived with her father, a fisherman, at Southend. The prisoners saw her in the street by herself, and induced her to go with them; they took her to a lonely house, and there Green had criminal intercourse with her. MARTIN, B., directed an acquittal. He said (3 F. & F. at pp. 274, 275):

"There must be a taking out of the possession of the father. Here the prisoners picked up the girl in the streets, and for anything that appeared they might not have known that the girl had a father. The girl was not taken out of the possession of anyone. The prisoners no doubt had done a very immoral, but the question was whether they had committed an illegal, act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offence."

In each of these cases the girl was surely in the legal possession of her father. The mere fact of her being in the street at the time could not possibly prevent her from being in the possession of her father. Everything, therefore, prohibited was done by the prisoner in fact. But in each case the ignorance of facts was held to prevent the case from being the crime to be punished.

In *R.* v. *Tinkler* (21), in a case under this section, COCKBURN, C.J., charged the jury thus (1 F. & F. at p. 514):

"It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes's custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise, which he alleged he had made to her father, and that he did not suppose that he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal."

The jury found the prisoner Not Guilty. In *R.* v. *Sleep* (4), the prisoner had possession of government stores, some of which were marked with the broad arrow. The jury, in answer to a question whether the prisoner knew that the copper, or any part of it, was marked, answered: "We have not sufficient evidence before us to show that he knew it." The Court for Crown Cases Reserved held that the prisoner could not be convicted. COCKBURN, C.J., said (8 Cox, C.C. at pp. 477, 478):

"Actus non facit reum, nisi mens sit rea, is the foundation of all criminal justice . . . The ordinary principle that there must be a guilty mind to constitute a guilty act, applies to this case, and must be imported into this statute, as it was held in *R.* v. *Cohen* (22), where the conclusion of the law was stated by HILL, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but this must be imported into the statute."

POLLOCK, C.B., MARTIN, CROMPTON, and WILLES, JJ., agreed. In *R.* v. *Robins* (1), and *R.* v. *Olifier* (2), there was hardly such evidence as was given in this case as to

A the prisoner being deceived as to the age of the girl and having reasonable ground to believe the deception, and there certainly were no findings by the jury equivalent to the findings in this case. In *R.* v. *Forbes and Webb* (3), where the charge was one of assaulting a police constable in the execution of his duty, although the policeman was in plain clothes, the prisoner certainly had strong ground to suspect, if not to believe, that he was a policeman, for the Case states that persons repeatedly B called out to rescue the boy and pitch into the constable.

Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or mens rea. Then comes the question: What is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end in bringing the C offence within a more serious class of crime. As if a man strike with a dangerous weapon with intent to do grievous bodily harm and kills. The result makes the crime murder; the prisoner has run the risk. So, if a prisoner do the prohibited acts without caring to consider what the truth is as to facts, as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen, he runs the risk. So, if he without abduction defiles a girl who is D in fact under ten years old, with a belief that she is between ten and twelve, if the facts were as he believed he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to mens rea applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, E make his acts no criminal offence at all. It may be true to say that the meaning of the word "unlawfully" is without justification or excuse. I, of course, agree that, if there be a legal justification, there can be no crime, but, I come to the conclusion that a mistake of fact on reasonable grounds, to the extent that, if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every F criminal charge and every criminal enactment in England. I agree with LORD KENYON that "such is our law," and with COCKBURN, C.J., that "such is the foundation of all criminal justice."

DENMAN, J.—The defendant was indicted under s. 55 of the Offences against the Person Act, 1861. I cannot hold that the word "unlawfully" is an immaterial G word in an indictment framed upon this section. I think that it must be taken to have a meaning, and an important meaning, and to be capable of being either supported or negatived by evidence upon the trial: see *R.* v. *Turner and Reader* (23); *R.* v. *Ryan and Connor* (24). In the present case the jury found that the defendant had done everything requisite to bring himself within the section as a misdemeanant, unless the fact that he bona fide and reasonably believed the girl H taken by him to be eighteen years old constituted a defence. That is, in other words, unless such bona fide reasonable belief prevented them from saying that the defendant, in what he did, acted unlawfully within the meaning of the section.

The question, therefore, is whether upon this finding of the jury the defendant did "unlawfully," etc., the things which they found him to have done. The solution of this question depends upon the meaning of the word "unlawfully" in s. 55. I If it means "with a knowledge or belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl under sixteen was being taken by him at all. If it only means without lawful excuse or justification, then a further question arises, viz., whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the section as constituting the offence, by reason merely that he bona fide and reasonably believed the girl to be older than the age limited by the section. Bearing in mind the previous enactments relating to the abduction of girls under sixteen, the Abduction Act, 1557,

s. 2, and the general decisions upon those enactments and upon the present statute, looking at the mischief intended to be guarded against, and for the reasons given in the judgments of BRAMWELL, B., and BLACKBURN, J., it appears to me reasonably clear that the word "unlawfully" in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words "without lawful excuse," using those words as equivalent to without such an excuse as, being proved, would be a complete legal justification for the act, even where all the facts constituting the offence exist. Cases may easily be suggested where such a defence might be made out; as, for instance, if it were proved that the prisoner had the authority of a court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence, not justified by the relation of parent and child, or schoolmistress or other custodian, and requiring forcible interference by way of protection.

In the present case the jury find that the defendant believed the girl to be eighteen years of age. Even if she had been of that age she would have been in the lawful care and charge of her father as her guardian by nature: see Co. LITT. 88b, n. 12, 19th Edn., recognised in *R.* v. *Howes* (8). Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act—viz., in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen; and, therefore, unable to allege that what he had done was not unlawfully done within the meaning of the section. In other words, having knowingly done a wrongful act, viz., in taking the girl away from the lawful possession of her father against her will and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the legislature. He had wrongfully and knowingly violated the father's rights against the father's will, and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.

Conviction affirmed.

[*Reported by* JOHN THOMPSON, ESQ., *Barrister-at-Law.*]

HUDSON *v.* TABOR

[Court of Appeal (Lord Coleridge, C.J., Mellish, L.J., Brett, J.A., and Amphlett, J.A.), November 28, 1876, April 17, 1877]

[Reported 2 Q.B.D. 290; 46 L.J.Q.B. 463; 36 L.T. 492; 42 J.P. 20; 25 W.R. 740]

Sea Wall—Maintenance—Failure to continue to maintain—Wall for many years previously kept in repair—Prescriptive duty.

The mere repair of a man's sea wall for his own benefit, however often done, and during however long a period of time, will not per se, although his neighbour may benefit by such repair, impose on him a prescriptive duty to continue such repair for his neighbour's benefit, so as to prevent the flooding of the neighbour's land, when he ceases to care to do it for his own.

Notes. Applied: *A.-G.* v. *Tomline* (1880), 14 Ch.D. 58. Distinguished: *London and North Western Rail. Co.* v. *Fobbing Levels Sewers Comrs.* (1896), 66 L.J.Q.B. 127. Applied: *Rundle* v. *Hearle*, [1898] 2 Q.B. 83. Referred to: *A.-G. and Public Trustee* v. *Woolwich Metropolitan Borough Council* (1929), 93 J.P. 173; *Symes and Jaywick Associated Properties* v. *Essex Rivers Catchment Board*, [1936] 3 All E.R. 908; *Greenwood Tileries, Ltd.* v. *Clapson*, [1937] 1 All E.R. 765.

As to liability of subject for coast protection, see 39 Halsbury's Laws (3rd Edn.) 573, and for cases see 44 Digest 82, 640 et seq.

Cases referred to:

(1) *Keighley's Case* (1609), 10 Co. Rep. 139a; 77 E.R. 1136; 44 Digest 82, *635.*

(2) *R.* v. *Essex Sewers Comrs.* (1823), 1 B. & C. 477; 2 Dow. & Ry.K.B. 700; 1 L.J.O.S.K.B. 169; 107 E.R. 177; 41 Digest 53, *385.*

(3) *Anon.* (1344), Y.B. 18 Edw. 3, 22 b pl. 1; 44 Digest 58, *422.*

(4) *Anon.*, Liber Assizorum, 37 Edw. 3, pl. 10.

(5) *Anon.* (1493), Y.B. 8 Hen. 7, fo. 5, pl. 2; 26 Digest (Repl.) 487, *1728.*

(6) *Henly* v. *Lyme Corpn.* (1828), 5 Bing. 91; affirmed (1831), 3 B. & Ad. 77; affirmed sub nom. *Lyme Regis Corpn.* v. *Henley* (1834), 1 Bing.N.C. 222; 8 Bli.N.S. 690; 2 Cl. & Fin. 331; 1 Scott, 29; 131 E.R. 1103, H.L.; 44 Digest 83, *642.*

(7) *Isle of Ely Case* (1609), 10 Co. Rep. 141a; 77 E.R. 1139; 44 Digest 82, *634.*

Also referred to in argument:

Rooke's Case (1598), 5 Co. Rep. 996; 77 E.R. 209; 41 Digest 61, *446.*

R. v. *Leigh* (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357; 113 E.R. 152; 44 Digest 82, *637.*

Lynn Corpn. v. *Turner* (1774), 1 Cowp. 86; 98 E.R. 980; 44 Digest 84, *654.*

Morland v. *Cook* (1868), L.R. 6 Eq. 252; 37 L.J.Ch. 825; 18 L.T. 496; 16 W.R. 77; 44 Digest 82, *633.*

R. v. *Pagham Sussex Sewers Comrs.* (1828), 8 B. & C. 355; 2 Man. & Ry.K.B. 468; 108 E.R. 1075; sub nom. *R.* v. *Bognor Sewers Comrs.*, 6 L.J.O.S.K.B. 338; 44 Digest 81, *625.*

Appeal by the plaintiff from a decision of the Queen's Bench Division (Cockburn, C.J., Mellor and Quain, JJ.), in favour of the defendant in an action brought by the plaintiff to recover damages from the defendant for neglecting to maintain a sea wall on his (the defendant's) land adjoining a sea wall and land of the plaintiff's, whereby the plaintiff's land was damaged by overflow of water.

The plaintiff was the occupier of land, and the defendant the owner of adjoining land, both fronting to the sea, the defendant's land being on a higher level than that of the plaintiff. The custom was that each frontager maintained a sea wall to keep out the high tides, and from time to time it was necessary to "top" up the wall to maintain the proper height. This the defendant failed to do, with the result that a very high tide flowed over his wall and on to the plaintiff's land

causing damage. The Queen's Bench Division held that on the facts there was no evidence of a prescriptive liability on the defendant to maintain the wall to protect the adjoining frontagers.

Thesiger, *Q.C.*, and *White* for the plaintiff.
Philbrick, *Q.C.*, and *Bennett* (with them *Day*, *Q.C.*) for the defendant.

Cur. adv. vult.

April 17, 1877. **LORD COLERIDGE, C.J.,** read the following judgment of the court.—In this case the plaintiff was the occupier, and the defendant the owner, of lands in Essex adjoining each other, and fronting a tidal estuary. Along the front of these lands, and for a long way on either side of them, a sea wall has been maintained time out of mind, to keep back the sea water from overflowing the lands inside the walls, which lands, but for the wall, would at each high tide have been overflowed. The wall, from various causes, has got lower from time to time, and it has been usual for each frontager, according as necessity dictates, to raise, or, as it is called, to "top" his wall, in order to keep out the tide. There was an unusually high tide on Mar. 20, 1874. The defendant had neglected to top his wall, and, in consequence of his neglect, the sea flowed over his wall, and did much damage to the plaintiff's lands, which were contiguous, as well as to the defendant's own. The action was brought to recover compensation for this damage, and the question is whether there was any obligation on the defendant as between himself and the plaintiff to maintain this wall. The court below thought that there was not, and we are of that opinion.

In this case, in the absence of any evidence, oral or documentary, beyond the fact that each frontager had been accustomed to repair and top the sea wall in front of his own land, it was possible to suggest two modes only, by which the alleged obligation to repair, for the benefit of the plaintiff, could be imposed upon the defendant—prescription and common law. By prescription no doubt it might be imposed, if there were any evidence of the prescription. *Keighley's Case* (1), and the language of Lord Tenterden in *R.* v. *Essex Sewers Comrs.* (2), are distinct authorities for this proposition. But prescription is matter of evidence, and one of the questions in this case is, whether there was any evidence to establish the prescription. The only evidence was that the defendant and his predecessors had been used to repair that portion of the wall which defended his land from the sea, that the other frontagers along the wall had done the same thing, and that no one had ever, by side fences or otherwise, protected his land from the possible damage which would arise if his neighbour neglected to keep his special portion of the sea wall in repair. But this, which is the whole, is not enough. The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not, per se, although his neighbour may benefit by such repair, impose on him the duty of continuing such repair for his neighbour's benefit when he ceases to care to do it for his own.

In this case the non-construction by the respective frontagers of any side defences is not, as the court below has pointed out, any further evidence of the liability which it is sought to impose. Each frontager had a direct interest in keeping up his frontage wall to protect his own land, and each frontager may well have relied upon the practical protection afforded him by the manifest intention of his neighbours all along the line to protect themselves. It is not to be denied that expressions are attributed to the judges, and especially to Lord Tenterden, in *R.* v. *Essex Sewers Comrs.* (2), from which it might be argued that they thought that mere usage to repair, without more, would impose the liability to repair for the benefit of others. But the evidence in the case, which was on affidavit, is very shortly stated, and it was not one between individual frontagers, but between a frontager and the Commissioners of Sewers, who had inflicted upon him the whole expense of repairing his own wall, by his default in repairing which great damage to a whole level had been occasioned, nor, inasmuch as the affidavits were held to establish the prescriptive

A liability of the defendant in point of fact, does the case really in any manner conflict with our decision in the case before us.

Next, in the absence of any evidence of prescription, is there such a liability as is contended for imposed upon a frontager by common law? It would lead to manifest hardship if it could be. SIR JAMES SCARLETT, arguendo, in *R.* v. *Essex Sewers Comrs.* (2) says (1 B. & C. at p. 482):

B

> "Suppose the case of 1,000 acres of land, all preserved by the same wall, the owner of 500 acres may have only five yards of wall, while the owner of a much smaller portion may have 1,000 yards; that may be washed down, the whole of his estate may be destroyed, and yet he may be compelled to repair the wall for the benefit of others."

C It must be admitted that such a consequence might not improbably follow, but there is no sufficient authority to warrant us in saying that in point of law it does follow. We entirely assent to the criticism of the court below upon the cases from the YEAR BOOK (*Anon.* (3)) and the LIBER ASSIZORUM (*Anon.* (4)), and *Anon.* (5), and upon the passage in CALLIS ON SEWERS, p. 115, where these authorities are cited. The learning as to the right or duty of the Crown to protect the realm from waste D of the sea before the time of Henry 6, and since that time to exercise this prerogative by means of commissioners of sewers, seems to us to point in the same direction.

It is said that it was the duty of the king to guard and protect the shores and land adjoining the sea from being overflowed by the sea; but although expressions are used, as for example by LORD WYNFORD in *Henly* v. *Lyme Corpn.* (6) (5 Bing. at p. 109), from which it might seem that this was supposed to be a liability to be E enforced against the king, such cannot be the meaning of them, and no mode of enforcing it has been or can be suggested. But probably the king has from the very earliest times had a right as part of the prerogative to defend the realm against waste of the sea, and to order the construction of defences at the expense generally of those who are to derive benefit from them. The various statutes of sewers, beginning with the statute of 6 Hen. 6, c. 5, did but regulate the exercise of the F prerogative in this respect, and prescribe the forms of commissions for the ordering and execution of the necessary works, which forms have from time to time been varied. In early times probably the king ordered the construction of such sea walls as he judged necessary—very much according to his own discretion.

In process of time, however, his discretion came to be limited by established rules, and at last by statute; but prior to any statute it is laid down by FITZHERBERT G (NATURA BREVIUM, 225 E), and assented to by LORD COKE in *Isle of Ely Case* (7), that before the king granted his licence to repair a trench coming from the sea, or make a new one, there should be a writ of ad quod damnum "to inquire what damage it will be to the king or others," and without a proper return to such a writ such works, as we understand LORD COKE, could not be done. The writ of ad quod damnum, though probably a common law writ, is not to be found mentioned before H the time of Edward 1, and is most commonly to be found employed in reference to the king's licence to aliene in mortmain; but it appears to have been very early applied to other subjects, and among them to the making of sewers, or the making and repair of defences against the sea. The whole of this procedure is entirely inconsistent with the notion that at common law the frontager could be compelled by action to repair any part of such defences which had been injured I "by the outrageousness of the sea." The same observation applies, and with increased force, to the whole machinery which the successive statutes of sewers have provided since the time of Henry 6.

As to the origin of the sea wall in this case in point of fact, general history and country history are alike silent. But in all likelihood it was first erected either by the king at the expense of those to be benefited by it, and assessed upon them respectively in proportion to the benefit they did or would respectively receive; or by some great landowner for his own benefit, whose land if it came into the hands of separate owners would be liable to no other burdens than those which the law

imposes upon all other lands within the realm. But, as we have said, we can see no reason for holding that the burden sought to be imposed upon the defendant in this case in respect of his frontage land is one of such burdens, and we are of opinion that the judgment in his favour given by the court below should be affirmed.

Appeal dismissed.

Solicitors: *Hudson*; *Beaumont & Warren.*

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

Re MYER. Ex Parte PASCAL

[Court of Appeal (James and Mellish, L.JJ., and Baggallay, J.A.), January 13, 1876]

[Reported 1 Ch.D. 509; 45 L.J.Bcy. 81; 34 L.T. 10; 24 W.R. 263]

Bankruptcy—Jurisdiction—Debt contracted abroad—Foreign debtor and creditor —Debtor resident temporarily in England.

A foreign creditor issued a debtor's summons in England against a foreign debtor who was for the time being in England in respect of a debt contracted abroad.

Held: it being admitted that the debtor could have been sued in England in respect of the debt the summons could properly be issued against him.

Notes. For the present law relating to the initiation of bankruptcy proceedings see ss. 1, 2, and 3 of the Bankruptcy Act, 1914: 2 Halsbury's Statutes (2nd Edn.) 321.

Referred to: *Cooke* v. *Charles A. Vogeler Co.*, [1900–3] All E.R.Rep. 660.

As to alien bankrupts, see 2 Halsbury's Laws (3rd Edn.) 290, and ibid., vol. 1, p. 506; and for cases see 4 Digest (Repl.) 24 et seq.

Case referred to:

(1) *Re Crispin, Ex parte Crispin* (1873), 8 Ch. App. 374; 42 L.J.Bcy. 65; 28 L.T. 483; 37 J.P. 391; 21 W.R. 491, L.C. & L.J.; 4 Digest (Repl.) 24, *202.*

Also referred to in argument:

Jackson v. *Spittall* (1870), L.R. 5 C.P. 542; 39 L.J.C.P. 321; 22 L.T. 755; 18 W.R. 1162; 1 Digest (Repl.) 14, *112.*

Re Giles, Ex parte Mauritz (1870), 5 Ch. App. 779; 39 L.J.Bcy. 56; 23 L.T. 293; 18 W.R. 1097, L.JJ.; 4 Digest (Repl.) 110, *979.*

Re O'Loghlen, Ex parte O'Loghlen (1871), 6 Ch. App. 406; 40 L.J.Bcy. 28; 23 L.T. 878; 19 W.R. 459, L.JJ.; 4 Digest (Repl.) 104, *928.*

Ellis v. *M'Henry* (1871), L.R. 6 C.P. 228; 40 L.J.C.P. 109; 23 L.T. 861; 19 W.R. 503; 4 Digest (Repl.) 643, *5714.*

Appeal by the creditors from a decision of Mr. Registrar Pepys sitting as Chief Judge in Bankruptcy dismissing a debtor's summons with costs.

Isaac Myer, who was a jeweller in Lima, Peru, in the course of extensive dealings with the firm of Pascal and Lacasse, commission merchants in Paris, had become indebted to the latter by 1874 by over £20,000. In March, 1875, Myer, for health reasons left Peru for England, and in April of that year took up residence with his father-in-law in London. His intention was to go back to Lima as soon as his health was restored. On July 16, 1875, Myer was served with a debtor's summons at the suit of Pascal and Lacasse in respect of an alleged debt of £20,963. On July 29 Myer served notice of motion to dismiss the summons. In his affidavit Myer stated that he had not carried on business or incurred debts in

England, and that since he had left Lima he had been made bankrupt there by an agent of Pascal and Lacasse. Mr. Registrar PEPYS ordered that the summons be dismissed with costs on the ground that a foreigner could not be served with a debtor's summons in this country at the suit of another foreigner in respect of a debt contracted abroad.

Jackson, *Q.C.*, and *Sidney Woolf* for the creditors.
Swanston, *Q.C.*, and *Robson* for the debtor.

JAMES, L.J.—The only question which we have to decide in this case is whether a foreigner in respect of a debt contracted abroad can issue a debtor's summons against another foreigner who happens at the time to be in this country. Under the old law it is clear that a foreigner residing in this country could be sued here by another foreigner in respect of a foreign debt. Not only could he be sued, but he could have been held to bail under the old writ of capias ad satisfaciendum, and kept in this country under a judge's order; judgment could have been enforced against his person, for he might have been brought up for judgment, and execution could have been enforced against him, and he might have petitioned for his discharge under the Insolvent Debtors' Act. All that was altered, however; imprisonment for debt was abolished, and under the bankruptcy law a process has been substituted of serving a debtor's summons. It is quite clear that this process can be adopted against any debtors, for there is nothing in the Act to show that persons liable under and subject to the old law are not liable under the new law also. If it were proved that the debt in respect of which this summons was issued was discharged, that would be a sufficient answer; but no such evidence has been adduced. It was said that adjudication in this country would be idle, because the assets are all in Peru, and proceedings in bankruptcy in respect of this very debt are pending in that country. But it has not been shown that the debtor has been discharged by the operation of any law being administered in Peru. All those questions will be open on the petition for adjudication. All that we decide now is that a debtor's summons can be issued in the same way as the old writ. This summons was, therefore, properly issued, and the Registrar's order must be discharged.

MELLISH, L.J.—I am of the same opinion. What was decided in *Ex parte Crispin* (1) was that if a foreigner comes to England and commits an act of bankruptcy here, he can be adjudicated a bankrupt. There the debt had been contracted in England, so that it was unnecessary in that case to consider the point which arises in the present case. Does it make any difference where the debt is contracted? I am of opinion that it makes no difference for this purpose whether the debt is contracted in England or abroad, so long as the act of bankruptcy is committed by the foreigner while in this country. If he leaves England before committing an act of bankruptcy this court has no jurisdiction, but if he commits an act of bankruptcy while in this country he becomes amenable to the jurisdiction of this court, and can be made bankrupt. It is admitted that the debtor could be sued in England in respect of this debt, and I am unable to see any ground why a debtor's summons should not be issued against him, it being simply a means of compelling a man to pay his debts. As to the bankruptcy proceedings in Peru, there is no real evidence of their nature, and that is a matter which will be open to the debtor to urge in the adjudication proceedings as a reason why he should not be made a bankrupt in this country. As to residence, s. 59 of the Bankruptcy Act, 1869, and r. 17 of the Bankruptcy Rules, 1870 [revoked], were merely intended to determine in what court a man is liable to be sued, and not whether he is liable to be sued. A man cannot avoid bankruptcy proceedings by saying that he is not resident in England.

BAGGALLAY, J.A.—I am of the same opinion, and for the same reasons as those assigned by the lords justices.

Registrar's order accordingly discharged.

Solicitors: *Abrahams & Roffey*; *E. J. Sydney & Son.*

PAGET *v.* EDE

[Vice-Chancellor's Court (Bacon, V.-C.), March 17, 18, 1874]

[Reported L.R. 18 Eq. 118; 43 L.J.Ch. 371; 30 L.T. 228; 22 W.R. 625]

Conflict of Laws—Mortgage—Foreclosure—Mortgage of land abroad—Parties English and mortgage executed in England.

The court has jurisdiction to grant a decree of foreclosure of a mortgage in respect of an estate outside the jurisdiction where both the mortgagor and mortgagee are English and the mortgage was executed in England, since the decree acts in personam depriving the mortgagor of his personal right to redeem.

Notes. Considered: *British South Africa Co.* v. *De Beers Consolidated Mines* (1910), 80 L.J.Ch. 65. Referred to: *Re Hawthorne, Graham* v. *Massey* (1883), 23 Ch.D. 743.

As to mortgages of foreign immovables generally, see 7 Halsbury's Laws (3rd Edn.) 36, 37, 72, and ibid. vol. 14, p. 523; and for cases see 11 Digest (Repl.) 375, 397, et seq. As to the nature of the equity of redemption, see 14 Halsbury's Laws (3rd Edn.) 552; and for cases see 35 Digest (Repl.) 394, 395.

Case referred to:

(1) *Toller* v. *Carteret* (1705), 2 Vern. 494; 1 Eq. Cas. Abr. 134, pl. 5; 23 E.R. 916; sub nom. *Anon.*, 1 Salk. 404; 11 Digest (Repl.) 375, *395*.

Also referred to in argument:

Maunder v. *Lloyd* (1862), 2 John. & H. 718; 1 New Rep. 123; 11 W.R. 141; 70 E.R. 1248; 11 Digest (Repl.) 424, *730*.

Lord Cranstown v. *Johnston* (1796), 3 Ves. 170; 30 E.R. 952; 11 Digest (Repl.) 372, *380*.

Penn v. *Lord Baltimore* (1750), 1 Ves. Sen. 444; 27 E.R. 1132, L.C.; 11 Digest (Repl.) 377, *407*.

Jackson v. *Petrie* (1804), 10 Ves. 164; 2 E.R. 807, L.C.; 20 Digest (Repl.) 570, *2694*.

Lord Arglasse v. *Muschamp* (1682), 1 Vern. 76; 23 E.R. 322, L.C.; 11 Digest (Repl.) 378, *413*.

Fryer v. *Bernard* (1724), 2 P. Wms. 261; 24 E.R. 722; L.C.; 11 Digest (Repl.) 370, *364*.

Jones v. *Jones* (1858), 4 K. & J. 361; 32 L.T.O.S. 49.

Re Trant (1857), cited in Seton on Decrees, p. 1007.

Norris v. *Chambres* (1861), 3 De G.F. & J. 583; 4 L.T. 345; 7 Jur.N.S. 689; 9 W.R. 794; 45 E.R. 1004, L.C.; 11 Digest (Repl.) 373, *383*.

Bill filed by the plaintiffs praying for a decree of foreclosure against the defendants in respect of the mortgage of an estate in the island of Nevis, West Indies.

By an indenture of mortgage of Oct. 25, 1845, made between John Buckley Ede, John William Ede, Eleanor Mary Ede, Charlotte Ede, and William Adam, a plantation on the island of Nevis in the West Indies was granted by way of mortgage as security for further loans to the said William Adam, with no power of sale. All the parties were English, the mortgage was executed in England, and the deed was registered according to the laws of Nevis. William Adam was adjudged bankrupt and the plaintiffs were his assignees in bankruptcy. In July, 1872, they instituted these proceedings for foreclosure, and if proper and necessary, the appointment of a receiver.

Kay, Q.C., and *G. W. Lawrance* for the plaintiffs.

Chitty, Q.C., and *Caldecott* for the defendant Charlotte Ede.

Jackson, Q.C., and *Caldecott* for the other defendants.

Broderick for the trustees.

BACON, V.-C.—Two points have been argued upon this occasion—one of them is as to the jurisdiction of the court. It is said that because no instances are referred to of a decree for foreclosure of land in any one of the colonies, therefore, the court has not jurisdiction. One instance is referred to, and if I were to refer to my own recollection, I should have said that there have been many such decrees; but whether there have or have not been any decrees since the *Sark* case [*Toller* v. *Carteret* (1)] up to the present time, I cannot doubt the jurisdiction of the court and the right of the plaintiff to the relief he asks for in the exercise of that jurisdiction.

The case is the plainest and simplest that can be conceived. The owner of an estate in Nevis, subject to a certain charge or encumbrance, together with the persons entitled to that charge or encumbrance, agrees to make a security by way of mortgage. The deed is executed, the legal estate passes to the mortgagee, the formalities which the law of Nevis requires in the way of registration are complied with, and the legal estate is clearly and plainly in Mr. Adam; he has become bankrupt, and his assignees are the present plaintiffs. What then remains—the equity of redemption. It is said that that is an estate. It is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by curtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest; they do not create an estate; and, in my opinion, it is a misapplication of words to call an equity of redemption an estate in the proper technical legal sense. That it is a right is beyond all doubt—a right which may be enforced in this court, and which is recognised by the record in this case.

I am then threatened with this, that I know nothing about the law of Nevis—which is quite true—nothing judicially, and that I cannot make this decree, because it may lead to inconvenient consequences and to some conflict of law in Nevis. I do not conceive the possibility of any such thing happening. If there were any foundation for the suggestion it ought to have appeared in the pleadings. The decision of the court ought to be asked upon the subject, and there is no trace of any such thing in the pleadings, but only a vague suggestion that this court has not jurisdiction. As I am satisfied that it is a jurisdiction which has been very frequently employed in the case of appointing receivers of mortgaged estates in the colonies, and as I cannot entertain any doubt that the court has a right as between the English mortgagor and the English mortgagee to enforce that personal contract between them, although one of the consequences of it may be to vest in the plaintiffs the absolute interest in the mortgaged estate, which at present is qualified only by the existence of the equity of redemption, I cannot hesitate for a moment in saying that the suit is properly brought in this court, that it is brought for the purpose of having the account taken, of realising the estate if it should be necessary, and giving to the mortgagor the opportunity of redeeming it if he thinks fit to do so. Upon the point of jurisdiction there is in my opinion no reason whatever for doubt.

Solicitors: *Lawrence, Plews & Co.*; *Shum & Co.*, for *Green & Moberly*, Southampton.

A

Re PAGE. Ex Parte PAGE

[Court of Appeal (James and Mellish, L.JJ., and Baggallay, J.A.), March 23, 1876]

[Reported 2 Ch.D. 323; 45 L.J.Bcy. 119; 34 L.T. 638; 24 W.R. 502]

B

Bankruptcy—Composition—Scheme of arrangement—Approval of court—Resolution of majority of creditors—Power to be exercised bona fide and for creditors generally—Motives of kindness to debtor—Bankruptcy Act, 1869 (32 & 33 *Vict.*, *c.* 71), *s.* 126.

The debtor offered a composition of 1s. in the pound although on his own estimate his assets were enough to pay 5s. in the pound. A requisite majority of creditors passed a resolution to accept the composition, but a dissenting creditor opposed an application to register the resolution.

C

Held: the power given to creditors to pass such a resolution binding a dissentient minority must be exercised bona fide and for the benefit of the creditors generally and not, as appeared from the evidence, from motives of kindness to the debtor; accordingly, the composition was not one which could reasonably or properly bind the minority and the application to register would be refused.

D

Notes. Section 126 of the repealed Bankruptcy Act, 1869, has been replaced by s. 16 of the Bankruptcy Act, 1914 (2 Halsbury's Statutes (2nd Edn.) 341).

Followed: *Re Terrell, Ex parte Terrell, Ex parte Sheffield and Rotherham Joint Stock Banking Co.* (1876), 4 Ch.D. 293. Applied: *Re Wedgwood Coal and Iron Co.* (1877), 6 Ch.D. 627. Followed: *Re Poole, Ex parte Cocks* (1882), 21 Ch.D. 397. Referred to: *Re Aaronson, Ex parte Aaronson* (1878), 7 Ch.D. 713; *Re Durham, Ex parte Merchant Banking Co. of London* (1881), 16 Ch.D. 623; *Re Walton, Ex parte Hudson* (1883), 22 Ch.D. 773.

E

As to reasons for approval or refusal by the court of proposal for composition or scheme of arrangement, see 2 Halsbury's Laws (3rd Edn.) 343; and for cases see 5 Digest (Repl.) 1144 et seq.

F

Cases referred to in argument:

Re Cowen, Ex parte Cowen (1867), 2 Ch. App. 563; 16 L.T. 469; 15 W.R. 859, L.JJ.; 5 Digest (Repl.) 1201, *9668.*

Re Harper, Ex parte Linsley (1874), 9 Ch. App. 290; 43 L.J.Bcy. 84; 29 L.T. 857, L.C. & L.JJ.; 4 Digest (Repl.) 627, *5591.*

G

Appeal from a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy, affirming a decision of Mr. Registrar Keen refusing to register a resolution to accept a composition. The application was opposed by a dissenting creditor.

The debtor, John Offord Page, carried on business as a butcher at Dockhead, and also as a beer-retailer at Coldharbour Lane, Brixton. On Jan. 11, 1876, he filed a petition for liquidation of his affairs by arrangement. At the first meeting of his creditors on Jan. 27, 1876, a statement of his affairs was produced, showing that his unsecured debts amounted to £1,257, while his assets were estimated to be worth £371, made up as follows: stock-in-trade in the business of a butcher £50, book debts £26, fixtures and furniture £40, cash £5, equity of redemption in certain leasehold property £150; other property £100. He offered to pay a composition of 1s. in the pound in twelve months without giving any security for it. This offer was accepted by the resolution of the statutory majority of the creditors. At the second meeting on Feb. 8, 1876, this resolution was duly confirmed.

H

I

The application for registration was opposed by Beer, a dissenting creditor whose debt amounted to £50 12s. The debtor appealed.

Robertson Griffiths for the debtor.

Brough for the dissenting creditor.

JAMES, L.J.—Two registrars in succession have come to the conclusion that, under the circumstances of the case, this resolution, which has been passed by the statutory majority of the creditors, under s. 126 of the Bankruptcy Act, 1869, is not one which can reasonably or properly bind the minority. The legislature, no doubt, has given great power to the majority to bind the minority by a bargain with the debtor; but the bargain must be made in the interest of the creditors generally, and the power must be exercised bona fide for the benefit of the creditors, and not from motives of kindness to the debtor. There must be a bona fide resolution of the creditors dealing as creditors. In the present case both the registrars thought that, having regard to the debtor's own estimate of his assets, the composition of 1s. in the pound was really a sham, and could not be supported. I am of the same opinion.

MELLISH, L.J.—I am of the same opinion.

BAGGALLAY, J.A.—I agree.

Appeal dismissed.

Solicitors: *B. W. Nind*; *G. H. Finch.*

BOWER *v.* PEATE

[QUEEN'S BENCH DIVISION (Cockburn, C.J., Mellor and Field, JJ.), January 19, February 25, 1876]

[Reported 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789]

Negligence—Nuisance—Adjoining premises—Damage to defendant's house—Insufficient support of plaintiff's house by defendant's contractor—Liability of defendant.

A man who orders a work to be executed from which in the ordinary course of things injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

The plaintiff and the defendant were owners and occupiers of adjoining houses, the former being entitled to the support of the latter's soil for his house. The defendant wished to pull down his house, excavate the foundations, and build another on the same site. He employed a contractor to do the necessary work, the contractor agreeing to undertake the risk of supporting the plaintiff's house so far as was necessary during the progress of the work, and to make good any damage which might be sustained and satisfy any claims arising therefrom. In consequence of the contractor's defective underpinning and want of other support to the plaintiff's soil and walls in the course of the work, the plaintiff's house was damaged. In an action for damages brought by the plaintiff against the defendant,

Held: the defendant did not order any specific work necessary to provide support for the plaintiff's house, but left the recourse to such work entirely to the discretion of the contractor, whereas he was bound to take steps to prevent the mischief arising and could not relieve himself of his liability for

the wrongful consequences of the work by employing the contractor, and, therefore, the plaintiff was entitled to succeed.

Notes. Approved: *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, [1881–5] All E.R.Rep. 1. Applied: *Lemaitre* v. *Davis* (1881), 51 L.J.Ch. 173. Considered: *Hughes* v. *Percival* (1883), 8 App. Cas. 443; *Crawford* v. *Consett Local Board* (1891), 55 J.P.Jo. 218. Applied: *Odell* v. *Cleveland House* (1910), 102 L.T. 602. Considered: *Brooke* v. *Bool*, [1928] All E.R.Rep. 155; *Matania* v. *National Provincial Bank, Ltd. and Elevenist Syndicate, Ltd.*, [1936] 2 All E.R. 633; *Spicer* v. *Smee*, [1946] 1 All E.R. 489. Referred to: *Birmingham Corpn.* v. *Allen* (1877), 6 Ch.D. 284; *Whitely* v. *Pepper* (1877), 46 L.J.Q.B. 436; *Burt* v. *Victoria Graving Dock Co. and London and St. Katherine's Dock Co.* (1882), 47 L.T. 378; *Barham* v. *Ipswich Dock Comrs.* (1885), 54 L.T. 23; *Joliffe* v. *Woodhouse* (1894), 10 T.L.R. 553; *Hardaker* v. *Idle District Council*, [1895–9] All E.R.Rep. 311; *Penny* v. *Wimbledon Urban Council*, [1895–9] All E.R.Rep. 204; *Cribb* v. *Kinoch*, [1907] 2 K.B. 548; *Cox* v. *Coulson*, [1916] 2 K.B. 177; *Selby* v. *Whitbread*, [1917] 1 K.B. 736; *Honeywill and Stein, Ltd.* v. *Larkin Brothers (London Commercial Photographers), Ltd.*, [1933] All E.R.Rep. 77; *Bond* v. *Norman*, *Bond* v. *Nottingham Corpn.*, [1939] 2 All E.R. 610; *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349; *Balfour* v. *Barty-King*, [1956] 2 All E.R. 555.

As to easement of support, see 12 Halsbury's Laws (3rd Edn.) 606 et seq.; and for cases see 19 Digest (Repl.) 186 et seq.

Cases referred to:

(1) *Backhouse* v. *Bonomi* (1861), 9 H.L.Cas. 503; 34 L.J.Q.B. 181; 4 L.T. 754; 7 Jur.N.S. 809; 9 W.R. 769; 11 E.R. 825, H.L.; 19 Digest (Repl.) 178, *1197*.

(2) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384*.

(3) *Gray* v. *Pullen* (1864), 5 B. & S. 970; 5 New Rep. 249; 34 L.J.Q.B. 265; 11 L.T. 569; 29 J.P. 69; 13 W.R. 257; 122 E.R. 1091, Ex. Ch.; 34 Digest (Repl.) 207, *1443*.

(4) *Tarry* v. *Ashton* (1876), ante p. 738; 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 34 Digest (Repl.) 205, *1437*.

Also referred to in argument:

Hole v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest (Repl.) 202, *1424*.

Ellis v. *Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767; 2 C.L.R. 249; 23 L.J.Q.B. 42; 22 L.T.O.S. 84; 17 J.P. 823; 18 Jur. 146; 2 W.R. 19; 118 E.R. 955; 34 Digest (Repl.) 208, *1456*.

Rylands v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

Wyatt v. *Harrison* (1832), 3 B. & Ad. 871; 1 L.J.K.B. 237; 110 E.R. 320; 19 Digest (Repl.) 178, *1200*.

Rule Nisi obtained by the defendant to enter a verdict in pursuance of the leave reserved in an action tried before Field, J., at Liverpool, during the Spring Assizes, 1875, when a verdict was entered for the plaintiff, leave to move being reserved to the defendant.

The declaration alleged in one count that the plaintiff was possessed of land with a house thereon, and was entitled to have the same supported by the land adjacent thereto; and the defendant wrongfully removed the adjacent land without leaving sufficient support for the plaintiff's land and house, whereby the land gave way and the house was injured. The declaration alleged in another count that the defendant, by his agents and workmen, conducted himself so negligently in excavating the ground adjacent to the plaintiff's house for the re-building of a house of the defendant, and in under-pinning the party wall, and removing a part of the same, that the plaintiff's house was damaged. The defendant denied the plaintiff's

possession and his right to support, and pleaded not guilty. He claimed that he had entered into a building contract with a man named Rae for the work which caused this injury to the plaintiff. Besides the parts of the contract referred to in the judgment of the court, the following clause in the specification is material:

> "6. The adjoining buildings must be well and sufficiently propped and upheld during the progress of the works by the contractor, who shall be required to take the responsibility and to make good any damage occurring thereto."

The defendant obtained a rule nisi to enter a verdict in pursuance of the leave reserved, on the ground that the contractor was liable, if anyone, and not the defendant.

H. H. Bremner (with him *Day*, *Q.C.*) for the plaintiff, showed cause.
Herschell, *Q.C.*, and *T. H. James* supported the rule.

Cur. adv. vult.

Feb. 25, 1876. **FIELD, J.,** read the following judgment of the court, which was written by **COCKBURN, C.J.**—The facts of this case, which involves a point of considerable importance, were as follows. The plaintiff and the defendant were the owners and occupiers of two adjoining houses, and it appears that, prior to the re-building of the defendant's house, as hereinafter mentioned, the walls and foundations of the plaintiff's house went to a lower level than those of the defendant's. The defendant having determined to pull down his old house and build another on the same site, proposed to carry the foundations and walls of his new house to a lower depth than those of the plaintiff, for which purpose it would be necessary to excavate and remove the soil which before the alteration was adjacent to the plaintiff's house and land, and by which it had been supported. To do this without injury to the plaintiff's house, the well-known practice of underpinning, or some other safe mode of supporting or shoring the plaintiff's soil and walls during the operations, would, as was well known, have to be resorted to.

For the purpose of this re-building the house and executing the other necessary works, the defendant entered into a contract with a builder named Rae, by which Rae contracted to do all the necessary works. The contract contained the following clause:

> "And the said Thomas Rae further agrees to take upon himself the risk and responsibility of shoring and supporting, as far as may be necessary, the adjoining buildings affected by this alteration during the progress of the works, and to make good any damage which may be sustained by the said buildings during the progress or in consequence of the said works hereby contracted for, and to satisfy any claims for compensation arising therefrom which may be substantiated."

After the execution of this contract, Rae, the contractor, pulled down the defendant's house, excavated the soil to a lower depth than the foundation of the walls of the plaintiff's house, and re-built the defendant's house, but owing to defective underpinning or want of other support to the plaintiff's soil and walls in the course of these operations, injuries occurred to the plaintiff's house which gave rise to the present action.

No question was made on the argument as to the right of the plaintiff to the support of the adjacent soil of the defendant for his house, nor was it doubted that the damage to the house of which the plaintiff complained had been occasioned by the removal of such soil in the execution of the defendant's works. It was, however, contended that the defendant having committed the execution of the work to a contractor, both as regarded the taking down and re-building his house, and the measures necessary for the protection of the adjoining house, the contractor and not the defendant became liable for any injury arising from want of due care in shoring or otherwise supporting the plaintiff's house. The argument, as put on behalf of the defendant, may be shortly stated thus. According to the doctrine in *Backhouse* v. *Bonomi* (1), the taking away of the soil, to the support of which an

adjoining owner is entitled, is not in se wrongful. It only becomes so when followed by injurious consequences to the neighbour. If, therefore, such injurious consequences can be averted by efficient means, as by the substitution of artificial for the natural support previously afforded by the soil, the removal of the soil is in no respect wrongful. Here the defendant in one and the same contract employed the contractor to execute the work he desired to have done, and to take the necessary measures for protecting the plaintiff's premises. He authorised him to do the former only on consideration of his preventing it from causing injury to the plaintiff, and only so far as it could be done consistently with the safety of the premises of the latter. If, therefore, the work which the contractor was employed to do had been carried out in conformity with the instructions of the defendant, the work would have been perfectly lawful, and would have been attended with no injurious consequences. The injuries complained of have arisen from the negligence of the contractor alone. The defendant is, therefore, entitled to the benefit of the general rule, that when a person employs a contractor to do a work lawful in itself and involving no injurious consequences to others, and damage arise to another party from the negligence of the contractor or his servants, the contractor and not the employer is liable.

It appears to us that upon a correct view of the facts this reasoning cannot prevail. In the first place, because the assumption on which it is founded altogether fails. The contractor was not employed to give support to the plaintiff's house as part of the work he was to do for the defendant. It was not included in the specification, and formed no part of the work he contracted to do, except so far as was necessary to satisfy his obligation to provide the necessary support of the plaintiff's house. In addition to which the defendant stipulates that the contractor shall "take upon himself the risk and responsibility of shoring and supporting the adjoining buildings affected by the alterations," and shall "make good any damage which may be sustained by the said buildings in consequence of the works," and shall "satisfy any claims for compensation arising therefrom." The effect of this is, not that the defendant orders or stipulates for any specific work necessary for the support of the adjoining buildings, but that he leaves the recourse to such work entirely at the discretion of the contractor, stipulating only that the latter shall bear him harmless in the event of any damage taking place. In other words, he directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damages to the adjoining property. He is, therefore, not in the position of a man who has simply authorised and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is, therefore, not to be held responsible if while the work is going on injury arises from the negligence of the contractor or his servants.

The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, viz., that a man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which if properly done no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorising the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him

liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

It is true that according to the doctrine in *Backhouse* v. *Bonomi* (1), the removal of the soil, to the support of which an adjacent building or land may be entitled, is not in itself wrongful, and becomes so only when damage to the adjoining property results, whence it follows that if by artificial means of support the damage can be prevented, no cause of action arises. But it is equally clear that if effectual means of prevention fail to be applied and damage once results, the act of removal becomes wrongful and an action can be at once maintained. In the present instance preventive measures adequate to the occasion having failed to be provided, the removal of the soil was followed by actual damage to the plaintiff's house, and the act of removal was, therefore, wrongful as causing a wrong done to the plaintiff. But the act of removal was an act done by the order and authority of the defendant, in other words was the act of the defendant, and no man can get rid of liability for injury occasioned to another by a wrongful act by seeking to throw the responsibility on an agent whom he has employed to do the act. The agent may no doubt be responsible, but the responsibility of the principal is none the less.

Pickard v. *Smith* (2), and *Gray* v. *Pullen* (3), are in point to the present question. In *Pickard* v. *Smith* (2) the defendant having employed a coal merchant to put coals into his cellars, was held liable for injury suffered by the plaintiff from his falling through the cellar opening, which had been left open by the negligence of the coal merchant's servants. The law is well stated by WILLIAMS, J., in delivering the judgment of the court. He says:

> "Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, nor by a parity of reasoning to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. In the present case the defendant employed the coal merchant to open the trap in order to put in the coals, and he trusted him to guard it while open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant, and the defendant having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law."

In *Gray* v. *Pullen* (3) the Court of Exchequer Chamber carried this principle still further. An Act of Parliament having authorised the cutting a trench across a highway for the purpose of making a drain, but having attached to the exercise of the right the condition of filling up the trench after the drain had been completed, the defendant had employed a contractor to do the whole work. Owing to the negligence of the latter in filling up the trench, the plaintiff's wife had sustained personal injury. It was contended that the contractor alone was liable, and it was so held in this court; but the Court of Exchequer Chamber held otherwise, and reversed our judgment. It is true that in that case the obligation to make good the road was one imposed by statute, but it can make no difference in point of principle whether the obligation was imposed by statute or existed at law, and the case is, therefore, an authority for saying that where a work is being executed from which danger may arise to others, and it thereby becomes incumbent on the party doing or ordering it to be done to take measures to prevent damage resulting

to others, he cannot divest himself of liability by transferring the duty to a contractor.

In *Tarry* v. *Aston* (4), where the defendant had become occupier of premises from which a large lamp was suspended over the highway, and the lamp, before he became occupier, had become worn out, and the defendant, having notice of this, was therefore under an obligation, if he continued to maintain the lamp, to take care that it was not a nuisance to the highway, and the lamp had fallen down and injured a person passing, this court on a like principle held the defendant liable, though he had employed a contractor to attend to the condition of his lamps. Both on authority and principle, therefore, we are of opinion that our judgment should be for the plaintiff, and that consequently this rule to enter the verdict for the defendant should be discharged.

Judgment for plaintiff.

Solicitors: *G. L. P. Eyre & Co.*, for *E. Cotton*, Liverpool; *Gregory, Rowcliffe & Co.*, for *Payne & Son*, Liverpool.

[*Reported by* M. W. McKellar, Esq., *Barrister-at-Law.*]

LANCEFIELD *v.* IGGULDEN

[Court of Appeal (Lord Cairns, L.C., and James, L.J.), December 17, 1874]

[Reported 10 Ch. App. 136; 44 L.J.Ch. 203; 31 L.T. 813; 23 W.R. 223]

Will—Residue—Real estate—Residuary devise—To be treated as specific as if all items specified.

The rule that a residuary devise of real estate was to be treated as specific, just as much as if all the items had been specified, **held** to be well-settled and not to be affected by s. 24 of the Wills Act, 1837, which provides: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will", although the effect of the section is that when the testator makes his will he does not know what will be comprised in the residuary devise he makes.

Notes. Distinguished: *Farquharson* v. *Floyer* (1876), 3 Ch.D. 109. Applied: *Phillips* v. *Low*, [1892] 1 Ch. 47. Considered: *Re Mason, Ogden* v. *Mason*, [1901] 1 Ch. 619; *Re Ridley, Nicholson* v. *Nicholson*, [1950] 2 All E.R. 1. Referred to: *Tomkins* v. *Colthurst* (1875), 1 Ch.D. 626; *Re Mills, Mills* v. *Mills* (1886), 34 Ch.D. 186.

Case referred to:

(1) *Hensman* v. *Fryer* (1867), 3 Ch. App. 420; 37 L.J.Ch. 97; 17 L.T. 394; 16 W.R. 162, L.C.; 44 Digest 395, *2278*.

Also referred to in argument:

Eddels v. *Johnson* (1858), 1 Giff. 22; 27 L.J.Ch. 302; 31 L.T.O.S. 35; 4 Jur.N.S. 255; 6 W.R. 401; 65 E.R. 808; 23 Digest (Repl.) 530, *5964*.

Dady v. *Hartridge* (1858), 1 Drew. & Sm. 236; 32 L.T.O.S. 7; 6 W.R. 834; 62 E.R. 369; 23 Digest (Repl.) 530, *5963*.

Rotheram v. *Rotheram* (1859), 26 Beav. 465; 33 L.T.O.S. 159; 5 Jur.N.S. 402; 7 W.R. 368; 53 E.R. 977; 23 Digest (Repl.) 530, *5965*.

Clark v. *Clark* (1865), 4 Giff. 702; 6 New Rep. 86; 34 L.J.Ch. 477; 12 L.T. 485; 11 Jur.N.S. 820; 13 W.R. 735; 66 E.R. 889; 23 Digest (Repl.) 531, *5969*.

Pearmain v. *Twiss* (1860), 2 Giff. 130; 29 L.J.Ch. 802; 2 L.T. 81; 6 Jur.N.S. 337; 8 W.R. 329; 66 E.R. 56; 23 Digest (Repl.) 531, *5966*.

Edwards v. *Pugh* (1853), 2 Giff. 135, n.; 66 E.R. 58; 23 Digest (Repl.) 530, *5962*.

Collins v. *Lewis* (1869), L.R. 8 Eq. 708; 23 Digest (Repl.) 529, *5949*.

Dugdale v. *Dugdale* (1872), L.R. 14 Eq. 234; 41 L.J.Ch. 565; 27 L.T. 705; 23 Digest (Repl.) 529, *5950*.

Forrester v. *Lord Leigh* (1753), Amb. 171; 27 E.R. 114, L.C.; 23 Digest (Repl.) 535, *5999*.

Alcock v. *Sloper* (1833), 2 My. & K. 699; 39 E.R. 1111; 44 Digest 197, *266*.

Tombs v. *Roch* (1846), 2 Coll. 490; 7 L.T.O.S. 428; 10 Jur. 534; 63 E.R. 828; sub nom. *Toombs* v. *Roch*, 15 L.J.Ch. 308; 23 Digest (Repl.) 530, *5958*.

Bethell v. *Green* (1865), 34 Beav. 302; 55 E.R. 652; 23 Digest (Repl.) 531, *5968*.

Jackson v. *Pease* (1874), L.R. 19 Eq. 96; 23 W.R. 43; 23 Digest (Repl.) 531, *5973*.

Hanby v. *Roberts* (1751), Amb. 127; 27 E.R. 83; sub nom. *Hanby* v. *Fisher*, 2 Coll. 512, n.; sub nom. *Hamly* v. *Fisher*, 1 Dick. 104, L.C.; 23 Digest (Repl.) 538, *6032*.

Spong v. *Spong* (1829), 3 Bli.N.S. 84; 1 Dow. & Cl. 365; 4 E.R. 1271, H.L.; 23 Digest (Repl.) 522, *5861*.

Mirehouse v. *Scaife* (1837), 2 My. & Cr. 695; 7 L.J.Ch. 22; 40 E.R. 805, L.C.; 23 Digest (Repl.) 525, *5894*.

Appeal from a decision of Bacon, V.-C., in an action for an account by a devisee under a will and creditor of the testator.

George Lancefield, by his will, dated Nov. 24, 1864, after making various specific devises, and giving certain legacies, directed his trustees to stand possessed of his freehold building yards and hereditaments in Broad Street, Northgate, Canterbury, and all his estate and interest in his stone, brick, and lime yards, and business premises, in trust for the plaintiff for the term of his natural life, and after his death upon certain trusts for the benefit of the plaintiff's children. The testator also directed that, subject and without prejudice to the life estate of his mother therein, his trustees should stand possessed of his messuages and premises and land at Wingmore, in the county of Kent, in trust for the plaintiff, his heirs and assigns. Subject to the life estate of his mother in the residue of his freehold and leasehold messuages, lands and hereditaments, the trustees of the will were directed to stand possessed of the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands and hereditaments in trust for his sister, Eliza Lancefield, her heirs, executors, administrators, and assigns; and as to all the residue of his personal estate and effects not thereinbefore disposed of, subject to the payment thereout of his debts and funeral and testamentary expenses, the testator gave and bequeathed the same unto Eliza Lancefield absolutely. The testator died on Feb. 17, 1868. The plaintiff, in addition to his claims as a specific devisee under the will, claimed also as a creditor of the testator to the amount of £400 for work and labour, and for bricks and materials supplied, and he instituted the present suit praying for an account and payment of what was due to him, and to all other creditors of the testator, and for administration of the testator's real and personal estate. The personal estate was insufficient for payment of the testator's debts, and the bill alleged that the defendants, the trustees of the will, had sold a portion of the property specifically devised for the benefit of the plaintiff and his children, and applied the proceeds in payment of the testator's debts. The usual accounts and inquiries were directed by the decree made at the hearing, including an inquiry what real estate the testator was seised of or entitled to at the time of his death, distinguishing such parts as were given or

devised by name from those parts which the testator directed his trustees to stand possessed of, as "the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments."

The plaintiff had carried in his claim as a creditor of the testator for £401 14s. 8d., but that claim (with the exception of a sum of £24 12s. 8d.) was disallowed by the chief clerk, and a balance was found due from him to the estate upon investigation of a counterclaim by the executors, of £62 6s. 4d.

The cause having come on for further consideration, the Vice-Chancellor held that the specifically devised estates did not become liable to contribute towards payment of the testator's debts until the residuary real estate had proved insufficient, and, as to the costs of the plaintiff's unsuccessful claim, he held that it would not be just to make him pay any costs, but that, on the other hand, he could not be allowed any costs in respect of his claim. From this decision the residuary devisee appealed.

Millar, Q.C. (with him *Ince*), for the residuary legatee.
Kay, Q.C., and *G. W. Collins* for the plaintiff.

LORD CAIRNS, L.C.—Independently of the state of the law before the Wills Act, 1837, independently of the Wills Act, and also independently of the particular provisions of this will, if a man bequeaths specific portions of his personal estate to certain persons, and the residue of his personal estate to another person, and devises Blackacre to one person, Whiteacre to another, and the residue of his estate to a third person, there seems to me to be a strong presumption that in those two cases a different conclusion should be drawn as to the primary liability of the subject matter of the specific, and of the residuary gifts. For inasmuch as every one must owe some debts at his death, and it is a well-known rule of law, that the personal estate is the primary source for the payment of debts, a man may be supposed to expect that the usual rule of law will be followed, and the debts be paid out of the residue of his personalty. But with regard to real estate this is not so. A man may well be supposed to be looking to the probability that his personal estate will be sufficient for payment of his debts, and not to contemplate the possibility that the debts will fall upon the real estate. Therefore, a testator who devises Blackacre to one person, Whiteacre to another, and the residue of his real estate to a third, cannot well be supposed to have meant his debts to be paid out of the residue of his real estate rather than out of the specifically devised portions of it.

Thus, prima facie, there would be no reason to suppose that the testator intended his residuary real estate to be liable to the payment of his debts in priority to his specifically devised real estate. When we come to look at the present will, there appear to me to be most marked reasons arising from the form of the will for coming to the conclusion that the present testator had no such intention. What the testator has done in this particular case is this. Having three sisters married and one unmarried, he devised certain specific portions of his real estates for the benefit of his three married sisters, their husbands and families, subject to a life interest which he had given to his mother in the whole of his realty, and then he directed that, subject to the life estate of his mother in the residue of his freehold and leasehold messuages, lands and hereditaments, the trustees for the time being of his will, should stand possessed of the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands and hereditaments in trust for his unmarried sister, Eliza Lancefield, her heirs, executors, administrators and assigns. As to all the residue of his personal estate and effects not thereinbefore disposed of, subject to the payment thereout of his debts and funeral and testamentary expenses, he gave and bequeathed the same to his sister, Eliza Lancefield, absolutely. What the testator did was this. Having parcelled out parts of his real estate to his married sisters, to save the enumeration of particular items, he devised "the residue of . . . his freehold and leasehold messuages, lands and hereditaments" to his unmarried sister; and he evidently con-

templated that the residuary personalty would be sufficient for the payment of his debts as he expressly makes that fund subject to the payment of his debts and funeral and testamentary expenses. Therefore, the whole scope of the will shows that the testator had no intention to make the residue of his real estate more liable to the payment of debts than the specifically devised portions of his real estate.

To come to the rule of law. Before the Wills Act the rule that a residuary devise of real estate was to be treated as specific, just as much as if all the items had been specified, was as well settled as any rule of this court. The result was that after-acquired real estate would not pass under a general residuary devise. Then the Wills Act stepped in. I quite agree that it would have been competent for the legislature to say that real estate should be placed, in all respects, on the same footing as personal estate. That, however, is not what they have done. It is well known that the Wills Act was framed throughout in a most careful way—not on a theoretical or philosophical basis, but by taking each individual evil, and dealing with it by a particular enactment. The legislature thought fit to deal with this particular matter in s. 24 of the Act. By that section it is enacted that:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

I think it was Lord Westbury who observed in a case before him that in this section the legislature attributed to the will a continuing operation as if the devise were repeated at every moment up to the time of the testator's death. Realising, therefore, the hypothesis of the legislature, and treating the will as if made the moment before the testator's death, what is the result? The testator must be treated as having made a devise of his residuary realty immediately before his death, but a residuary devise specific in its nature, and, therefore, the residuary devise comprises all the realty not otherwise disposed of, of which the testator was seised at his death. But there is nothing in the Act to alter a well-settled rule of law as to the effect of a residuary devise, when you know the time when it was made.

As to the state of the authorities on the point, Kindersley, V.-C., and the late Master of the Rolls [Sir John Romilly] took a different view of the matter from what I have just expressed, but the latter view has been taken by Stuart, V.-C., Wood, V.-C., Hall, V.-C., and Lord Chelmsford. I feel bound to say that I look upon Lord Chelmsford's decision in *Hensman* v. *Fryer* (1), as a distinct authority on the subject. It was a most carefully considered decision, and a distinct expression of opinion by the then head of this court that the Wills Act has made no difference in the law on this point, and as such it was binding upon the vice-chancellor, whose decision in the present case is not satisfactory upon any ground stated in it. Both upon principle and on authority, I think we are bound to arrive at a different conclusion from the vice-chancellor.

JAMES, L.J.—I am of the same opinion on both points. I very well recollect the decision of Lord Chelmsford in *Hensman* v. *Fryer* (1), and the extent to which it was canvassed at the time, but I never was able to see what answer could be given to the way in which he put the case. The Wills Act provides that the will is to be construed as if it had been executed immediately before the death of the testator. If it had been executed at that time, what would the effect of it be? There can be no doubt that the residuary devise would be specific. But, independently of that, I think the decision of Lord Chelmsford ought to have been considered binding by the vice-chancellor. It was a deliberate decision of the Court of Appeal given for the purpose of settling the differences which then existed between the decisions of the various branches of the court, and it ought to be treated as binding. *Appeal allowed.*

Solicitors: *J. Henry Jones*; *Monckton, Long & Co.*, for *Sankey, Low & Flint*, Canterbury.

A

MORRICE *v.* AYLMER

[House of Lords (Lord Hatherley, Lord O'Hagan and Lord Selborne), June 21, 1875]

[Reported L.R. 7 H.L. 717; 45 L.J.Ch. 614; 34 L.T. 216; 24 W.R. 587] B

Will—Shares—Stock—Railway company stock—Inclusion in gift of "shares".

By his will a testator gave to his wife "all such stocks in the public funds or shares in any railway of which I may die possessed." At the time of his death the testator was the registered proprietor of £6,300 ordinary stock and of 63 shares in the London and North-Western Rail. Co.: C

Held: the £6,300 stock passed under the bequest of "shares."

Oakes v. *Oakes* (1) (1852), 9 Hare, 666, overruled.

Notes. Considered: *Re Herring, Murray* v. *Herring*, [1908] 2 Ch. 493. Referred to: *Bothamley* v. *Sherson* (1875), L.R. 20 Eq. 304; *Re Bennett, Ex parte Kirk* (1877), 5 Ch.D. 800; *Morgan* v. *Thomas* (1877), 25 W.R. 750; *Re Gray, Dresser* v. *Gray* (1887), 36 Ch.D. 205; *Re Bodman, Bodman* v. *Bodman*, [1891] 3 Ch. 135; D *Re Tyler, Tyler* v. *Tyler* (1891), 65 L.T. 367; *Re Slater, Slater* v. *Slater* (1907), 76 L.J.Ch. 472; *Re Home and Foreign Investment and Agency Co.*, [1912] 1 Ch. 72; *Re McEacharn's Settlement Trusts, Hobson* v. *McEacharn* (1939), 161 L.T. 263; *Re Everett, Prince* v. *Hunt* (1944), 113 L.J.Ch. 81; *Re Boys' Will Trusts, Westminster Bank* v. *Boys*, [1950] 1 All E.R. 624.

As to meaning of "stock" and "shares" in a will, see 39 Halsbury's Laws (3rd E Edn.) 1028; and for cases see 44 Digest 703–705.

Cases referred to:

(1) *Oakes* v. *Oakes* (1852), 9 Hare, 666; 68 E.R. 680; 44 Digest 703, *5453*.

(2) *Trinder* v. *Trinder* (1866), L.R. 1 Eq. 695; 14 W.R. 557; 44 Digest 703, *5464*.

(3) *Re Gibson, Mathews* v. *Foulsham* (1866), L.R. 2 Eq. 669; 35 L.J.Ch. 596; 14 W.R. 818; 44 Digest 651, *4913*. F

Also referred to in argument:

Slingsby v. *Grainger* (1859), 7 H.L.Cas. 273; 28 L.J.Ch. 616; 5 Jur.N.S. 1111; 11 E.R. 109, H.L.; 44 Digest 702, *5450*.

West v. *Lawday* (1865), 11 H.L.Cas. 375; 13 L.T. 171; 11 E.R. 1378, L.C.; 44 Digest 906, *7665*. G

Appeal by the plaintiff from a decision of the Court of Appeal (Lord Cairns, L.C., and James, L.J.), reversing a decision of Sir George Jessel, M.R., in an action by an executor to determine the effect of a provision in a will.

The testator, G. W. Aylmer, by his will dated in July, 1853, bequeathed, inter alia, H

"all such stocks in the public funds or shares in any railway of which I may die possessed and that may be standing in my own name"

to his wife for life, and after her death to his brother, T. B. Aylmer. The testator died in November, 1853. At the date of his will, and also at his death, he was possessed of £6,300 stock in the London and North-Western Rail. Co. and sixty-three new £12 10s. shares in the same company, on which £2 10s. had been paid up. I The widow died in February, 1874, having appointed the appellant her executor and residuary legatee. The respondent was the representative of T. B. Aylmer, who had survived the testator, but died in 1858. The Master of the Rolls held that he was bound by the previous decisions to decide that the stock did not pass under the will, but his decision was reversed, as above mentioned.

Glasse, Q.C., and *Nalder* for the appellant.

Miller, Q.C., and *W. Barber* for the respondent, were not called on to argue.

LORD HATHERLEY.—The case which your Lordships are called upon to determine on the present appeal is one in which the Court of Appeal have come to a conclusion reversing the decision of the Master of the Rolls as to the meaning of the will of a testator, a conclusion which also necessarily overrules a decision come to by TURNER, V.-C., the question being simply whether or not a will framed as this will is, describing the subject of the bequest by the testator in these terms, "and all such stocks in the public funds or shares in any railway of which I may die possessed and that may be standing in my own name," was sufficient to pass certain stock which at the time of his death he possessed in certain railways. At the time of the testator making this will he was possessed of sixty-three shares in a railway company, of £12 10s. each, standing in his own name. Those shares continued to stand in his own name from that time up to the time of his death. They had not at the time of his making his will been paid up; only £2 10s. had been paid up on them, leaving a sum of £10 due. But it appears that at his death he was also the owner of a sum of £6,300 stock in the same railway company.

The case mainly turns upon the question whether or not the expression,

> "shares in any railway company of which I may die possessed and that may be standing in my own name,"

is sufficient to pass both shares and stock in a railway company standing in his name at the time of his death. It may be observed that in this particular will he refers not only to what he had in hand at the time of his making the will itself, but to all the shares that he may die possessed of and that may be standing in his own name in any railway company whatever at the time of his death. I do not think that anything turns upon that circumstance and I think that what we now have to determine is whether or not "stock" in a railway company would pass under the word "shares" in a railway company, unaccompanied by any indication in the will to the contrary, that is to say, anything tending to show that the testator had intended to draw a distinction between the "stock" in a company and the "shares" in a company by the testator himself. The question, I say, is whether this expression, "shares in any railway company," simpliciter is sufficient to pass stock in a railway company. It appears to me to be reduced to that simple point.

The course of decision has been this. TURNER, V.-C., had before him a case, *Oakes* v. *Oakes* (1), in which a testator had used these words in his will:

> "I give and bequeath all my Great Western Railway shares, and all the other railway shares which I shall be possessed of at the time of my decease unto my nephew A. for his own absolute use and benefit."

At the date of his will he had shares in the Great Western Railway, and he afterwards acquired a considerable sum of stock in that railway company. The Lord Chancellor says, in his decision in the present case, that he thinks that the argument in that case scarcely dwelt sufficiently upon the character of stock in a railway company, and upon the identity in substance of stock with shares. Possibly it may be that the argument went at some length upon another point, in regard to the view whether or not there had been ademption with regard to the purchase that had been made of that stock, but I find in the argument that it was brought to the attention of the vice-chancellor that

> "there was no alteration in substance in the testator's interest in the property, and that, in fact, a share in the capital of a railway company and in the stock of the company is the same thing; the only difference that can be suggested between them is, that the interest payable upon a share would not be divided."

So that, although, perhaps, it was not sufficiently pressed upon his attention, this point certainly was brought before the learned judge, and he distinctly decided in that case that Great Western Railway stock could not pass under the description of Great Western Railway "shares." He did not enter into any very full discussion of the reasons which led him to that conclusion, but he considered that there was a marked distinction, as is stated in his judgment, between the railway shares

mentioned by the testator in his will and the stock of the same railway company, and he held that the bequest of the "shares" that the testator might have at his decease could not pass stock. A

In the two cases that were cited by counsel for the appellant in his argument as decisions of my own, *Trinder* v. *Trinder* (2) and *Re Gibson* (3), the only observation that I have to make is that in each case what I appear by the report to have said, and my recollection concurs with the report, was applicable to the particular case then before me. In both the cases I came to the conclusion that stock and shares were so similar that if you find that the testator possessed any of either which would satisfy the description used by him in his bequest, they must necessarily pass. I gave, therefore, no decision upon the particular point that we have now before us, either one way or the other. I said that I was free from the necessity of coming to a decision upon it owing to the terms that the testator had used in his will in the particular case before me. B C

Speaking according to my present impression, I do not feel any doubt that if this present testator had been minded to make, as of course he was at liberty to make, a distinction between "shares" and "stock" in railway companies, he might have so expressed himself in his will as to give all his shares to A. and all his stock to B., and it would then have been understood that he meant to distinguish between shares and stock (which differ in this respect, that shares are not necessarily paid up), and intended to give to one legatee shares that were, perhaps, not paid up, and to give to another shares that were paid up or stock. Shares are not necessarily converted into stock as soon as they are paid up; they may exist either as paid-up or as not paid-up shares. Stock can only exist in the paid-up state. It cannot—I refer now to the words of s. 61 of the Companies Clauses Consolidation Act, 1845 (3 HALSBURY'S STATUTES (2nd Edn.) 277)—be stock until it is consolidated, and shares cannot be consolidated until they are fully paid-up. The Lord Chancellor, in his judgment in this case, states this quite correctly, and no doubt has been thrown upon it in the argument here. In fact, the Lord Chancellor quotes the section of the statute which provides for this process of changing shares into stock. The heading to s. 61 itself speaks of "the consolidation of the shares" into stock. D E F

There is a certain extent of change as well as consolidation when paid-up shares are consolidated. They are changed from ordinary shares in the respect that they are no longer incapable of being subdivided. Shares in a company cannot be bought in fractions of their face value, but the consolidated stock of a company can be bought in just the same way as the stock of the public debt can be bought, split up into as many portions as you like, and subdivided into as small fractions as you please. That, no doubt, is of great importance in selling the stock of a railway company. Independently of that, however, it possesses all the qualities of shares. It is, in fact, simply a set of shares put together in a bundle, with this peculiarity added to them, that they are transferable in a manner in which you cannot transfer the ordinary shares of a railway company. That being the case, as stock can thus be fractionally dealt with, a provision is added with respect to this process of consolidation of shares that, as regards the power of voting, there shall be no voting upon these fractions, but that the voting shall go on in the same way as if the stock only represented a definite number of shares corresponding amount taken at their nominal value independently of the fraction; that is to say, you may have twenty shares worth, if I may so express it, of consolidated stock, plus some small fractional amount, in that case you will only vote as a holder of twenty shares [see now Companies Act, 1948, Table A., art. 42 : 3 HALSBURY'S STATUTES (2nd Edn.) 452]. But in all other respects you will be just as you were before the consolidation of your shares. G H I

What, then, is the result of the consolidation of your shares? You obtain a dividend in respect of the whole amount of those shares on the profits of the company; you are entitled to share in those profits. It is not at all analogous, as has been suggested at the Bar, to the interest on the public debt which is paid

to the holders of the public stock and funds; it is an actual partnership. The partnership is complete, with all the same accessories, except as to that simple point of voting in respect of a fraction of a share, as those with which the holders of shares remaining still unconverted hold them. It is admitted that there is no distinction to be drawn between what the shares were when they were fully paid up and what they were in the year or two which elapsed before they were actually converted into consolidated stock. They were paid-up shares before that conversion, giving all the same rights to holders as paid up consolidated stock. After a time a vote is taken, and the shares are consolidated by that vote. But they remain, as it appears to me, to every intent and purpose, properly speaking, shares, namely, those things which give you a right to participate in the profits of that company according to that amount of stock which you hold, in other words, according to the number you hold of shares which have been consolidated.

I think there would be extreme difficulty in coming to any other conclusion than that the view taken of this case by the Court of Appeal below is right, and should be affirmed. If your Lordships did not so hold, consider the position in which all testators would be placed who were owners of shares in public companies. They might well bequeath all their shares in public companies which were standing in their names at their death, and it might so happen that those shares, being at the time they made their wills not paid-up, as in the present case, the effect of the bequest might be materially altered; in consequence of the process of paying by instalments, as calls were from time to time made upon the shares, the result might be found to be that in four or five companies in which a man was a large holder of this description of property, shares had been paid-up and afterwards consolidated by a vote of three-fifths of the subscribers voting at a meeting which the testator had not himself cared to attend, and the consequence would be that it would be found that the whole purport and scope of the will had been altered, perhaps in a few weeks, or months, or even at a time just immediately before his decease. It might be found that a certain quantity of these shares had been turned into stock, and taken out of the operation of the will, while the other portion would remain shares, simply from the accident of the time having become ripe for this process of consolidation to take place as to some shares, but not as to the others.

I think it is more consonant to the language that is ordinarily used in these transactions, including the language of the Act of Parliament, where such an expression occurs, to say that "shares" shall be held to include "stock." It has become, as JAMES, L.J., seems to have thought in the court below, the ordinary mode in which testators speak of their property, and justly and rightly speak of it. They describe themselves as holding "shares" in a company, although those shares have been converted into stock. At the same time you comply more strictly with the language of the legislature when it defines a "shareholder" as a person who is a proprietor in a company, and, therefore, holds the rights of such a proprietor, and among others the right of participating and sharing in the profits which shall be declared by that company [see s. 3 of Companies Clauses Consolidation Act, 1845]. For these reasons I think the decision of the court below is right. In my judgment, the appeal ought to be dismissed, and the costs will naturally follow the result.

LORD O'HAGAN.—This seems to me a clear case, notwithstanding the decision of a very eminent judge, which I think we are bound to overrule. *Oakes* v. *Oakes* (1) is undoubtedly an express authority upon the point before us, but I find myself unable to follow it. Each will has its own peculiarities, and, when it becomes the subject of judicial consideration, must be interpreted according to its own special terms. It is rarely possible to find one so identical with another as to make the same rulings completely applicable to both, and we unsettle no principle by differing from TURNER, V.-C., as to the particular instruments with which he had to deal. As to *Re Gibson* (3) and *Trinder* v. *Trinder* (2), they do not materially touch the question before us, and so far as they do touch it at all, they appear to me

to assist the case of the respondent. In neither of them was the solution of the present question the basis of the judgment; but the learned judge held in both cases that under certain circumstances "stock" might properly be taken to describe "shares," and "shares" to describe "stock"; and so far he discredited the argument which would attribute to "shares" a meaning so technical and settled as to make it incapable of describing "stock," even though the testator plainly meant, as the Master of the Rolls believed he meant in this case, to use it for that purpose. There are terms to which usage and authority in the law have given so masterful an interpretation that their rigid construction is not affected by any assurance of the defeat to be necessarily inflicted by it on the real intentions of those who employ them; but "shares" and "stock" are not of this class, and I, at least, am not desirous to extend the class.

The argument founded on the statutes also appears to me to tell against the appellant. I asked the learned counsel to indicate the particulars in which any substantial distinction could be demonstrated between "railway shares" and "railway stock," and there was no satisfactory answer, because the Companies Clauses Consolidation Act, 1845, makes such a distinction impossible. For privilege or for profit, for getting dividends, or giving votes, or acquiring office, they are of equal value and effect, and when we find the shareholder described in the interpretation clause as a "proprietor or member" of the company, which, exactly to the same extent and with the same powers and properties, the stockholder also is, and when we further find the interpretation clause in various Acts declaring "shares" and "stock" to mean the same thing, we seem to have even the highest legislative authority for the construction which the appellant has asked us to condemn. The shares when paid-up grow into stock, and are put upon a special register, for the more convenient management of the business of the company; but in substance and in fact they continue to be the same thing, and may well pass by the same words, unless there be a clear difference made between them, and a plain indication of intention to have them dealt with in different ways. Without this indication, which anyone may make if he pleases, "stock" and "shares" are merely descriptions of identical interests in a company giving a right to participation in identical advantages, and the use of them by a testator must have identical results. On the whole, I have no doubt that the judgment of the Court of Appeal was right, and ought to be affirmed.

LORD SELBORNE.—The word "share" as used in this will is interpreted by the Master of the Rolls in his judgment as meaning

> "a share in the capital stock of a railway, which, as we know, may be transferred from one name to another, and may stand in any name."

If that is the true interpretation of the word, it is in substance equally applicable to the share in its original state before, and in its later state after, its conversion or consolidation into stock. The share, while still indivisible, whether subject to calls or paid-up, and registered on one system of book-keeping, is in substance and in truth nothing but "a share in the capital stock of the company," and it is still "a share in the capital stock of the company" after it has become divisible and registered on a different system of book-keeping. Under both conditions it is capable of being transferred from one name to another, and it may stand in any name. The difference makes no real change for any purpose whatever material to the nature or the incidents of the property, except that the shareholder's power of transfer is no longer subject to certain restrictions. Unless, therefore, the Acts of Parliament have made the word "share" a vox signata in a sense exclusive of stock, stock would be included in its natural and ordinary meaning when there is nothing in the context to lead to a different conclusion. But has the legislature done this? I think quite the contrary. It has said, in s. 3 of the Act of 1845, that "shareholder" is to mean a proprietor or member of the company; it has spoken, in s. 61 of the Act, not of the conversion only, but of the "conversion or consolida-

tion of shares into stock"; and it has used the word "stock" in the sense of the capital stock of the company after it has undergone the process of consolidation, discontinuing the use of the word "shares" only because that word had been used before the process of consolidation for purposes connected with the division of the capital stock into a definite number of shares, and not to express the amount of the interest of any particular individual therein. I will only add that the whole context of the will in the present case satisfies me that the testator used the words "all such shares in any railway of which I may die possessed," in their wider and more natural, and not in their narrower, sense.

Appeal dismissed.

Solicitors: *Collyer-Bristow, Withers & Russell*; *Rogers, Jull & Rogers.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

HOUSEHOLD FIRE AND CARRIAGE ACCIDENT INSURANCE CO. *v.* GRANT

[COURT OF APPEAL (Thesiger, Baggallay and Bramwell, L.JJ.), May 22, 23 and July 1, 1879]

[Reported 4 Ex.D. 216; 48 L.J.Q.B. 577; 41 L.T. 298; 44 J.P. 152; 27 W.R. 858]

Contract—Acceptance of offer—Acceptance by post—Time of acceptance—Posting of letter—Letter not received by offeror.

Company—Shares—Allotment—Time of allotment—Binding contract to take shares—Posting of allotment letter to applicant for shares.

Where an offer has been made to a person who is expressly or by implication authorised to accept it by post, then, as soon as a letter containing an acceptance is posted correctly addressed to the offeror, the contract is complete, even though the letter never reaches the offeror.

On Sept. 30, 1874, G. applied by letter for 100 shares in the plaintiff company, and on Oct. 20 a letter allotting 100 shares to him was duly addressed and posted by the company. The letter never reached G.

Held (per THESIGER, L.J., and BAGGALLAY, L.J., BRAMWELL, L.J., dissenting): the contract to take the shares was complete when the letter of allotment was posted, and G. was liable to pay calls made on the shares.

Notes. Followed: *Carta Para Gold Mining Co.* v. *Fastnedge* (1882), 30 W.R. 880. Considered: *Henthorn* v. *Fraser*, [1891–4] All E.R.Rep. 908. Referred to: *Byrne* v. *Van Tienhoven* (1880), 49 L.J.Q.B. 316; *Reed* v. *Harvey* (1880), 5 Q.B.D. 184; *Fry* v. *Raggio* (1891), 40 W.R. 120; *Entores, Ltd.* v. *Miles Far East Corpn.*, [1955] 2 All E.R. 493.

As to contracts made through the post, see 8 HALSBURY'S LAWS (3rd Edn.) 78–80; and for cases see 12 DIGEST (Repl.) 84–88. As to allotment of shares, see 6 HALSBURY'S LAWS (3rd Edn.) 235–239; and for cases see 9 DIGEST (Repl.) 290–291.

Cases referred to:

(1) *Dunlop* v. *Higgins* (1848), 1 H.L.Cas. 381; 12 Jur. 295; 9 E.R. 805, H.L.; 12 Digest (Repl.) 86, *470.*

(2) *Re Imperial Land Co. of Marseilles, Harris' Case* (1872), 7 Ch. App. 587; 41 L.J.Ch. 621; 26 L.T. 781; 20 W.R. 690, L.JJ.; 12 Digest (Repl.) 85, *465.*

(3) *Adams* v. *Lindsell* (1818), 1 B. & Ald. 681; 106 E.R. 250; 12 Digest (Repl.) 86, *477.*
(4) *Stocken* v. *Collin* (1841), 7 M. & W. 515; H. & W. 84; 10 L.J.Ex. 227; 151 E.R. 870; 6 Digest (Repl.) 254, *1829.*
(5) *Duncan* v. *Topham* (1849), 8 C.B. 225; 18 L.J.C.P. 310; 13 L.T.O.S. 304; 137 E.R. 495; 12 Digest (Repl.) 87, *480.*
(6) *Re National Savings Bank Association, Hebb's Case* (1867), L.R. 4 Eq. 9; 36 L.J.Ch. 748; 16 L.T. 308; 15 W.R. 754; 12 Digest (Repl.) 72, *399.*
(7) *British and American Telegraph Co.* v. *Colson* (1871), L.R. 6 Exch. 108; 40 L.J.Ex. 97; 23 L.T. 868; 12 Digest (Repl.) 87, *481.*
(8) *Potter* v. *Sanders* (1846), 6 Hare, 1; 67 E.R. 1057; 12 Digest (Repl.) 86, *478.*
(9) *Brogden* v. *Metropolitan Rail. Co.* (1877), 2 App. Cas. 666, H.L.; 12 Digest (Repl.) 55, *300.*
(10) *Tayloe* v. *Merchants Fire Insurance Co.*, 9 Howard's U.S. Sup. Ct. Rep. 390.
(11) *Re Constantinople and Alexandria Hotels Co., Finucane's Case* (1869), 20 L.T. 729; 17 W.R. 813; 9 Digest (Repl.) 290, *1818.*
(12) *Anon.* (1477), Y.B. 17 Edw. 4, fo. 1, pl. 2; cited in Plowd. 11b; 75 E.R. 18; 12 Digest (Repl.) 72, *397.*

Also referred to in argument:

Re Imperial Land Co. of Marseilles, Townsend's Case (1871), L.R. 13 Eq. 148; 41 L.J.Ch. 198; 25 L.T. 692; 20 W.R. 164; 12 Digest (Repl.) 85, *464.*

Re Constantinople and Alexandria Hotels Co., Reidpath's Case (1870), L.R. 11 Eq. 86; 40 L.J.Ch. 39; 23 L.T. 834; 19 W.R. 219; 12 Digest (Repl.) 87, *482.*

Re Imperial Land Co. of Marseilles, Wall's Case (1872), L.R. 15 Eq. 18; 42 L.J.Ch. 372; 12 Digest (Repl.) 87, *483.*

Countess Dunmore v. *Alexander* (1830), 9 Sh. (Ct. of Sess.) 190; 12 Digest (Repl.) 86, **300.*

Harvey v. *Johnston* (1848), 6 C.B. 295; 6 Dow. & L. 120; 17 L.J.C.P. 298; 11 L.T.O.S. 245; 12 Jur. 981; 136 E.R. 1265; 12 Digest (Repl.) 209, *1496.*

Re Richmond Hill Hotel Co., Pellatt's Case (1867), 2 Ch. App. 527; 36 L.J.Ch. 613; 16 L.T. 442; 15 W.R. 726, L.JJ.; 9 Digest (Repl.) 250, *1592.*

Re Universal Banking Corpn., Gunn's Case (1867), 3 Ch. App. 40; 37 L.J.Ch. 40; 17 L.T. 365; 16 W.R. 97, L.J.; 9 Digest (Repl.) 288, *1804.*

Dickinson v. *Dodds* (1876), 2 Ch.D. 463; 45 L.J.Ch. 777; 34 L.T. 607; 40 J.P. 532; 24 W.R. 594, C.A.; 12 Digest (Repl.) 66, *358.*

Thomson (*Keir's Trustees*) v. *James* (1855), 18 Dunl. (Ct. of Sess.) 1; 12 Digest (Repl.) 86, **301.*

Taylor v. *Jones* (1875), 1 C.P.D. 87; 45 L.J.Q.B. 110; 34 L.T. 131; 12 Digest (Repl.) 84, *460.*

Re Rolling Stock Co. of Ireland, Shackleford's Case (1866), 1 Ch. App. 567; 35 L.J.Ch. 818; 15 L.T. 129; 12 Jur.N.S. 695; 14 W.R. 1001, L.JJ.; 9 Digest (Repl.) 250, *1595.*

Appeal by the defendant from a decision of Lopes, J., in an action by the plaintiff company for calls on shares.

On Sept. 30, 1874, the defendant applied by letter for 100 shares in the company. The shares were allotted and an allotment letter was posted to him on Oct. 20, 1874, directed to him at the address given by him. The defendant said that the allotment letter had never been received by him, and that he had heard nothing of the shares until March, 1877, when he received a letter demanding £95, the amount of a call on 100 shares. This he refused to pay, denying that he was a shareholder, and on that the action was brought by the plaintiffs. The jury found (i) that the allotment letter of Oct. 20, 1874, had been posted; and (ii) that the defendant had never received it. On these findings Lopes, J., on consideration, gave judgment for the plaintiffs. The defendant appealed.

Finlay and *Dillwyn* for the defendant.

W. G. Harrison, Q.C., *Wilberforce* and *Arbuthnot* for the plaintiff company.

A

Cur. adv. vult.

July 1, 1879. The following judgments were read.

THESIGER, L.J.—In this case the defendant made an application for shares in the plaintiff company under circumstances from which we must imply that he
B authorised the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment; but upon the finding of the jury, it must be taken that the letter never reached its destination.

In this state of circumstances LOPES, J., has decided that the defendant is liable
C as a shareholder. He based his decision mainly upon the ground that the point for his consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court. *Dunlop* v. *Higgins* (1) is the leading case on the subject. It is true that LORD COTTENHAM, L.C., might have decided that case without deciding the point in this. But it appears to me equally true that he did not do so, and
D that he preferred to rest, and did rest, his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, this court is as much bound to apply that principle, constituting as it did a ratio decidendi, as it is to follow the decision itself. The exception was that in that case the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer according to the usages of trade,
E they were not responsible for any casualties in the Post Office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all, and LORD COTTENHAM, L.C., in expressing his opinion that it was not open to objection, did so after putting the case of a letter containing a notice of dishonour being posted to the holder of a bill of exchange in proper time, in which case he said (1 H.L.Cas. at p. 399):

F "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the Post Office he is not responsible."

In short, LORD COTTENHAM, L.C., appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event
G of the letter never being delivered.

My view of the effect of *Dunlop* v. *Higgins* (1) is that taken by JAMES, L.J., in *Harris' Case* (2), where he speaks (7 Ch. App. at pp. 591, 592) of the former case as

"a case which is binding upon us, and in which every principle argued before us was discussed at length by the Lord Chancellor in giving judgment. He [meaning the Lord Chancellor] arrived at the conclusion that the posting of
H the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it."

MELLISH, L.J., took the same view. He says (ibid. at pp. 595, 596):

I "In *Dunlop* v. *Higgins* (1) the question was directly raised whether the law was truly expounded in *Adams* v. *Lindsell* (3), and the House of Lords approved of the ruling in that case. LORD COTTENHAM, L.C., said, in the course of his judgment, that in the case of a bill of exchange, notice of dishonour given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not, and he referred to *Stocken* v. *Collin* (4) as an authority on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to *Adams* v. *Lindsell* (3), and quoted the

observation of LORD ELLENBOROUGH. That case, therefore, appears to me to be a direct decision that the contract is made from the time when it is accepted by post."

Leaving *Harris' Case* (2) for the moment, I turn to *Duncan* v. *Topham* (5) in which CRESSWELL, J., told the jury that, if the letter accepting the offer was put into the post office and lost by the negligence of the Post Office authorities, the contract would nevertheless be complete, and both he and WILDE, C.J., and MAULE, J., seem to have understood this ruling to have been in accordance with LORD COTTENHAM'S opinion in *Dunlop* v. *Higgins* (1). That opinion, therefore, appears to me to constitute an authority directly binding on us. But if *Dunlop* v. *Higgins* (1) were out of the way, *Harris' Case* (2) would still go far to govern the present. There it was held that the acceptance of the offer at all events binds both parties from the time of the acceptance being posted, and so as to prevent any retractation of the offer being of effect after the acceptance has been posted.

Whatever in abstract discussion may be said as to the legal notion of its being necessary in order to the effecting of a valid and binding contract that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless, therefore, a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are to be brought together at one and the same moment. This was pointed out by LORD ELLENBOROUGH in *Adams* v. *Lindsell* (3), which is a recognised authority upon this branch of law. But on the other hand, it is a principle of law as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance which only remains in the breast of the acceptor, without being actually or by legal implication communicated to the offeror, is no binding acceptance.

How, then, are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the Post Office as the agent of both parties, and it was so considered by LORD ROMILLY, M.R., in *Hebb's Case* (6), where, in the course of his judgment, he said (L.R. 4 Eq. at p. 12):

> "*Dunlop* v. *Higgins* (1) decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the Post Office is the common agent of both parties."

Also ALDERSON, B., in *Stocken* v. *Collin* (4), a case of notice of dishonour, and the case referred to by LORD COTTENHAM, L.C. (7 M. & W. at p. 516), says:

> "If the doctrine that the Post Office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission."

But if the Post Office be such a common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the Post Office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger, sent by the offeror himself as his agent, to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offeror, a principle which has been distinctly negatived?

This difficulty was attempted to be got over in *British and American Telegraph Co.* v. *Colson* (7), which was a case directly on all-fours with the present, and in which KELLY, C.B., is reported to have said (L.R. 6 Exch. at p. 115):

> "It may be that in general, though not in all cases, a contract takes effect from the time of acceptance, and not from the subsequent notification of it. As in

A the case now before the court, if the letter of allotment had been delivered to the defendant in the due course of the post, he would have become a shareholder from the date of the letter, and to this effect is *Potter* v. *Sanders* (8). And hence perhaps the mistake has arisen that the contract is binding upon both parties at the time when the letter is written and put into the post, although never delivered, whereas, although it may be binding from the time of acceptance, it is only binding at all when afterwards duly notified."

But, with deference, I would ask how a man can be said to be a shareholder at a time before he was bound to take any shares, or, to put the question in the form in which it was put by MELLISH, L.J., in *Harris' Case* (2), how there can be any relation back in a case of this kind as there may be in bankruptcy. The lord justice said (7 Ch. App. at p. 596):

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"If the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted."

The principles laid down in *Harris' Case* (2), as well as in *Dunlop* v. *Higgins* (1), can really not be reconciled with the decision in *British and American Telegraph* D *Co.* v. *Colson* (7). In *Harris' Case* (2) JAMES, L.J., in the passage I have already quoted (7 Ch. App. at pp. 591, 592), affirms the proposition that when once the acceptance is posted neither party can afterwards escape from the contract, and refers with approval to *Hebb's Case* (6). There a distinction was taken by LORD ROMILLY, M.R., that the company chose to send the letter of allotment to their own agent who was not authorised by the applicant for shares to receive it on his behalf, E and who never delivered it; but he at the same time assumed that if, instead of sending it through an unauthorised agent, they had sent it through the Post Office, the applicant would have been bound, although the letter had never been delivered. MELLISH, L.J., really goes as far, and states forcibly the result in favour of this view. The mere suggestion thrown out at the close of his judgment, when stopping short of actually overruling the decision in *British and American Telegraph Co.* v. F *Colson* (7) that, although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of his judgment, be said to represent his own opinions as to the law upon the subject. The contract, as he says (7 Ch. App. at p. 596) "is actually made when the letter G is posted." The acceptor in posting the letter has, to use the language of LORD BLACKBURN, in *Brogden* v. *Metropolitan Rail. Co.* (9) (2 App. Cas. at p. 691),

"put it out of his control, and done an extraneous act which clenches the matter, and shows beyond all doubt that each side is bound."

How then can a casualty in the post, whether resulting in delay, which in com- H mercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offeror, and I can see no principle of law from which such an anomalous contract can be I deduced. There is no doubt that the implication of a complete, final, and absolutely binding contract being formed as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in any view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An

offeror, if he choose, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post, he trusts to a means of communication which as a rule does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded except in the event of the acceptance actually reaching the offeror, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which dispatch is, as a rule, of the greatest consequence, would be occasioned, for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon a balance of convenience and inconvenience, it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Tayloe* v. *Merchants Fire Insurance Co.* (10), more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication which the parties themselves contemplated, instead of postponing its completion till the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of LOPES, J., was right, and should be affirmed, and that this appeal should, therefore, be dismissed.

BAGGALLAY, L.J.—I am of opinion that this appeal should be dismissed. It has been established by a series of authorities, including *Dunlop* v. *Higgins* (1) in the House of Lords, and *Harris' Case* (2) in the Court of Appeal in Chancery, that, if an offer is made by letter, which expressly or impliedly authorises the sending of an acceptance of such an offer by post and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery. The question involved in the present appeal is whether the same principle should be applied in a case in which the letter of acceptance, though duly posted, is not delivered to the person to whom it is addressed. LOPES, J., was of opinion that the principle was applicable to such a case, and gave judgment in favour of the plaintiffs, and from that judgment the present appeal is brought.

In support of his appeal, the defendant relies upon the decision of the Court of Exchequer in *British and American Telegraph Co.* v. *Colson* (7), to which for conciseness I will refer as *Colson's* case (7). I propose to consider *Dunlop* v. *Higgins* (1) and *Colson's* case (7) and *Harris' Case* (2) somewhat in detail, for the purpose of ascertaining whether the decision of the Court of Exchequer in *Colson's* case (7) is consistent with the decisions of the House of Lords and of the lords justices in the other two cases, and with the principles upon which such decisions were based.

The circumstances of *Dunlop* v. *Higgins* (1) were as follows. After a preliminary correspondence, Messrs. Dunlop & Co., who were merchants at Glasgow, addressed a letter on Jan. 28, 1845, to Messrs. Higgins & Co., who carried on business at Liverpool, offering them 2,000 tons of iron pigs at 65s. per ton net. This letter reached Higgins & Co. at 8 a.m. on Jan. 30, and on the same day they replied by letter, duly addressed to Dunlop & Co. in the following terms: "We will take the 2,000 tons of pig iron you offer us." It appeared by the evidence that the first post for Glasgow after the receipt by Higgins & Co. of the letter of Dunlop & Co. left Liverpool at 3 p.m. on Jan. 30, and that the post next following left at 1 a.m. on the 31st, and also that a letter dispatched by the former post would, in due course, arrive at Glasgow at 2 p.m. on the 31st, and by the latter in time to be delivered at 8 a.m. on Feb. 1. The letter so sent by Higgins & Co. was posted after the bags were made up for the 3 p.m. post, and was dispatched by the 1 a.m. post on Jan. 31. In due course it should have been delivered in Glasgow at 8 a.m. on Feb. 1, but it was not in fact delivered until 2 p.m. on that day, the

frosty state of the weather having prevented the train from Liverpool arriving at Warrington in time to meet the down train to Glasgow. It appeared that Higgins & Co. by mistake dated their letter as of Jan. 31 instead of the 30th. On Feb. 1, after the receipt of the letter of Higgins & Co. accepting the offer, Dunlop & Co. wrote to Higgins & Co.:

> "We have your letter of yesterday's day, but are sorry we cannot now enter the 2,000 tons, our offer of the 28th not being accepted in course."

The iron was not delivered, and Higgins & Co. brought their action for breach of contract. The defence of Dunlop & Co. was that their letter of Jan. 28 should have been answered by the first post, viz., by that which left Liverpool at 3 p.m. on the 30th; but that at any rate they were not bound to wait for a third post delivered at Glasgow at 2 p.m. on Feb. 1.

On the trial before the Lord Justice General, he admitted evidence to show that the letter of acceptance, though dated Jan. 31, was in fact written and posted on Jan. 30, and he directed the jury that if Higgins & Co. posted their acceptance of the offer in due time, according to the usage of trade, they were not responsible for any casualties in the Post Office establishment. It is important to bear in mind the terms of this direction, as it formed the substantial subject of appeal first to the Court of Session and then to the House of Lords. The jury found for the plaintiffs; that is to say, they found as a fact that the letter of Higgins & Co. was posted in due time according to the usage of the parties in their business transactions, and, having so found, they, under the direction of the judge, gave their verdict for the plaintiffs. Exceptions were thereupon taken by the defendants, and, among other grounds of exception, they objected to the admission of evidence as to the posting of the letter on Jan. 30, and to the direction of the Lord Justice General to which I have just referred. The exceptions were overruled by the judges of the First Division, and from their decision the defendants appealed to the House of Lords; the appeal was dismissed; and the ruling and direction of the Lord Justice General was upheld.

Though the question in dispute between the parties was whether Higgins & Co. were responsible for the delay in the delivery of the post, it is to be observed that the direction of the judge went further, for he ruled that, if their letter was duly posted, they were not responsible for any casualties in the Post Office establishment. During the argument LORD COTTENHAM, L.C., said (1 H.L.Cas at p. 392):

> "The question is whether putting in the post is not a virtual acceptance, though by the accident of the post it does not arrive."

In moving the judgment of the House he observed (ibid. at p. 398):

> "If a party does all that he can do, that is all that is called for; if there is an usage of trade to accept such an offer, and to return an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter in the post on the correct day, has he not done everything that he was bound to do—how can he be responsible for that over which he has no control?"

There is nothing in the language thus used by LORD COTTENHAM, L.C., to suggest any distinction between a case in which there is delay in the delivery of the letter, and one in which the letter is not delivered at all. LORD COTTENHAM, L.C., went on to illustrate his meaning, and did so in the following terms (ibid.):

> "It is a very frequent occurrence that a party having a bill of exchange which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do as far as he is concerned; he has put the letter into the post, and whether that

letter be delivered or not is a matter quite immaterial, because for accidents happening at the Post Office he is not responsible."

Having regard to those passages in LORD COTTENHAM's judgment, it appears to me impossible to doubt that the proposition which he intended to affirm, and which was in fact his ratio decidendi, was that when the letter accepting the offer was duly posted the contract was complete, although it might be delayed in its delivery, or might never reach the hands of the party making the offer. I desire, however, to guard myself against being considered as participating in a view of the effect of the decision in *Dunlop* v. *Higgins* (1) which has been sometimes adopted, and, as I think, without sufficient reason, namely, that in all cases in which an offer is accepted by a letter addressed to the party making the offer and duly posted, there is a binding contract from the time when such letter is posted. I do not take this view of the effect of the decision of *Dunlop* v. *Higgins* (1); on the contrary, I think that the principle established by that case is limited in its application to cases in which, by reason of general usage or of the relation between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorised. In *Dunlop* v. *Higgins* (1) the previous correspondence between the two firms was, in my opinion, quite sufficient not only to authorise the sending of the acceptance by post, but to point to it as the only mode in which, under the circumstances, such acceptance could be communicated, and it was in consequence of the jury finding as a fact that Higgins & Co. posted their acceptance of the offer of Dunlop & Co. in due time according to the usage of their business transactions that they found a verdict for the plaintiffs under the direction of the judge.

The principle involved in *Dunlop* v. *Higgins* (1) was recognised by CRESSWELL, J., upon the trial of *Duncan* v. *Topham* (5). Upon that occasion he directed the jury that, if the letter accepting the contract was put into the Post Office and lost through the negligence of the Post Office authorities, the contract would nevertheless be complete; and upon application in the same case to make absolute a rule nisi which had been obtained for a new trial, though the new trial was ordered upon other grounds, WILDE, C.J., and MAULE, J., expressed views to the same effect as the direction of CRESSWELL, J. In that case the letter never reached the hands of the person to whom it was addressed.

I proceed to consider the circumstances of *Colson's* case (7). They were as follows: On Feb. 13, 1867, the defendant sent an application to the company, through the post, for an allotment of fifty shares, undertaking by his letter to pay the sum of £2 per share on whatever number should be allotted to him. On the 14th of the same month fifty shares were allotted to him, and a letter informing him of such allotment was posted to his address, as given in his letter of application for shares, namely, 31 Charlotte Street, Fitzroy Square. A letter of application for shares in a public company, expressed in the usual form, must, I think, having regard to the usage in such matters, be considered as authorising the acceptance of the offer by a letter through the post. As was expressed by LOPES, J., in the case now under consideration, such would be the ordinary mode of transmission of an allotment letter. The defendant, however, swore—and there was no reason to doubt the truth of his statement—that he never received the letter of allotment, that another person of the same name lived opposite to him in the same street, that about this time the numbers in the street were changed, his own being altered from 31 to 87, and that several letters then sent to him had never reached him. On Feb. 28 the plaintiffs, on being informed that the letter of allotment had never reached the defendant, sent him a duplicate, which he refused to accept. The action was then brought by the company to recover the £2 per share. The jury found that the letter of allotment was posted to the defendant on Feb. 14, but that he never received it, and that the second notice was not sent in reasonable time. The learned judge, BRAMWELL, B., thereupon directed the verdict for the plaintiffs, but gave the defendant leave to move to have it entered for himself, on the authority

of *Finucane's Case* (11) which had then recently been decided by LORD ROMILLY, M.R.

A rule nisi was accordingly obtained, and cause was shown on Nov. 17, 1870, the court being composed of KELLY, C.B., and BRAMWELL and PIGOTT, BB. Judgment was reserved, and on Jan. 31, 1871, the rule was made absolute to enter the verdict for the defendant. The Lord Chief Baron, in the course of his judgment, expressed himself as follows (L.R. 6 Exch. at p. 111):

> "It appears to me that if one proposes to another by a letter through the post to enter into a contract for the sale or purchase of goods, or, as in this case, of shares in a company, and the proposal is accepted by letter, and the letter is put into the post, the party having proposed to contract is not bound by the acceptance of it until the letter of acceptance is delivered to him or otherwise brought to his knowledge, except in some cases, where the non-receipt of the acceptance has been occasioned by his own act or default."

Unless the proposition so put forward by the Lord Chief Baron is to be read with some qualification, it can hardly be considered as consistent with the decision in *Dunlop* v. *Higgins* (1), as such decision has been ordinarily understood. The view, however, taken by him of that decision does not appear to be in accordance with that generally taken, for, after alluding to the circumstances of *Dunlop* v. *Higgins* (1), he proceeded to express his entire concurrence in the decision of the Court of Session, and in the affirmance of it by the House of Lords, upon the ground that, in his opinion, the acceptance of the offer reached Dunlop & Co. in time, and that the House of Lords had acted upon the same view of the circumstances of the case. The distinction which he recognised between that case and the one then under consideration consisted in this, that whereas the letter of acceptance in *Dunlop* v. *Higgins* (1) was received by the party making the offer in due time, that in *Colson's* case (7) never reached its destination. PIGOTT, B., did not deliver a separate judgment, but it was stated that he concurred in that of the Lord Chief Baron. BRAMWELL, B., also commented upon the circumstances of *Dunlop* v. *Higgins* (1), and referred to several passages in the opinion of LORD COTTENHAM, L.C., including those which I have quoted. He then expressed himself as follows (L.R. 6 Exch. at p. 120):

> "It seems to me that the correct way to deal with these expressions is to refer them to the subject-matter, and not to consider them as laying down such a proposition as the plaintiffs here contend for; but that, when the post may be used between two parties, it must be subject to those delays which are unavoidable."

It would appear, then, that all the learned judges in the Court of Exchequer treated *Dunlop* v. *Higgins* (1) as one decided upon its special circumstances and not enunciating any general principle beyond what was necessary for dealing with such circumstances. I am unable to concur in this view. It may be that there were special circumstances in *Dunlop* v. *Higgins* (1) sufficient to have justified the decision of the House of Lords irrespective of the application of the principle involved in the direction of the Lord Justice General, but the decision was not expressed to be based upon any such ground, but upon the approval and adoption of the direction of that learned judge. After a careful consideration of the judgments of the Lord Chief Baron and of BRAMWELL, B., I can come to no other conclusion than that the decision in *Colson's* case (7) is inconsistent with that of the House of Lords in *Dunlop* v. *Higgins* (1). If I am right in this conclusion it is not for me to choose between the two. I am bound by the authority of the decision of the House of Lords.

I pass on to consider the circumstances of *Harris' Case* (2), which came before the lords justices in 1872. On Mar. 5, 1866, Lewis Harris, of Dublin, applied to the directors of the Imperial Land Co. of Marseilles, by a letter in the usual form, for an allotment of 200 shares, undertaking by his letter to accept that or any less number of shares that might be allotted to him. The directors alloted to

him 100 shares, and early on the morning of Mar. 16 posted a letter to him at his address, as given in his letter of application, which was received by him at Dublin. He had, however, in the interval between the posting and the delivery of the letter giving him notice of the allotment, written to the directors withdrawing his application and declining to accept any shares. Upon an order being made to wind-up the company. Mr. Harris was placed upon the list of contributories in respect of the 100 shares, and a summons having been taken out by him to have his name removed from the list, the summons was dismissed by MALINS, V.-C. From such dismissal Mr. Harris appealed, but the decision of the vice-chancellor was upheld. In giving judgment JAMES, L.J., said that it appeared to him that the contract was completed the moment that the notice of allotment was committed to the post; and a similar view was expressed by MELLISH, L.J., who, after referring to the decision of the Court of Exchequer in *Colson's* case (7) and stating that he had great difficulty in reconciling it with that of the House of Lords in *Dunlop* v. *Higgins* (1), observes, with reference to the last mentioned case, that the real question then before the House of Lords was whether the ruling of the Lord Justice General was correct, and that the House of Lords held that it was.

It is doubtless true, as was observed by both lords justices, that the decision in *Harris' Case* (2) was not necessarily inconsistent with that of the Court of Exchequer in *Colson's* case (7); but it is, I think, clear, that although the lords justices did not feel themselves called upon to express any dissent from the decision of the Court of Exchequer, as it was not necessary for the decision of the case before them that they should do so, they by no means recognised the propriety of the distinction drawn by the Court of Exchequer between *Dunlop* v. *Higgins* (1) and *Colson's* case (7). I do not think it is necessary to refer to *Finucane's Case* (11) and other cases decided by LORD ROMILLY, M.R., in which he held that the posting of a letter of allotment which never reached its destination was not sufficient to constitute the applicant a contributory, further than that in *Finucane's Case* (11), *Dunlop* v. *Higgins* (1), and *Duncan* v. *Topham* (5) were not cited, and that in the other two the circumstances were such that the Master of the Rolls deemed himself justified in not following the decision in *Dunlop* v. *Higgins* (1). Indeed, in one of these cases, *Hebb's Case* (6), he distinctly recognised the authority of the decision in *Dunlop* v. *Higgins* (1) which he considered to have been decided upon the ground that the Post Office was the common agent of both parties.

For the reasons which I have assigned I am of opinion that the principle established in the House of Lords in *Dunlop* v. *Higgins* (1) is applicable to the case now under consideration, and that the decision of LOPES, J., should be affirmed. I desire, however, to add that, should I have not felt myself bound by authority, my own convictions were entirely in accordance with the principles which I consider to have been established by authority; and in saying this I bear in mind as well the very forcible remarks made by the Lord Chief Baron and my present colleague upon the subject of the mischievous consequences that might ensue from an adoption of this principle in certain suggested cases, as the equally forcible remarks made by MELLISH, L.J., as to the like consequences which would ensue in other cases if those principles were departed from.

BRAMWELL, L.J.—The question in this case is not whether the Post Office was a proper medium of communication from the plaintiff to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives anyone the right to communicate with him gives the right to communicate in an ordinary, and so in this, way, and to this extent, that, if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offeror, I should say that an acceptance by post, though it did not reach the offeror until the next morning, would be in time. Nor is the question whether, when the letter reaches an offeror, the latter is bound and the bargain made from the time the letter is posted or dispatched, whether by post or otherwise.

A The question in this case is different. I will presently state what, in my judgment, it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case. First, where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer: per BRYAN, C.J., in *Anon.* (12), cited in BLACKBURN ON B SALE (1st Edn.), p. 189. Secondly, the present case is one of proposal and acceptance. Thirdly, as a consequence of or involved in the first proposition, if the acceptance is written or verbal—i.e., is by letter or message—as a rule, it must reach the proposer, or there is no communication, and so no acceptance of the offer. Fourthly, if there is a difference where the acceptance is by a letter sent through the post, which does not reach the offeror, it must be by virtue of some C general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offeror as he goes by, or leaving a letter at a certain place, or any other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar box or other place of reception should suffice. D Fifthly, as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference where the Post Office is employed as the means of communication. Sixthly, if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post.

As I have said, the question is not whether this communication may be made E by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post—e.g., a notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer and in the same letter gives me notice to quit, and posts his letter which, however, does not reach me, that he has communicated to me his acceptance of F my offer but not his notice to quit. Suppose a man has paid his tailor by cheque or bank-note, and posts a letter containing cheque or bank-note to his tailor which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques or bank-notes to his banker by post, and posts a letter containing cheques and bank-notes, which never reaches, is the banker liable? Would he be if this was the G first instance of a remittance of the sort? In the case I have supposed the tailor and banker may have recognised the mode of remittance by sending back receipts, and by putting the money to the credit of the remitter. Are they liable with that? Would they be liable without it?

The question, then, is: Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses H with it? It is for those who say it is to make good their contention. I ask why is it. My answer beforehand to any argument that may be urged is that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication; that those who affirm the contrary say the thing which is not; that if BRYAN, C.J., had had to adjudicate on the case he would deliver the same judgment as that reported; that because a man who may send I a communication by post or otherwise sends it by post, he should bind the person addressed though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it. It is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequences? Suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed. Could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article

is advertised at so much, and that it will be sent on receipt of a postal order, is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said: Let the offeror wait, the answer is: May be he will lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, and information posted does not reach, and someone else gives it and is paid, is the offeror liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offeror, who may have made his arrangements on the footing that his offer was not accepted. His non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do, but to act on the negative that no communication has been made to him? Further, the use of the Post Office is no more authorised by the offeror than "send an answer by hand," and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party? It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post; not that the letter can be got back, but that its arrival might be anticipated by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say it would, and that a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled. Suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed.

Then, as was asked, is the principle to be applied to telegrams? Further, it seems admitted that, if the proposer said: "Unless I hear from you by return of post the offer is withdrawn," the letter accepting it must reach him to bind him. There is, indeed, a case recently reported in "The Times," before the Master of the Rolls, where the offer was to be accepted within fourteen days, and it is said to have been held that it was enough to post the letter on the fourteenth, though it would and did not reach the offeror until the fifteenth. There may have been something in that case not mentioned in the report; but as it stands it comes to this, that if an offer is to be accepted in June, and there is a month's post between the places, posting the letter on June 30 will suffice, though it does not reach until July 31. But that case does not affect this. There the letter reached; here it has not. If it is not admitted that "unless I hear by return the offer is withdrawn" makes the receipt of the letter a condition, it is to say an express condition goes for naught. If it is admitted, is it not what every letter says? Are there to be fine distinctions, such as if the words are "unless I hear from you by return of post," etc., it is necessary that the letter should reach him, but if the words are "let me know by return of post," it is not, or if in that case it is, yet it is not where there is an offer without those words? Lord Blackburn said that Mellish, L.J., in *Harris' Case* (2), actually stated that where it is expressly or impliedly stated in the offer "You may accept the offer by posting a letter," the moment you post this letter the offer is accepted. I agree, and the same thing is true of any mode of acceptance offered with the offer and acted on—as firing a cannon, sending off a rocket, "give your answer to my servant the bearer." Lord Blackburn was not dealing with the question before us; there was no doubt in the case before him that the letters had reached.

As to the authorities, I shall not re-examine those in existence before *British and American Telegraph Co.* v. *Colson* (7). But I wish to say a word as to *Dunlop* v. *Higgins* (1), as the whole difficulty has arisen from some expressions in that case. The argument and reference to the case of the defendant's counsel when originally

in the Scottish court has satisfied me that *Dunlop* v. *Higgins* (1) decided nothing contrary to the defendant in this case. MELLISH, L.J., in *Harris' Case* (2), says: "That case is not a direct decision on the point before us." It is true he adds that he has great difficulty in reconciling *British and American Telegraph Co.* v. *Colson* (7) with *Dunlop* v. *Higgins* (1). I do not share that difficulty. I think that they are perfectly reconcilable, and that I have shown so. Where a posted letter arrives, the contract is complete on the posting. So where a letter sent by hand arrives, the contract is complete on the writing and delivery to the messenger. Why not? All the extraordinary and mischievous consequences which the lord justice points out might happen if the law were otherwise when a letter is posted, and would equally happen where it is sent otherwise than by the post. He adds: "The question before the House in *Dunlop* v. *Higgins* (1) was whether the ruling of the Lord Justice Clerk was correct," and they held it was. Now, counsel for the defendant showed very clearly that the Lord Justice Clerk decided nothing inconsistent with the judgment in *British and American Telegraph Co.* v. *Colson* (7).

Since that case there have been two before MALINS, V.-C., in the earlier of which he thought it "reasonable" and followed it. In the other, because the lords justices had in *Harris' Case* (2) "thrown cold water upon it," he appears to have thought it not reasonable. He says, "Suppose the sender of a letter says 'I make you an offer; let me have an answer by return of post.' By return the letter is posted, and A. has done all that the person making the offer requests." That is precisely what he has not done. He has not let him "have an answer." He adds: "There is no default on his part. Why should he be the only person to suffer?" Very true. But there is no default in the other, and why should he be the only person to suffer?

The only other authority is the expression of opinion of LOPES, J., in the present case. He says the proposer may guard himself against hardship by making the proposal expressly conditional on the arrival of the answer within a definite time. But it need not be express nor within a definite time. It is enough that it is to be inferred that it is to be, and if it is to be it must be within a reasonable time. The mischievous consequences he points out do not follow from that which I am contending for. I am at a loss to see how the Post Office is the agent for the parties. What is the agency? As to the sender it is merely to receive. But suppose it is not an answer but an original communication, what then? Does the extent of the agency of the Post Office depend on the contents of the letter? If the Post Office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offeror says: "My offer is conditional on your answer reaching me." Of whom is the Post Office the agent then? How does the offeror make the Post Office his agent because he gives the acceptor an option of using that or any other means of communication?

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer, and a communication to him of that acceptance, that there was no such communication, and that posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and Post Office. The difficulty has arisen from a mistake as to what was decided in *Dunlop* v. *Higgins* (1); and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences; and also from supposing that because, if the letter reaches, it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not. As so much has been said on the matter that principle has been lost sight of, I believe equal if not greater will, if it does not prevail. I believe that the latter will be only obviated by the rule being made nugatory by every prudent man saying: "Your answer by post is only to bind if it reaches me." But the question is not to be decided

on these considerations. What is the law? What is the principle? If BRYAN, C.J., had had to decide this, a public post being instituted in his time, he would have said that the law is the same now there is a post as it was before, namely, a communication to affect a man must be a communication, i.e., must reach him.

Appeal dismissed.

Solicitors: *Worthington Evans*; *John Davis*, for *Leyson*, Swansea.

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

KENDALL AND OTHERS *v.* HAMILTON

[HOUSE OF LORDS (Earl Cairns, L.C., Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, Lord Blackburn and Lord Gordon), May 26, 27, June 17, 20, 23, July 28, 1879]

[Reported 4 App. Cas. 504; 48 L.J.Q.B. 705; 41 L.T. 418; 28 W.R. 97]

Partnership—Action against partners—Judgment obtained against some members of partnership—Judgment not satisfied—Right of plaintiff later to sue other partner.

When a creditor obtains judgment against a member or members of a partnership the matter becomes res judicata, and, therefore, the judgment, although not satisfied, is a bar to a subsequent action by the creditor against any other member or members of the firm.

So **held** by LORD CAIRNS, L.C., LORD HATHERLEY, LORD O'HAGAN, LORD SELBORNE, LORD BLACKBURN, and LORD GORDON, LORD PENZANCE dissenting.

Agent—Undisclosed principal—Contract made by agent in his own name—Judgment against agent obtained by creditor—Judgment not satisfied—Right of creditor to sue principal.

Per EARL CAIRNS, L.C., and LORD BLACKBURN: Where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal, but, if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment does not result in satisfaction of the debt.

Practice—Joint contractors—Judgment against one joint contractor—Judgment not satisfied—Bar to action against other joint contractor.

Per LORD BLACKBURN: A judgment recovered against one or more of several joint contractors, although not satisfied, is a bar to a subsequent action against another joint contractor.

Notes. Considered: *Re Hodgson, Beckett* v. *Ramsdale*, [1881–5] All E.R.Rep. 931; *Badeley* v. *Consolidated Bank* (1886), 34 Ch.D. 536: Explained: *Leduc* v. *Ward* (1886), 54 L.T. 214. Considered: *Pilley* v. *Robinson* (1887), 20 Q.B.D. 155. Applied: *Cambefort* v. *Chapman* (1887), 19 Q.B.D. 229. Distinguished: *Beck* v. *Pierce* (1889), 23 Q.B.D. 316. Considered: *Hammond* v. *Schofield*, [1891] 1 Q.B. 453. Applied: *Blyth* v. *Fladgate*, *Morgan* v. *Blyth*, *Smith* v. *Blyth*, [1891] 1 Ch. 337. Considered: *Re Crook*, *Ex parte Collins* (1892), 66 L.T. 29. Explained: *Weall* v. *James* (1893), 68 L.T. 515. Considered: *Wegg-Prosser* v. *Evans*, [1895] 1 Q.B. 108; *McLeod* v. *Power*, [1895] 2 Ch. 295. Explained: *M. Isaacs & Sons, Ltd.* v. *Salbstein*, [1916–17] All E.R.Rep. 386. Applied: *Parr* v. *Snell*, [1922] All E.R.Rep. 270. Distinguished: *Duffner* v. *Bowyer* (1924), 40 T.L.R. 700.

Applied: *R.M.K.M.* (*Firm of*) v. *M.R.M.V.L.* (*Firm of*), [1926] A.C. 761; *Pirie* v. *Richardson*, [1927] 1 K.B. 448. Referred to: *Re McRae*, *Forster* v. *Davis*, *Norden* v. *McRae* (1883), 25 Ch.D. 16; *Re Davison*, *Ex parte Blenkiron Executors* (1884), 50 L.T. 635; *Re Davison*, *Ex parte Chandler* (1884), 13 Q.B.D. 50; *Munster* v. *Cox* (1885), 10 App. Cas. 680; *Odell* v. *Cormack* (1887), 19 Q.B.D. 223; *Hoare* v. *Niblett*, [1891] 1 Q.B. 781; *Westmorland Green and Blue Slate Co.* v. *Feilden Bros.*, [1891] 3 Ch. 15; *Re Outram*, *Ex parte Ashworth and Outram* (1893), 63 L.J.Q.B. 308; *British South Africa Co.* v. *Companhia de Moçambique*, [1891–4] All E.R.Rep. 640; *Wilson* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q.B. 422; *Hall* v. *Sim* (1894), 10 T.L.R. 463; *Morel Bros. & Co., Ltd.* v. *Earl of Westmorland* (1902), 87 L.T. 635; *Codling* v. *Mowlem*, [1914] 2 K.B. 61; *Goldrei*, *Foucard & Son* v. *Sinclair and Russian Chamber of Commerce in London*, [1916–17] All E.R.Rep. 898; *Norbury Natzio & Co., Ltd.* v. *Griffiths*, [1918–19] All E.R.Rep. 225; *Rodriguez* v. *Speyer*, [1918–19] All E.R.Rep. 884; *Moore* v. *Flanagan*, [1920] 1 K.B. 919; *Clarkson* v. *Davies*, [1923] A.C. 100; *The Koursk*, [1924] All E.R.Rep. 168; *Re Pennington and Owen, Ltd.*, [1925] All E.R.Rep. 354; *Bennett* v. *Whitehead*, [1926] 2 K.B. 380; *Hardie and Lane* v. *Chiltern* (1927), 96 L.J.K.B. 268; *Freshwater* v. *Bulmer Rayon Co.*, [1933] Ch. 162; *Holmes* v. *Watt*, [1935] All E.R.Rep. 496; *B. O. Morris, Ltd.* v. *Perrott and Bolton*, [1945] 1 All E.R. 567; *Young* v. *Bristol Aeroplane Co.*, [1946] 1 All E.R. 98.

As to actions against partners, see 28 Halsbury's Laws (3rd Edn.) 519–525; and for cases see 36 Digest (Repl.) 480 et seq.

Cases referred to:

(1) *Priestley* v. *Fernie* (1865), 3 H. & C. 977; 34 L.J.Ex. 172; 13 L.T. 208; 11 Jur.N.S. 813; 13 W.R. 1089; 2 Mar.L.C. 281; 159 E.R. 820; 21 Digest (Repl.) 299, *628*.

(2) *King* v. *Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest (Repl.) 293, *591*.

(3) *Ex parte Williams* (1805), 11 Ves. 3; 32 E.R. 988; 4 Digest (Repl.) 461, *4038*.

(4) *Rice* v. *Shute* (1770), 5 Burr. 2611; 2 Wm. Bl. 695; 96 E.R. 409; 36 Digest (Repl.) 514, *788*.

(5) *Beresford* v. *Browning* (1875), 1 Ch.D. 30; 33 L.T. 524; sub nom. *Beresford* v. *Browing*, *Browing* v. *Beresford*, 45 L.J.Ch. 36; 24 W.R. 120, C.A.; 36 Digest (Repl.) 526, *907*.

(6) *Ex parte Kendall* (1811), 17 Ves. 514; 34 E.R. 199; sub nom. *Re Dawes*, *Ex parte Kendall*, 1 Rose 71, L.C.; 36 Digest (Repl.) 492, *601*.

(7) *Gray* v. *Chiswell* (1803), 9 Ves. 118; 32 E.R. 547, L.C.; 24 Digest (Repl.) 855, *8507*.

(8) *Boson* v. *Sandford* (1689), 2 Salk. 440; 91 E.R. 382; 34 Digest (Repl.) 157, *1093*.

(9) *Cabell* v. *Vaughan* (1669), 1 Saund. 291; 1 Vent. 34; 2 Keb. 528; 85 E.R. 389; sub nom. *Chappel* v. *Vaughan*, 1 Sid. 420; 7 Digest (Repl.) 246, *846*.

(10) *Evans* v. *Lewis* (1794), 1 Wms. Saund. 291, n.; 85 E.R. 392; 7 Digest (Repl.) 39, *160*.

(11) *Re Morrison*, *Ex parte Waterfield* (1851), 4 De G. & Sm. 199; 64 E.R. 797; sub nom. *Re Morrison*, *Ex parte Jones*, 20 L.J.Bcy. 5; 16 L.T.O.S. 346; 15 Jur. 214; 4 Digest (Repl.) 469, *4110*.

Also referred to in argument:

Lane v. *Williams* (1692), 2 Vern. 277; 23 E.R. 779; 6 Digest (Repl.) 92, *726*.

Bishop v. *Church* (1751), 2 Ves. Sen. 371; 28 E.R. 976, L.C.; 7 Digest (Repl.) 198, *323*.

Liverpool Borough Bank v. *Walker* (1859), 4 De G. & J. 24; 45 E.R. 10, L.JJ.; 24 Digest (Repl.) 613, *6104*.

Jacomb v. *Harwood* (1751), 2 Ves. Sen. 265; 28 E.R. 172; 24 Digest (Repl.) 619, *6142*.

Daniel v. *Cross* (1796), 3 Ves. 277; 30 E.R. 1009, L.C.; 36 Digest (Repl.) 493, *615.*

Devaynes v. *Noble, Sleech's Case* (1816), 1 Mer. 529, 539; 35 E.R. 767, 771; 36 Digest (Repl.) 494, *623.*

Sumner v. *Powell* (1816), 2 Mer. 30; 35 E.R. 852; affirmed (1823), Turn. & R. 423, L.C.; 12 Digest (Repl.) 28, *53.*

Wilkinson v. *Henderson* (1833), 1 My. & K. 582; 2 L.J.Ch. 190; 39 E.R. 801; 36 Digest (Repl.) 495, *630.*

Hills v. *M'Rae* (1851), 9 Hare, 297; 20 L.J.Ch. 533; 17 L.T.O.S. 242; 15 Jur. 766; 68 E.R. 516; 36 Digest (Repl.) 517, *814.*

Ridgway v. *Clare* (1854), 19 Beav. 111; 52 E.R. 291; 24 Digest (Repl.) 883, *8814.*

Lodge v. *Pritchard* (1863), 1 De G.J. & Sm. 610; 2 N.R. 537; 32 L.J.Ch. 775; 9 L.T. 107; 11 W.R. 1086; 24 Digest (Repl.) 855, *8509.*

Robinson's Executor's Case, Re Royal Bank of Australia (1856), 6 De G.M. & G. 572; 26 L.J.Ch. 95; 28 L.T.O.S. 167; 2 Jur.N.S. 1173; 5 W.R. 126; 43 E.R. 1356, L.C. & L.JJ.; 10 Digest (Repl.) 963, *6630.*

Burn v. *Burn* (1798), 3 Ves. 573; 30 E.R. 1162, L.C.; 4 Digest (Repl.) 470, *4123.*

Re Tyler, Ex parte Higgins (1858), 3 De G. & J. 33; 27 L.J.Bcy. 27; 31 L.T.O.S. 47; 4 Jur.N.S. 595; 6 W.R. 406; 44 E.R. 1181, L.JJ.; 4 Digest (Repl.) 469, *4111.*

Simpson v. *Vaughan* (1739), 2 Atk. 31; 26 E.R. 415, L.C.; 7 Digest (Repl.) 199, *338.*

Thomas v. *Frazer* (1797), 3 Ves. 399; 30 E.R. 1074, L.C.; 7 Digest (Repl.) 199, *340.*

Vyvyan v. *Vyvyan* (1861), 30 Beav. 65; 7 Jur.N.S. 891; 9 W.R. 879; 54 E.R. 813; affirmed, 4 De G.F. & J. 183, L.C.; 20 Digest (Repl.) 552, *2584.*

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (Brett, Cotton and Thesiger, L.JJ.), reported 3 C.P.D. 403, reversing a judgment of Huddleston, B., in favour of the plaintiffs, at the trial of the case before him without a jury. The facts are stated in the judgments of their Lordships.

Kay, Q.C., Watkin Williams, Q.C., and *Bowen* for the appellants.

Benjamin, Q.C., and *Rigby* for the respondent.

The case was first heard on May 26 and 27, 1879, and at their Lordships' wish was re-argued on June 17, 20 and 23.

Their Lordships took time for consideration.

July 28, 1879. The following opinions were read.

EARL CAIRNS, L.C.—In the arguments in this case at your Lordships' Bar, as well as in the arguments and judgments in the court below, the facts of the case were presented in a form which may be thus described. It was said that the appellants were creditors to whom a debt was due from Wilson, McLay, and the respondent; that this debt was in the nature of a partnership debt due from the three jointly; that the appellants brought an action for the debt against Wilson and McLay alone; that at the time they brought the action they were not aware that the debt was contracted by the respondent jointly with Wilson and McLay; that Wilson and McLay did not plead in abatement, or otherwise object to the non-joinder of the respondent; that judgment was obtained by the appellants against Wilson and McLay, but this judgment, by reason of their insolvency, did not lead to the satisfaction of the debt; that the appellants afterwards discovering the interest of the respondent brought an action against him for the debt, which is the action out of which the present appeal rises; that thereupon two questions arose for the determination of the court—first, was the judgment recovered against Wilson and McLay, even without satisfaction, a bar, according to the principle hitherto prevailing in the courts of common law, to the action against the respondent? and, secondly, was there not a doctrine in courts of equity that all partnership debts were several as well as joint, and, if so, ought not that doctrine to be

A applied just as if the debt in this case had been the several debt of the respondent, so as to prevent him setting up the judgment against Wilson and McLay as an impediment to the appellants suing him? I will presently endeavour to express to your Lordships what my opinion would be upon these questions if they were really the questions to be determined in the case. But I must first suggest to your Lordships that the facts of the case, when properly considered, would seem to me B to make it doubtful whether the questions which I have mentioned really arise in the case, and whether the case does not fall to be determined upon considerations somewhat different.

Between 1870 and 1874 the appellants were merchants, carrying on business in London. Wilson and McLay were carrying on business in Glasgow and London, under the firm of Wilson, McLay & Co. They undertook certain speculative ship- C ments of old iron, and the appellants agreed to provide, through the acceptance and discounting of bills of exchange, the money necessary to carry on these speculations. In point of fact, though the appellants did not know it at the time, the respondent Hamilton was interested in these shipments. He had agreed that the shipments should be for the joint benefit of himself, Wilson, and McLay, and that the financial arrangements should be managed by Wilson and McLay. They were, therefore, the D agents who were authorised to borrow money for undisclosed principals, who were Wilson, McLay, and Hamilton. The persons advancing the money would have the right, on becoming aware of the interest of Hamilton, to sue Wilson, McLay, and Hamilton, as the principals on the contract, and if they sued Hamilton alone he would have a right to plead in abatement the non-joinder of Wilson and McLay. But the persons advancing the money would also have the right to treat Wilson E and McLay as the principals, and to sue them alone, and Wilson and McLay would have no right in such an action to plead in abatement, or otherwise object to the non-joinder of Hamilton. In the present case the transactions to which I have referred resulted in a large sum of money being due to the appellants. For this sum they brought an action against Wilson and McLay. This they were clearly entitled to do, whether they knew or did not know of the interest of Hamilton. F They might, it is true, at any time before judgment, have discontinued the action against Wilson and McLay, and have brought a fresh action against them and Hamilton, as principals, but if they did not do so, Wilson and McLay could not in any way have objected to the non-joinder of Hamilton, or have contended that they were not the persons, and the only persons, to be sued. In this state of things, the action went on, and resulted, as I have already said, in a judgment against G Wilson and McLay.

I take it to be clear that where an agent contracts in his own name for an undisclosed principal the person with whom he contracts may sue the agent or he may sue the principal, but, if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even though the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed *Priestley* v. H *Fernie* (1) may be mentioned. The reasons why this must be the case are, I think, obvious. It would be clearly contrary to every principle of justice that the creditor who had seen and known, dealt with and given credit to the agent should be driven to sue the principal if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal, who really has had the benefit of the loan, should be prevented from suing him if he I wishes to do so. It would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent, would have a right of action for indemnity against his principal, while, if the principal were liable also to be sued, he would be vexed with a double action. Further than this, if actions could be brought, and judgments recovered first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action. They might not necessarily be for the

same amounts, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode upon the face of the judgments, or by any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action, and that satisfaction of one was, or would be, satisfaction of both.

In the present case, I think that when the appellants sued Wilson and McLay, and obtained judgment against them, they adopted a course which was clearly within their power, to which Wilson and McLay could have made no opposition, and that, having taken this course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, co-exist with a right of action on the same facts against another person. If Wilson and McLay had been the agents, and Hamilton alone the undisclosed principal, the case could hardly have admitted a doubt; and I think it makes no difference that Wilson and McLay were the agents, and the undisclosed principals were Wilson, McLay and Hamilton. If the view which I have taken of the facts, and if the law applicable to them is correct, it is not necessary to look at Wilson, McLay, and Hamilton in the position of co-contractors, but, looking at them in this light, I must say that *King* v. *Hoare* (2) appears to me to have been decided on satisfactory grounds. It is the right of persons jointly liable to pay a debt to insist on being sued together. If, then, there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But should he afterwards bring a further action against the third, that third may justly contend that the three should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that, whatever he pays on the judgment against himself, he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued.

It has been suggested that, even assuming *King* v. *Hoare* (2) to have been rightly decided, the law as laid down in that case has been altered by the Judicature Acts, and by the abolition of the plea in abatement. I am unable to agree to this suggestion. I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting by means of a plea in abatement to the non-joinder of a defendant who ought to be included in the action is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles as those on which a plea in abatement would have succeeded or failed. In this particular case I observe that the judgment against Wilson and McLay was obtained before the Judicature Act came into operation; and if this judgment then became pleadable in bar, according to *King* v. *Hoare* (2) by Hamilton, in answer to an action against himself, I cannot see how this defence is taken away from him by the Judicature Act subsequently coming into operation.

If, then, this was the attitude of defence which Hamilton was entitled to take up in opposition to the present action, it does not appear to me that any difference is made by the doctrines of the courts of equity with regard to partnership debts. There is no doubt that in many cases and textbooks we find the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with

reference to what were the functions of the court of equity as to partnership debts. The only interposition of a court of equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a deceased member of it. Where a member of a partnership died the debts became in the eye of a court of law the debts of the survivors; but the survivors, on the other hand, in a court of equity had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a court of equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a court of equity, were joint and several, not thereby meaning that a court of equity altered or changed a legal contract, but merely that the court, in order before distributing assets to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only and would give the creditor the benefit of the equity which the surviving partners might have insisted on.

This is so clearly expressed by LORD ELDON in *Ex parte Williams* (3) that I will take leave to read his expressions, which appear to me to render unnecessary any comment on the numerous authorities which were cited on this head at your Lordships' Bar. LORD ELDON says (11 Ves. at pp. 5, 6):

> "Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions. . . . But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners and get judgment, and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment, clearly not in respect of any interest he had in the partnership effects while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership: effluxion of time; the death of one partner; the bankruptcy of one, which operates like death; or, as in this instance, a dry naked agreement that the partnership shall be dissolved. In no one of those cases can it be said that to all intents and purposes the partnership is dissolved, for the connection remains until the affairs are wound-up. The representative of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor or the solvent partner, but still in either of those cases that community of interest remains that is necessary until the affairs are wound-up, and that requires that what was partnership property before shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require; and it is through the operation of administering the equities as between the partners themselves that the creditors have that opportunity; as in the case of death it is the equity of the deceased partner that enables the creditors to bring forward the distribution."

I imagine that the words "bring forward" are an inaccurate report, but it obviously means "to insist upon the distribution."

If, therefore, this case is to be looked at as a case in which judgment has been recovered for a partnership debt against two out of three co-partners, it appears to me that, on the principle of *King* v. *Hoare* (2), the judgment would be a bar at law to a subsequent action against the third co-partner; and I know of no principle

on which a court of equity would hold the debt to be several for the purpose of preventing such a result. In any view of the case, therefore, I am of opinion that the judgment of the Court of Appeal was correct, and I have to move your Lordships to dismiss the appeal with costs.

LORD HATHERLEY.—I am of the same opinion as to the result which must be arrived at in this case. The question here is whether or not a person who was unknown to the appellants at the time they were advancing their money as being one of the borrowers of the money, and was acting through the agency of Messrs. Wilson and McLay, is now, in consequence of anything which has taken place under the Judicature Act—for that was the principle of the argument at the Bar—placed in a different position from that in which he would have been if the Act had not been passed. If it had not been passed I think his position would have been sufficiently clear. If *King* v. *Hoare* (2) is to subsist as an authority—and having stood so long I apprehend it would be difficult to shake it—then the appellants in this case having sued two of the partners, and having omitted to sue the other partner, of whose existence they were unconscious, as I think the whole of the evidence goes to show, having proceeded against two partners and obtained a judgment against them, their co-contractor could not, according to *King* v. *Hoare* (2), be sued, because the debt, which was a simple contract debt in the first instance, contracted by the firm, had passed into rem judicatam under the operation of the judgment which had been obtained against the two.

I would, therefore, for the purpose of considering this case, which has been discussed by the Lord Chancellor upon the general question of agency, prefer to consider it as a simple question of partnership, in which a debt has been contracted; and I assume for the present purpose that it was originally joint, in order that we may see what remedies were at the time open to the appellants, independently of death. This case not being like the numerous cases cited in which the Court of Chancery held a partnership debt to be joint as well as several, there being no death in this case, it is obvious that such a remedy as the plaintiffs then had was entirely at law. The Court of Chancery could offer no assistance in the case where there was a legal contract, unless there was found in that contract some element which made it inequitable that the debtor should be allowed to set up the defence now relied on. In the case of a person setting up a term of years at law, the Court of Chancery can interfere by injunction, and prevent his doing so, but that case would be very different. If the defence in *King* v. *Hoare* (2) be, as has been supposed by some, and as was urged at your Lordships' Bar, contrary to what one may call the equitable engagement between the parties, then I apprehend the proper course would have been to take some proceeding for preventing the respondent from setting up such a defence as was effectually set up in that case, on the ground that it was an inequitable defence, and that a judgment obtained against two of the co-contractors in the absence of the third should prove no bar to a subsequent suit against the third. But not only was no such attempt made in this case, but in no case that I ever heard of in equity has there been any injunction applied for, much less obtained, with regard to that particular position of the parties.

What happened in *King* v. *Hoare* (2) was that one of the partners died, and then an application was made that the equity which has been administered from time to time in Chancery with regard to the assets of a deceased partner, and the distribution of those assets among the several creditors, might be made available on account of that death. That was met by the averment that the death had happened since the suit, and that it could not interfere with the previous suit, but that that must meet with the common fate of such suits. That being the position of the parties at common law, what was their position in equity? Numerous cases were cited to your Lordships to show that the equity courts recognised a partnership debt as being in its nature and essence a joint and several debt; but I can say with confidence, having gone through the cases cited, that no

A case will be found in which any such assertion has been made with reference to the nature of the debt, except sub modo—that is to say, except in those cases where the remedy has been given against the assets of the deceased partner upon the grounds which are stated very distinctly by LORD ELDON in *Ex parte Williams* (3). These cases are numerous, but, although they are so numerous, there is no single case existing in which an attempt was made to administer that particular species B of equity which would induce the court to turn a contract which at law was joint into a joint and several contract. In all these cases there has been a necessary administration of assets for the purpose of clearing the assets as between the partners themselves.

That being so, there is, I apprehend, no mode in which the relief now asked in this action under the new procedure could be obtained. A court, combining law C and equity under the Judicature Act, is authorised to adopt the procedure of a court of equity, and the court of equity is compelled to avail itself of the powers given to it as a court of law. There is nothing in those circumstances which can, as it appears to me, assist the plaintiff at all, if he had not, at the time of the passing of the Act, any remedy which could be given him by law, or any remedy which could be given him by equity. It does not seem to me possible that two D powers combined, neither of which could affect anything of itself, would have a more efficacious result than when taken separately, except in this sense, that if there was really a remedy in the one court which was not given by the other, you can understand that the assistance of the one might give a more complete, perfect, and effectual remedy than the other separately.

In the present case, before the passing of the Judicature Act, nothing could have E been recovered at all in respect of a legal debt in a court of equity, and a court of law, having once given judgment on a contract, had no power to authorise any procedure against a third person as a party to that contract. During the argument in the court below the remark was quoted as having been made by a very eminent judge that this rule, which was adopted in *King* v. *Hoare* (2) was entirely a rule of procedure. I do not take that view of the case, because I apprehend that when F Hamilton contracted, together with the others, to pay the debt, in contracting jointly he gave rights to those others. Suppose the debt was enforced against one of those who were jointly liable for the debt, rights would be acquired by the one who paid the whole debt against those who had not taken part in that payment.

One great object in bringing all the parties concerned before the court is this. In equity it is always considered essential that, if there be a suit upon a debt for G which two parties are jointly liable, you must have both those parties present in order to enforce the payment of that debt. The reason is that the person who has entered into this joint contract has a right to have the whole matter settled at once. Otherwise you might bring an action against the co-contractor, and having established your case against him, we will say for £1,000 as principal moneys and interest, you might then proceed to bring a totally distinct action against the other, H and obtain from him payment of a larger or smaller sum, as the case might be. But you would obtain a judgment which would settle nothing as between the two co-contractors; it would settle nothing as regards the debt due by way of suretyship from one co-contractor to the other. Each of them has a right to be sued and to have the matter settled at once, instead of its being settled piecemeal. He ought not to be compelled to submit to another suit, which would indeed be equally dis- I advantageous to the plaintiff himself, because, of course, the defendant in that suit would naturally have a right to insist upon having the debt proved against him, if at all, to the extent to which it had been proved against his co-contractors.

When it is said here that the co-contractors do not mean the whole of the three parties to the suit, Mr. Hamilton has nothing to say to that whatever. He remains ignorant. There is nothing to show that he necessarily was aware of what was coming upon him with regard to the question in dispute. He would have no opportunity of defending that other action when it was brought against the co-contractors, and it would not lie with him to raise a plea in abatement if it ever could be raised.

Those who ought, if they intended to have set up that plea, to insist upon it in the first instance, were his co-contractors, and if the appellants, being unaware of the existence of this partner, did not introduce him in the first instance, he must take the consequence of losing the advantage which might have been obtained from having Mr. Hamilton as one of the co-contractors. That advantage could not be retained by the appellants, and ought not in justice to be retained by them, after they had attained the result they were aiming at, namely, the judgment against the two co-contractors.

It has been observed during the course of the argument here that, in truth, as to the abstract justice of this case, there is a pretty even balance between the two, because it is only by the fortunate accident of Mr. Hamilton being a solvent party that the appellants find that they have a solvent co-contractor, of whom they were unaware. They did not contract with Mr. Hamilton except as an undisclosed person, and this undisclosed person, with whom they entered into no engagement that he knew of, turns out afterwards to be liberated in consequence of the appellants not having taken steps to ascertain who were the co-contracting parties when they were bringing the action. The appellants having advanced the money, looked to Wilson and McLay as the people who should pay, but they have since discovered that there is another person whom they think they may sue. I think it would not be conductive to the advancement of abstract justice that they should have an opportunity of suing this person, whom they did not sue when they sued the two co-contractors. I see nothing, I confess, in *King* v. *Hoare* (2) which would lead one to doubt that that case was one, as the law stood, legally decided; and even if there be any consequential injustice arising from any particular circumstances to persons similarly situated, the evil would preponderate over any advantage there might be in requiring all co-contractors to be made parties liable. If there is any injustice in it, it can only be remedied by the legislature, should it think fit to afford this remedy. At this distance of time, after so much reliance has been placed from time to time in other cases upon the law as laid down in *King* v. *Hoare* (2) it cannot be now altered by a decision of your Lordships' House, the ordinary practice of which would require that which has been so long established as the law among mercantile men to be continued until it has been reversed by Act of Parliament. I am, therefore, of opinion that the resolution you are asked to come to, sustaining the decision of the court below and dismissing the appeal, is a correct conclusion, and that no substantial injustice will be done in that way.

LORD PENZANCE.—The appellants advanced a large sum of money to the respondent in conjunction with two other persons. The respondent has had the full advantage and benefit of the appellants' money to the extent of his share in the joint adventure. In every aspect of the case, therefore, the appellants have no doubt acquired a legal, equitable, and moral right against the respondent to repayment; nor has this been, even in argument, denied. The defence set up against this just claim rests upon this, and upon this alone, that in accordance with a certain rule of procedure, established some twenty-five years ago by the single case of *King* v. *Hoare* (2) which has never yet had the sanction of a Court of Appeal, the appellants, by bringing a previous action against two out of the three partners, have wholly lost their remedy against the respondent, who is the third.

I will presently examine the technical grounds upon which this rule is based, but before doing so I cannot forbear asking myself how far such a rule is consistent with justice. What justice is there in saying that when three persons are all and each individually liable to a debt, an action and judgment (still unsatisfied) against two of them shall extinguish the liability of the third? The most that can be said is that by two actions being brought instead of one, additional costs have been incurred. The joint contractors or partners may reasonably insist that the appellants should not pursue their remedies against them in a vexatious manner, and if two actions are, without good reason, brought where one would have sufficed, it may well be that to the extent of the extra costs thereby involved the loss should

be borne by the appellants. But this is a very different penalty from the extinction of the respondent's liability, which may be the same thing as the loss of the appellants' debt altogether. Even this consideration, however, as to unnecessary costs applies only to a case in which a plaintiff with his eyes open has chosen to sue some of the partners first and the others afterwards. It cannot apply to a case like the present, in which the two first sued concealed the fact that the third was a partner in the adventure, a fact of which the appellants were ignorant, and, being ignorant, could not possibly have sued the whole three together. This circumstance removes at once all blame from the appellants, and with it all semblance of justice from the defence now made. So entirely is this the case that no argument has been offered at your Lordships' Bar to show that the respondent has been prejudiced by the appellants' conduct, or that anything has taken place which ought, in reason or justice to render the respondent less liable to pay this debt than he was at first. The defence is, and has been rested throughout, wholly and solely upon the technical rule to which I have adverted, and the authority of the case by which that rule was laid down.

In this state of things I confess that I am unwilling that your Lordships should confer the high sanction of this, the ultimate Court of Appeal, upon a rule of procedure which, without affecting to assert any just rights on the part of the respondent, denies the aid of the law to enforce those of the appellants. Procedure is but the machinery of the law after all, the channel and means whereby the law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish legal rights, and is thus made to govern where it ought to subserve.

With these observations I proceed to consider *King* v. *Hoare* (2) upon which the present case is rested. The proposition that a cause of action which has never been before the court at all has become res judicata is a startling one. The present appellants have never before impleaded the present respondent, have never made any previous attempt to enforce the liability which they now assert, and yet are met at the threshold of their suit with the plea that the matter between them and the respondent has already become res judicata. The doctrine of law respecting merger is perfectly intelligible. Where a security of one kind or nature has been superseded by a security of a higher kind or nature it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former. In like manner when that which was originally only a right of action has been advanced into a judgment of a court of record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Parke, B., in *King* v. *Hoare* (2). He says (13 M. & W. at p. 504):

> "The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. Hence the legal maxim transit in rem judicatam; the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher."

This reason is satisfactory and conclusive upon the assumption that the cause of action attempted to be sued upon is the same cause of action as that upon which a judgment has already been obtained. But is it so in a case like the present? If a man delivers goods, or lends money to two partners, the promise which the law implies is a joint promise. The effect of such a promise, as distinguished from a joint and several promise, is that in case of death the debt is enforceable only against the survivor. If the further effect of such a joint promise in point of law were that it could not constitute a cause of action against one only of the two contractors, then the reasoning in *King* v. *Hoare* (2) would be unquestionable, for there would be but one cause of action resulting from it, and that a joint one, and the cause of action, having been advanced to a judgment, could not support a

second action. But this is not what the cases establish the effect of a joint promise to be. If a man, contracting as above supposed with two partners, likes to bring an action against one only, and to allege against him a promise by him alone, taking no notice whatever of the other partner, or of his promise, he has a good cause of action, and one which cannot be defeated by the defendant proving that the promise was not made by him alone, but by him jointly with another.

If a joint promise by two were a thing so different in point of law in its quality and character from a promise by one only that it could not be held to include within it, a promise by each, and if it did not in point of law give rise to a separate cause of action against one, the defendant in the case above supposed ought to be able to defeat the plaintiff's claim by showing that the promise sued upon was not the promise made, and that the promise which was in reality made was a joint one only, and such as did not give rise to the separate claim. This was exactly what the defendant attempted to do in *Rice* v. *Shute* (4), but it was adjudged against him. In that case the judge who tried the cause considered that a declaration upon a separate promise of the defendant was not supported by proof of a joint promise by the defendant and another, and there was in consequence a variance between the allegation and the proof, and he nonsuited the plaintiff. This nonsuit the court set aside, and the language of LORD MANSFIELD is so instructive that I quote it (5 Burr. at p. 2613):

> "To be sure, a distinction is to be found in the books between torts and assumpsits; that in torts all the trespassers need not be made parties, but in actions upon contracts every party must be a defendant. Many nonsuits, much vexation, and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shows that convenience as well as justice lies the other way. All contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute is a matter merely among themselves."

Again,

> "It is cruel to turn a creditor round and make him pay the whole costs of a nonsuit in favour of the defendant who is certainly liable to pay his whole demand, and is not injured by another partner not being made defendant, because what he pays he must have credit for in his account with the partnership."

He goes on to say that he had consulted the other judges, and that

> "they were all of opinion that the defendant ought to plead in abatement; he must then say who the partners are. If the defendant does not take advantage of it at the beginning of the suit, and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded upon the merits of the cause, but on the form of proceeding. No injustice is done to the defendant by allowing the plaintiff to recover, but great injustice is done to the plaintiff by allowing the nonsuit to stand."

It is clear, therefore, that though the defendant in such a case may, if he like, compel the plaintiff to discontinue his action and bring a fresh one against both by means of a plea in abatement, there is yet a good cause of action against him, which will sustain the verdict and judgment, if that course be not followed. This, therefore, might happen: the plaintiff upon a joint promise might bring and carry forward two actions pari passu, one against each of the joint contractors, and, provided that neither of them chooses to plead in abatement, which they may have no object in doing, as it does not get rid of their liability, these actions may go on to judgment, and in neither of them, though the fact of the promise being joint

A only, and not joint and several, were to appear on the record—by bill of exception or otherwise—could the judgment be arrested, or declared erroneous.

If two judgments against two different defendants can be supported upon one joint promise, does not that show that there are in reality two causes of action involved in the breach of one joint promise? If so, the principle upon which *King* v. *Hoare* (2) was decided, resting as it does upon the assertion that the joint B promise gives rise to one cause of action, and only one, cannot be sustained. The true position of the creditor would appear to be that he has a cause of action against either of his debtors separately or both together, subject to a plea in abatement. What is a plea in abatement? It is not a plea that affirms that the plaintiff has no cause of action, or that, having had one, it has been barred. It affirms only that the plaintiff is bound to pursue his remedy in another form of proceeding, and an C essential quality of it is that it should show that such form of proceeding is available to him. I will quote Mr. Chitty's description of it (1 Chitty on Pleading (7th Edn.) 462):

> "Whenever the subject-matter of a plea or defence is that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the D supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is for ever concluded, should in general be pleaded in abatement (from the French 'abattre'). The criterion or leading distinction between a plea in abatement and a plea in bar is that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him E with materials for avoiding the same mistake in another suit in regard to the same cause of action; or, in technical language, must give the plaintiff a better writ."

By such a plea, therefore, either of the two joint contractors being sued alone, might insist upon the plaintiff bringing his action against both. But it is obvious that this right can only be exercised, on the part of both, by him who is first F sued. If one of the two allows his liability to be enforced in a separate action, it is too late afterwards for the other, if sued, to plead in abatement, for he cannot give the plaintiff a better writ. The conduct of his co-contractor, in permitting the plaintiff to go on to judgment against him alone, has rendered a joint action against the two impossible. The plaintiff has no longer a joint promise upon which to sue the two, the promise of one having passed into res judicata. G The technical grounds, therefore, upon which the decision in *King* v. *Hoare* (2) is based appear to me to be insufficient and unsatisfactory. When the judges of the King's Bench, under the guidance of Lord Mansfield, determined in *Rice* v. *Shute* (4) that a joint promise of several might give rise to a separate action against one only, contrary to the rule of law previously established that it could not do so, they destroyed the basis upon which the court built the decision in *King* v. H *Hoare* (2), namely, that the second action was brought for the same cause of action as the first.

Passing from mere technical views, and regarding this rule of procedure in the light of convenience, and fitness to promote the ends of justice, there is still less to be said for it. For it is to be observed that the rule is unbending and indiscriminate. No exception is permissible under it for a case in which one or I more of several partners may be abroad, in which case the plaintiff must either wait to bring his action until they are all within the jurisdiction, or bring it at once, at the cost of losing the responsibility of those who are out of the country. Nor is any exception possible for a case like the present, in which the appellants could not possibly sue all the partners at once, being ignorant that the respondent was one of them. In the first case the rule impedes and obstructs justice, and in the second denies it altogether. No doubt rules of procedure must be framed on general considerations, though they may work hardship in individual cases, and when a rule is once established those who practice the law must be assumed to

be aware of it, and frame their proceedings accordingly; but then the rule ought to be such that it can be acted on; and a rule that, in a joint promise, all partners must be sued jointly, cannot be acted upon by one who does not know of the existence of some of the parties liable, and so becomes a mere trap and pitfall which the creditor has no means of escaping.

I must now advert to the Judicature Act. Assuming that *King* v. *Hoare* (2) was well decided in the then state of the law, at a time when the defeat of just rights by non-joinder or misjoinder of parties, defects of pleading, and the non-observance of technical rules was a matter of daily occurrence, a further and more important question in the present action appears to me to be whether since the passing of the Judicature Act, and in a proceeding taken under that Act, such a defence as the present can be maintained. Every provision and every line of that Act proves it to have been based on the broad principle of making forms, rules, and modes of procedure subordinate to the prime and paramount object of reaching the justice of the case, and I should be surprised to find that a doctrine so wholly foreign to its spirit and objects as that upheld by *King* v. *Hoare* (2) had survived the sweeping changes which it introduced. I think I can show that it has not done so. That Act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of both legal and equitable rights, which is independent of all the old rules of law on the subject. Particularly it did away with all objections and defences arising out of the misjoinder and non-joinder of parties, either plaintiff or defendant. Since that Act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection, or defence to the action. In such a case the action goes on, and

> "The court or a judge may . . . on such terms as may appear to be just, order that the name or names of any party or parties, whether as plaintiffs or as defendants . . . who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added:" R.S.C., 1875, Ord. 16, r. 13 [now R.S.C. (Revision) 1962, Ord. 15, rr. 6, 8]

These provisions appear to me to have entirely altered the rights of joint contractors in respect of procedure. They have no longer any absolute right to insist that they should be sued together or not at all. The creditor may bring and pursue his action against one or more of them, and if the defendants desire that others should be joined they must apply to a judge, who will hear what is to be said on both sides, and decide that additional parties shall, or shall not, be joined according to the requirements of justice, and not according to the election of the defendants or any imperative rule that all who jointly contracted must be jointly sued. The joint contractor having thus lost the right (for it was a right, and an absolute one, though only a right of procedure) to be sued only in conjunction with his co-contractor, he can no longer be heard to maintain either that his co-contractor must be sued with him, or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. The necessary connection in matters of procedure which the law before the Act had established, as Lord Mansfield said, "for convenience," between the joint contractors, and had enforced by the plea in abatement, is now by the Act severed, and put an end to. When the plea in abatement was swept away the legal right of a joint contractor to have the other joint contractor joined in any action brought upon the joint promise was swept away too, and the creditor became entitled to sue the parties severally, subject no longer to the will of the defendant, but to the discretion of the court exercised for the furtherance of justice. This again cuts the ground from under the doctrine of *King* v. *Hoare* (2), in which case Parke, B., laid great stress upon the argument that if after the first action the defendant could not plead in abatement, "he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other."

A Upon the whole, then, it seems to me that the right of persons making a joint promise to be sued jointly, first broken in upon by LORD MANSFIELD in *Rice* v. *Shute* (4), when he allowed an action to be maintained against one only of several joint contractors, was finally put an end to by the Judicature Act when the right to plead in abatement was withdrawn from them; and that the question properly arising in this case may be shortly dealt with as follows. The appellants sue for
B a debt which the respondent, originally at least, must be held to have owed them. The respondent answers that the debt was due from him jointly with others, and not otherwise, that the appellants' only right is to sue him jointly with the others, that they cannot sue the others now, having already done so, and that they have thus lost the only right of action he ever had. The answer to this is simple. Since the Judicature Act it is not true that the appellants only right is to sue the
C respondent jointly with the others. I will not occupy your Lordships' time further on the proper view to be taken in regard to the authorities in equity. I willingly adopt the opinions of the Lord Chancellor and others of your Lordships much more competent than I am to read those decisions aright, but for the reasons which I have given I think that the judgment of the court below ought to be reversed, and the appellants have judgment for their debt in this action.

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LORD O'HAGAN.—I have had the opportunity of reading and considering the opinion which has been delivered by the Lord Chancellor in this case, and I concur generally with the views he has expressed, and the reasons by which he has sustained them. There is no question of fact in the case; and in the argument at the Bar it seemed to be conceded that, unless the doctrines of a court of equity
E intervene to establish that the defendant Hamilton and his co-partners McLay and Wilson may be dealt with as joint and several debtors, and not as joint debtors only, the appeal must be dismissed.

The appellants obtained judgment against Wilson and McLay whom they sued as their sole debtors in ignorance that Hamilton was a partner, and, therefore, responsible for the payment of the debt, and it was asserted that the judgment
F so obtained was, at law, a bar to the suit against him, on the ground that the original cause of action had thereby passed in rem judicatam, and could not be the foundation of any further proceeding. Unless your Lordships are prepared to overrule the decision in *King* v. *Hoare* (2), the proposition cannot be disputed. That decision is clear upon the point, and has been followed in a number of cases, and generally recognised by courts of law in accordance with the statement of
G PARKE, B., cited by LORD PENZANCE (supra). I do not deem it necessary to go further into a consideration of the grounds of that decision. They have been sufficiently explained by my noble and learned friends. On these grounds it seems to me sustainable, as well as on a view of the right which a joint debtor has to be sued with others upon a promise made by him jointly with them, with whom his relations may be injuriously affected if, a judgment having been obtained for the
H same cause of action, he cannot have the advantage, which might otherwise have accrued to him for the purpose of contribution and account, and the establishment of joint responsibility. The question is one of procedure, and the rule may operate hardly in conceivable circumstances. But it has been justified, from the desirability of preventing repeated litigation for the same cause, and maintaining the claim of the debtor to have any such benefit as may accrue to him if, his liability being
I joint, he is required to answer jointly.

In this case the merits are certainly not with the respondent; but it is to be noted that the appellants have had the opportunity of enforcing their demand against the persons with whom they meant to contract, and on whose credit only they made the sale and delivery of their goods. I am afraid that rules of procedure, adopted because they are convenient and effective generally for assisting in the rightful administration of justice, from the imperfection of human tribunals will sometimes, in particular instances, be found to defeat equitable claims. But be the merits as they may, I do not see sufficient reason for overruling a well-considered judgment,

sustained as it is by such considerations, and such a series of authorities, and not assisted at the Bar by any argument or suggestion on behalf of the appellants. As regards the operation of the principle recognised by *King* v. *Hoare* (2), it does not seem to me (reserving the consideration of the effect to be given to the doctrine of equity on the joint and several liability of contractors) that the Judicature Act meddles with that principle. The procedure is changed. The plea in abatement is abolished. The court is required to intervene where the parties to the action were formerly obliged to plead; but it does not seem to follow that the change in the machinery of enforcement alters the rights to be enforced, or takes from the joint contractor any privilege which formerly belonged to him. It may be guarded in a different way, but I do not think it is abrogated by any express proviso or necessary implication.

It is clear, however, that the doctrine of *King* v. *Hoare* (2) is not applicable if the debt sued for be joint and several; and the real contention of the appellants has been that, although at law the contract in the case was joint, inasmuch as equity would have dealt with it before the passing of the Judicature Acts as joint and several, the appellants are entitled, under s. 24 of the Supreme Court of Judicature Act, 1873, to the same relief as would have been given to them by the Court of Chancery in a suit or proceeding instituted there. In the first place, in ordinary cases, and unless in exceptional circumstances a deviation from ordinary principles of construction has been allowed, a contract is construed in the same way by a court of equity and by a court of law; and it lies upon those who seek such a deviation to produce authority which may clearly justify it. The presumption is the other way. Here the contract at law was confessedly joint. The burden of showing that in equity it was joint and several lies upon the appellants. It is conceded that the precise contention which grounds the argument has never been sustained in the exact circumstances to which it is now applied. In another state of facts, and as between parties having other relations than those of the plaintiffs and defendants, courts of equity have, not without difficulty and hesitation, dealt with a contract, joint at law, as joint and several, but if the distinction, so established in a particular case, was meant to apply, not merely to it but generally to all cases, it seems scarcely conceivable that the point should not have heretofore arisen, for it must often have been the interest of suitors to avoid by recourse to equity the embarrassments created by legal strictness as to joint contracts and their incidents.

A great many cases have been cited to your Lordships in which dicta of learned judges are embodied, and successive textbooks seem to represent, without limit or qualification, that the debts of co-partners are in equity joint and several. If these dicta are to be taken without reference to the subject-matters to which they apply, they would undoubtedly countenance the contention of the appellants. But, as has been made very clear by my noble and learned friends, they have been applied in fact merely in cases of the administration of the assets of partners who have died. In these cases only has effect been given to them, for the purpose apparently of making the administration more full and equitable than it would have been if the debt had been held good, without a provision for the proportional discharge of liabilities out of the estate of the deceased in reciprocity with its claims on the estate of the survivors. JAMES, L.J., in *Beresford* v. *Browning* (5), explains succinctly the equitable rule as to partnership contracts:

> "So far as regards partners where there is in equity no survivorship of property there is in equity no survivorship of liability."

The reason of the rule, so far as it is ascertainable, has already been discussed. It is well explained in the passage from LORD ELDON which has been cited, and needs no further exposition. It is notable that LORD ELDON himself in *Ex parte Kendall* (6) (17 Ves. at p. 518) expressed his surprise that

> "where parties think proper to enter into a joint instead of a joint and several contract, courts of equity have not left that to its fate as a joint contract."

A He admits the force of the authorities deciding

> "that there is a remedy against the assets of the deceased if the survivor cannot pay,"

but he admits it with apparent reluctance. He repeats, in the same case, referring to a doubt of LORD THURLOW upon the point, the expression of his own surprise

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> "that a court of equity should have interposed to enlarge the effect of a legal contract."

Again he carefully confines the enlargement, as warranting only "resort to the assets of a deceased debtor."

I see no valid ground for extending it further, and no sufficient reason for holding, C according to the contention of the appellants, that in equity all partnership contracts are in all circumstances and for all purposes joint and several. I think that COTTON, L.J., correctly states the result of the cases; and that the effect of the judgment at law against Wilson and McLay is not done away by any equitable principle. I have not adverted to the peculiar view presented to this House by the Lord Chancellor. It has originated with him, and was not suggested or dis- D cussed in the course of the argument. The House could scarcely act upon it as against the appellants without affording their counsel the opportunity of considering, and, if possible, encountering it. I base my opinion, therefore, on the conclusions at which I have arrived with reference to the points mooted at the Bar. I shall only say that at present I am disposed to concur with the Lord Chancellor, although the same objection as to the evil of giving procedure the effect of defeating a fair E demand would apply as much to the result of his opinion as to the decision in *King* v. *Hoare* (2). On the whole, for the reasons I have given, I think the appeal must be dismissed.

LORD SELBORNE.—The argument of the appellants was chiefly, if not wholly, founded upon the course of the Court of Chancery in the administration of the assets F of a deceased person who has been a partner in a trading firm, and upon the language used by several judges of high authority with respect to the equitable position of partnership creditors. If that language were found to be technically exact when tested by the practice of the courts of equity upon all occasions when the rights of partnership creditors have come in question, it might, perhaps, be a sound conclusion that its principle ought to be extended to such a case as the G present, though no precedent directly in point has been produced. But the fact is otherwise. If every debt of a trading partnership were regarded in equity as from its commencement joint and several in the proper sense of those words, there would be no reason why in bankruptcy, where equitable are regarded as much as legal rights, it should not have been treated in the same way as any other joint and several debt; nor why LORD ELDON should have made such a decree as he did H in *Gray* v. *Chiswell* (7). Nor do I think it possible that, if in equity a separate debt due from a creditor of a firm to one of the partners could be set off against the debt of the firm, there would not have been ample authority for that proposition. If no rule had been established in equity giving partnership creditors a remedy against the assets of a deceased partner, it would have seemed clear on principle that in all these cases, where there was no mistake to be rectified in any written I instrument, the legal contract between the creditor and the debtor was the only contract, and that its construction must be the same in equity as at law.

I conclude, therefore, that those expressions of eminent judges in which partnership debts have been spoken of as in equity joint and several, were not meant by them to be understood in the proper and technical sense of those words, and that they cannot safely be used to establish any rule or principle extending beyond those limits within which the courts of equity have hitherto given to creditors of a partnership remedies which they would not have obtained at law. It is undoubtedly true that the remedy which a court of equity gives to a partnership creditor in the

administration of the assets of a deceased partner, has the effect of preserving to him the liability of an estate which, by the survivorship of the co-debtor or co-debtors has, at law, become exonerated. Great judges, such as LORD ELDON and LORD THURLOW, have felt difficulty in referring this course of practice to any very clear or satisfactory principle. It has been said to depend upon, or to arise out of, the adjustment of the rights and liabilities of the deceased and the surviving partners inter se; but this explanation does not, to my mind, remedy the difficulty, because upon that principle it would seem that the creditors ought to be limited, in each particular case, by the extent of the rightful claims of the surviving partners upon the deceased partner, and to be wholly excluded if the state of the accounts between them were such as to make it just to leave the whole liability where the law had cast it, namely, upon the surviving partners.

The actual course of administration, subject to the distinction between a personal action and proof against assets, has been to give the creditor as large and unqualified a remedy against the estate of the deceased partner as he would have had by action at law in his lifetime. There is, as it seems to me, only one really consistent explanation of this course of practice, when taken in connection with the rule in bankruptcy, and with the general principles of law and equity, namely, that derived from the doctrine, jus accrescendi inter mercatores locum non habet. As in several other well-known classes of cases of which mortgages and security bonds with penalties may be taken as examples, equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, inter mercatores, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in equity it is taken as still subsisting for every purpose of liquidation, just as if it had been dissolved inter vivos, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several by that dissolution, and by the exclusion in equity of the survivorship which takes effect in law; and although, when this rule was first established it might well have been doubted if it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by co-partners. For this purpose, and for this purpose only, and only by the operation of death, all such contracts may be described as, in equity, joint and several.

My conclusion is that in the present case there is no equity upon which the appellants can be entitled to be relieved from the legal effect of the judgment obtained by them against Wilson and McLay, if, as the equitable argument assumes, that judgment had the effect of extinguishing, in the lifetime of all the partners, the legal liability of the respondent as a partner for the debt previously due from the partnership of which he was a member. There is no question here of jus accrescendi; the question relates simply to the constitution of the appellants' debt. Before the action it was a joint debt, but by the result of the action, if the decision in *King* v. *Hoare* (2) is right, and is applicable to this case, it became the separate debt of Wilson and McLay only. If the joint debt, for which alone the respondent was ever liable, was merged and extinguished at law by this judgment, on which the respondent is clearly not liable, either at law or in equity, it seems to me to be impossible that equity should, on that ground, raise or imply against him out of the original contract, a separate liability to the appellants from which he is free at law, whatever may be the rights of contribution, indemnity, or otherwise which Wilson and McLay may possess against him in respect of this judgment.

Upon the legal question I understand it to be the opinion of all your Lordships that a second action cannot be maintained upon a cause of action which has once passed in rem judicatam, and that this principle is not affected by any of the changes of procedure introduced by the Judicature Acts. What I understand to be the view of LORD PENZANCE is that the cause of action in this case is not the same as that on which the judgment against Wilson and McLay was obtained.

Apart from authority I should myself have thought it clear that, if the contract was joint only, the cause of action was the same. The rule established in *Rice* v. *Shute* (4), on whatever principle it may have been founded, was, I suppose, applicable to all cases of actions against one, or less than all, of several joint contractors, and not only to partnership cases. Unless, therefore, that rule justifies the conclusion that all joint contracts are in law several as well as joint, until survivorship takes place by the death of one of the contractors, I cannot see how it tends to prove that there are, in such cases, more causes of action than one upon the same contract. If that conclusion were sound, it is by no means clear to my mind that even a plea in abatement ought to have been allowed; nor can I imagine any reason why the same principle should not equally hold in the converse case of an action brought by one of several persons with whom jointly a contract has been made, in which case, whatever may have been the ground of the distinction, the rule has been that a plea in abatement was not necessary, but that it was sufficient to make the defence of joint contract available if the facts came out in evidence. I, therefore, agree with my noble and learned friend on the Woolsack, that the appeal in this case ought to be dismissed; but I have preferred to rest my own judgment upon that view of the facts of the case which was taken by counsel on both sides, and in the court below.

LORD BLACKBURN.—In this case the appellants entered into transactions with the firm of Wilson and McLay. They, at the request of that firm, and in consequence of contracts made with that firm, accepted bills, and entered into other transactions, the result of which was that a large sum was owing to the appellants for which they might have maintained an action for money lent against those two persons. The appellants did not, at the time when they entered into the contracts which resulted in the cause of action, know that any other person was interested in them; they dealt with Wilson and McLay and with them alone, and gave credit to them alone. But afterwards, in the view which I take of the case it is immaterial when, the appellants discovered that the respondent Hamilton had agreed to share with Wilson and McLay in certain adventures which would require the advance of money, and that "the financial arrangements should be managed" by Wilson and McLay. This amounted to an authority to Wilson and McLay to borrow money for the joint account of Wilson, McLay, and Hamilton, who were the undisclosed principals of Wilson and McLay in the contract of loan. And it is, I think, now firmly established as law that a person entering into a contract with one to whom, and to whom alone he trusted, may, on discovering that the contractor really had a principal, though he neither trusted to him nor gave credit to him, nor even knew of his existence, charge that principal, unless something has happened to prevent his doing so. He is not bound to do so. In the present case Wilson and McLay could not, if sued before the Judicature Acts, have pleaded in abatement the non-joinder of Hamilton; nor, if Wilson and McLay had sued the appellants, could they have resisted a set-off of the money lent to them on the ground that in borrowing it they were agents acting for an undisclosed principal.

I will first consider how this case would have stood at law before the Judicature Acts, and then inquire what difference those Acts make. I take it, for the reasons I have given, to be clear that, under such circumstances as exist in the present case, the appellants in the present case might have maintained an action for money lent against Hamilton on the ground that he, jointly with Wilson and McLay, being undisclosed principal to Wilson and McLay, was as such liable to the appellants. But the facts are such that Hamilton could have proved a plea that the contract on which he was sued was made by the appellants with him, and Wilson and McLay jointly, and not with him alone, and that the appellants before action had recovered judgment against Wilson and McLay for the same loan on the same contract. Then the question would have arisen whether a judgment recovered against one or more of several joint contractors was, without satisfaction, a bar to an action against another joint contractor sued alone.

The decision in *King* v. *Hoare* (2) was that it is a bar. I have already said that, in my view of the matter, it was immaterial when the appellants first discovered that they had a right to have this recourse against Hamilton, which they had never bargained for, and which was to them a piece of pure good luck. If the principle on which *King* v. *Hoare* (2) was decided had been that by suing some he had elected to take them as his debtors to the exclusion of those whom he had not joined in the action, it would be material, for I assent to the argument that there cannot be election until there is knowledge of the right to elect. But *King* v. *Hoare* (2) proceeded on the ground that, the judgment being for the same cause of action, that cause of action was gone. *Transivit in rem judicatam*, which was a bar, partly on positive decision, and partly on the ground of public policy that there should be an end of litigation, and there should not be a vexatious succession of suits for the same cause of action. The basis of the judgment was that an action against one on a joint contract was an action on the same cause of action as that in an action against another of the joint contractors or in an action against all the joint contractors on the same contract. From very early times it was the law that a contract was an entire thing, and that, therefore, all who were parties to the contract must, if alive, join as plaintiffs, and must be joined as defendants.

If this was not done there must be a plea in abatement (Comyn's Digest, "Abatement," E. 12, F. 8). That very learned lawyer cites 7 Hen. 4, 6, and 20 Hen. 6, 11, as authorities for this, and probably earlier authorities might be found, but I think it unnecessary to search for them, as it has never, so far as I know, been doubted that the defendant might plead the non-joinder of his joint contractors in abatement, and in that way to compel the plaintiff to join as defendants all who were parties to the joint contract and were still alive. But there was a long controversy whether the plea in abatement was the only way in which the objection could be raised. If on the evidence it was proved that the contract was joint, it was thought that there was a variance between the proof of a joint contract with the parties to the action and someone not a party to the action and still alive, and the allegation in the declaration which, it was thought, must be taken to be an allegation of a contract between the parties to the action and no others, and consequently that there should be a nonsuit or verdict for the defendant on the ground of variance. This, it has now been settled, is the law in cases where the objection is the non-joinder of a plaintiff, and consequently the non-joinder of a co-contractor as plaintiff was never in modern times pleaded in abatement; and it was long thought by many that the same course was open to a defendant. Such was the decision of Holt, C.J., and the Court of King's Bench in *Boson* v. *Sandford* (8).

I need hardly point out that, if this had been still followed as law, it would have made it clear that the cause of action against the one was the same as that against all, or rather that there was no cause of action against the one alone, and never could be judgment against one alone; and so the point could never have arisen. But it was established by a series of cases which may be found collected in the note to *Cabell* v. *Vaughan* (9), that, though all the joint contractors must be joined as co-defendants, the only way of taking advantage of the non-joinder was by a plea in abatement. The first case in which I find this decided was *Rice* v. *Shute* (4). The last case in which I find it contraverted, though unsuccessfully, was *Evans* v. *Lewis* (10), in 1794. But though the mode of enforcing the joinder of all was thus cut down, it still remained the law that all ought to be joined. Consequently I cannot doubt that the judges in *King* v. *Hoare* (2) were accurate in holding that the two actions were upon the same cause of action. I cannot agree with what seems to be the opinion of Lord Penzance, that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as defendants, or made it a mere matter of discretion in the court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed.

I do not think the defence a meritorious one; but I think in the present case there is no great hardship. The appellants had a right of recourse against Hamilton, for which they never bargained; but they did nothing inequitable in taking advantage of that which the law gave them. They have destroyed that remedy by taking a judgment against persons who turn out to be insolvent. I do not see that Hamilton does anything inequitable in taking advantage of the defence which the law gives him. The appellants got a right by operation of law, without any merits of their own, by what, as far as regards them, was pure good luck. They have lost it by what was no fault of theirs, but was, as far as they were concerned, pure bad luck. If the appellants were willing to take advantage of their good luck against the respondent, it seems no hardship that he should take advantage of their bad luck against them. But in such a case as *King* v. *Hoare* (2), where the plaintiff had contracted with the provisional committee of a company, and consequently was very uncertain how many were joint contractors, it did operate harshly. He dared not join many in the first action, for, as the law then stood, if he failed as to any one he failed as to all; and it does seem hard that a judgment obtained under such circumstances against one should be, without satisfaction, a bar as to all the others. This hardship is very much removed by the provisions of the existing law, by which the plaintiff recovers judgment against those whom he proves to be his debtors, though he has joined others as defendants, and has only to pay the costs of those improperly joined. But I think that the hardness of the law, even if it exist, is a reason for altering it, not for refusing to act upon it; and I think no doubt has ever been expressed, unless, perhaps, in *Re Morrison, Ex parte Waterfield* (11) that *King* v. *Hoare* (2) does truly state the law as it existed before the Judicature Acts; and it was not doubted in the courts below, or I think seriously questioned at the Bar that it did so. But since the Supreme Court of Judicature Act, 1873, s. 24, law and equity are to be concurrently administered. Therefore if, before the passing of that Act, the appellants could have sued in equity on these facts, or if they could have successfully applied for an injunction to prevent the respondent from pleading this defence, they may raise the same point in this suit in the Common Pleas Division. But the Judicature Acts do not create any equity applicable to this case which did not exist before. They only enable the court to administer the equities already existing without the delay and expense formerly required. On the first argument at your Lordships' Bar counsel for the respondent convinced me that in cases of joint contracts there was no difference between law and equity, except in the single case of the death of one of the parties to a joint contract, where the contract was such that the maxim inter mercatores jus accrescendi locum non habet applied, but I was diffident of my opinion in a question of such pure, and I might say technical, equity, and was, therefore, very willing that the case should be re-argued. I have now heard the opinions of the noble and learned Lords who are conversant with the proceedings in the courts of equity, and have no diffidence in saying that I am of the same opinion.

LORD GORDON concurred.

Appeal dismissed.

Solicitors: *Freshfields & Williams*; *J. W. Sykes.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

SINGER MANUFACTURING CO. *v.* CLARK

[Exchequer Division (Huddleston, B., and Hawkins, J.), November 7, 10, 29, 1879]

[Reported 5 Ex.D. 37; 49 L.J.Q.B. 224; 41 L.T. 591; 44 J.P. 59; 28 W.R. 170]

B

Pledge—Pledge without consent of owner of article pledged—Right of owner to recover—Hire-purchase agreement—Pledge by hirer of article hired—Pawnbrokers Act, 1872 (35 & 36 *Vict.*, *c.* 93), *s.* 25, *s.* 26, *s.* 29.

Where goods are pledged by a pledgor without the knowledge and consent of the true owner (as where the hirer of an article pledges the article in breach of the hire-purchase agreement) the owner is entitled to recover the goods in an action in trover and for wrongful conversion. The provisions of ss. 25, 26, and 29 of the Pawnbrokers Act, 1872, do not deprive the owner of this right which he possessed at common law.

C

Notes. As to the recovery of goods unlawfully pledged, see 29 Halsbury's Laws (3rd Edn.) 223, 232; and for cases see 37 Digest (Repl.) 17–22. For the Pawnbrokers Act, 1872, see 17 Halsbury's Statutes (2nd Edn.) 763.

D

Cases referred to:

(1) *Cooper* v. *Willomatt* (1845), 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173; 9 Jur. 598; 135 E.R. 706; 3 Digest (Repl.) 112, *334*.

(2) *Peet* v. *Baxter* (1816), 1 Stark. 472; 37 Digest (Repl.) 24, *193*.

(3) *Packer* v. *Gillies* (1806), 2 Camp. 336, n., N.P.; 37 Digest (Repl.) 22, *174*.

E

(4) *Hoare* v. *Parker* (1788), 2 Term Rep. 376; 100 E.R. 202; 37 Digest (Repl.) 17, *143*.

(5) *Cheesman* v. *Exall* (1851), 6 Exch. 341; 20 L.J.Ex. 209; 155 E.R. 574; 37 Digest (Repl.) 8, *36*.

Also referred to in argument:

Burslem v. *Attenborough* (1873), L.R. 8 C.P. 122; 42 L.J.C.P. 102; 28 L.T. 115; 37 J.P. 327; 21 W.R. 406; 37 Digest (Repl.) 25, *196*.

F

Wilkinson v. *King* (1809), 2 Camp. 335, N.P.; 33 Digest (Repl.) 491, *476*.

Appeal by the plaintiffs, proprietors and manufacturers of sewing machines, against a decision of the learned judge of the Southwark County Court, in an action brought by the plaintiffs against the defendant, a pawnbroker and silversmith, to recover the sum of £7 17s., the price of a sewing machine, in which the learned judge gave a verdict for the defendant, subject to the opinion of the High Court on a Case stated by him.

G

By an agreement dated Oct. 16 the plaintiffs let a sewing machine, the admitted price of which at the time of hiring was £7 17s., to one Elizabeth Smith, who took possession of the machine thereunder.

By the agreement the hirer (Smith) undertook to pay the owners a rent of 2s. 6d. per week payable weekly in advance, and further:

H

"C. To keep the machine and accessories in good order and undefaced (damage by fire included), fair wear only excepted, and at all times to allow the owners' authorised agents to inspect the same. D. To keep the machine and accessories in the hirer's own custody [at an address mentioned in the agreement] and not to remove them without the owners' previous consent in writing."

I

The agreement further provided:

"E. That if the hirer do not duly perform this agreement the owners may (without prejudice to their right to recover arrears of rent, and damages for breach of this agreement) terminate the hiring, and re-take possession of the said machine and accessories, and for that purpose leave and licence is hereby given to the owners to enter, by force if necessary, any premises occupied by

the hirer, or of which the hirer is tenant, to search for, and re-take possession of the said machine and accessories, without being liable to any suit, action, indictment, or other proceeding by the hirer or anyone claiming under him or her. F. That when the hiring is terminated, and/or the machine and accessories are returned to the owners, the hirer shall not on any ground whatever be entitled to any allowance, credit, or return for payments previously made, and the sum paid on hiring shall not be set off against rent.

The said owners agree: A. That the hirer may terminate the hiring by delivering up to the owners the machine and accessories. B. That the hirer may at any time during the hire become the purchaser of the machine and accessories by payment in cash of the hereon endorsed price. C. That if such purchase be effected credit will be given for all payments previously made under this agreement, and if the rent has been regularly paid a further credit of 5 per cent. will be allowed upon the payment on hiring, provided it amounted to £1 or upwards. Unless a purchase be effected the hirer shall remain bailee only of the machine and accessories."

On or about Nov. 30, 1878, the machine was pledged with the defendant in the name of "Brown," for a loan under 40s., but whether by Elizabeth Smith, or by some other person with or without her consent, did not appear. On or about Dec. 9, 1878, one J. Dalton, a clerk in the service of the plaintiffs, saw the machine on the premises of the defendant, such premises being licensed premises wherein the defendant carried on the business of a pawnbroker, under the provisions of the Pawnbrokers Act, 1872, and thereupon served him with a demand of possession on the part of the plaintiffs. The defendant refused to deliver up the machine to the plaintiffs or their agent under the notice on the ground that the notice was informal and invalid as not being in compliance with the provisions of the Pawnbrokers Act, 1872. No payment was ever made under the agreement by Elizabeth Smith, or by any person on her behalf to the plaintiffs or to any of their agents, and it was admitted before the learned county court judge, on the part of the defendant, that, at the time when the machine was pledged the bailment had been determined, and the plaintiffs were entitled to the possession of the machine. It was also admitted that the plaintiffs were not the holders of the pawn ticket relating to the pledge, and that when the notice of demand was served on the defendant, the plaintiffs did not tender to him the amount of the loan and the profit due upon the pledge. On or about Jan. 13, 1879, the defendant delivered the pledge to a person producing the pawn ticket relating thereto on payment of the loan and profit, but he gave no notice to the plaintiffs or their agent of his having done so.

On Feb. 17, 1879, the plaintiffs became aware of the defendant having so delivered the machine, and on Feb. 22 they commenced this action against the defendant in trover, and for wrongful conversion of the sewing machine, claiming £7 17s. as damages. On the hearing of the case it was contended on the part of the plaintiffs that their common law right, as owners, to demand possession of their own property and to sue for damages for the wrongful conversion thereof by the defendant was not affected by their not having availed themselves of the provisions of the Pawnbrokers Act, 1872, their title as true owners being paramount to that of the pawner. On the part of the defendant it was contended that a pawnbroker was not liable in trover at common law when the alleged act of conversion was, as in this case, an act done in conformity with the provisions of the Act of 1872, and when the plaintiffs as owners had not availed themselves of the provisions contained in s. 29 of the Act, and also that the machine having been pledged for a loan under 40s., the case was within the provisions of the Act, which, by s. 10, are applied to every loan by a pawnbroker of 40s. or under; that s. 29 provided a remedy for the true owner by a declaration in the form No. 4 contained in Sched. 3 to the Act; that, further, in default of such prescribed form of declaration being delivered by the plaintiffs to the defendant, the defendant

was bound to deliver back the machine on payment of the loan and profit to any person producing the pawn ticket relating thereto, and would, by neglecting or refusing so to do, have rendered himself liable to a penalty not exceeding £10, as having been guilty of an offence against s. 45 of the Act. It was further contended on the part of the defendant that, having regard to the period, limited to three days, within which a declaration should be made, as provided by s. 29 of the Act, the plaintiffs, in standing by from Dec. 9, 1878, to Feb. 17, 1879, might be deemed to have foregone their right (if any) of priority over the holder of the ticket to require delivery of the machine with or without a tender of the loan and profit to the defendant. The county court judge gave judgment for the defendant, and the plaintiffs appealed.

By the Pawnbrokers Act, 1872:

"Section 25. The holder for the time being of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, and, subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn ticket, and he is hereby indemnified for so doing. Section 26. A pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn ticket for it is delivered to him. Section 29. The following provisions shall have effect for protection of owners of articles pawned and of pawners not having their pawn tickets to produce. (1). Any person claiming to be the owner of a pledge, but not holding the pawn ticket, or any person claiming to be entitled to hold a pawn ticket, but alleging that the same has been lost, mislaid, destroyed, or stolen or fraudulently obtained from him, may apply to the pawnbroker for a printed form of declaration, which the pawnbroker shall deliver to him. (2). If the applicant delivers back to the pawnbroker the declaration duly made before a justice by the applicant . . . the applicant shall thereupon have, as between him and the pawnbroker, all the same rights and remedies as if he produced the pawn ticket: Provided that such a declaration shall not be effectual for that purpose unless it is duly made and delivered back to the pawnbroker not later than on the third day after the day on which the form is delivered to the applicant by the pawnbroker (exclusive of the day or days on which the pawnbroker is prohibited from carrying on business). (3). The pawnbroker is hereby indemnified for not delivering the pledge to any person within the expiration of the period aforesaid. (4). The pawnbroker is further hereby indemnified for delivering the pledge or otherwise acting in conformity with the declaration, unless he has actual or constructive notice that the declaration is fraudulent or is false in any material particular. If any person makes a declaration under this Act, either as an applicant or as identifying an applicant knowing the same to be false in any material particular, he shall be guilty of a misdemeanour, and shall be liable to the punishment attaching by law to perjury."

Benjamin, Q.C., *Lumley Smith* and *Candy* for the plaintiffs.
J. Brown, Q.C., and *Hollings* for the defendant.

Cur. adv. vult.

Nov. 29, 1880. **HAWKINS, J.**, read the following judgment of the court.—The question in this case is whether the true owner of an article, which has without his knowledge or consent, been pledged with a pawnbroker for a sum under 40s., is entitled in exercise of his common law right, to recover it or its value from the pawnbroker by action, notwithstanding that the pawnbroker has returned it to the pawner, who has redeemed it, or whether his common law right so to do has been taken away by the provisions of the Pawnbrokers Act, 1872.

On the part of the defendant, the pawnbroker, it was contended that he, having delivered up the pledge to the person who for the time being was the holder of and produced the pawn ticket, was, by s. 25 of the Act, indemnified for so doing

against all the world, including, of course, the true owner, and that the notice and demand served upon him while the pledge was yet in his custody operated as nothing in the absence of such a declaration as is prescribed in s. 29, the form of which is given (No. 4) in Sched. 3 to the Act. It was not, and could not be, denied that at common law the plaintiffs would be entitled to recover. They were the owners of the article pledged and entitled to the possession of it, for the bailment to Smith, the pawner, was determined by her pledging it to the defendant: see *Cooper* v. *Willomatt* (1), where it was held that, on a wrongful sale by a bailee to a bona fide vendee, the latter was liable in trover to the bailor. Here, instead of a wrongful sale, it was a wrongful pledge, but the same law applies, and the delivery back to the pawner, after notice of the plaintiff's title and demand, was clearly a wrongful conversion, unless it was protected by the provisions of s. 25: see *Peet* v. *Baxter* (2); *Packer* v. *Gillies* (3); *Hoare* v. *Parker* (4). In construing the provisions of the Pawnbrokers Act, 1872, some assistance will be derived from a clear understanding of the relations between the pawner and the pawnee, independently of all statutory enactment. In the case of an ordinary pledge there is, no doubt, an implied undertaking on the part of the pledgee to re-deliver to the pledgor the article pledged on payment by the pledgor of the sum advanced, with interest, but there is, on the other hand, an implied undertaking on the part of the pledgor that the property pledged is his own, or that he has the authority of the owner to pledge it and that it may safely be delivered back to him. The undertaking to re-deliver on the part of the pledgee is, however, not an absolute one, but is subject to this—that the pledgor has the title he warrants himself to have; and if it turns out that he is not the owner, and had no authority from the owner to pledge, the pledgee may restore the property pledged to the person lawfully entitled to it: see *Cheesman* v. *Exall* (5), per POLLOCK, C.B., and PARKE, B.

Further assistance to a correct understanding of the statute and the intention of the legislature will be acquired by bearing in mind one or two matters of common knowledge relating to pledges and pawn tickets. In the first place, it is a very common occurrence for a pawner to dispose, by sale or gift, of his pawn ticket to another person, with the intention to confer upon the vendee or donee a right to redeem the article pledged; and by the accidents of life it constantly happens that the pawner loses or accidentally destroys his ticket, or has it stolen or fraudulently obtained from him. It is also a very common practice for the owners of articles upon which they desire to obtain loans to employ other persons to pledge such articles for them, in which case the person so employed who actually delivers the article to the pawnbroker, is in law the pawner, and in his name the ticket is made out; and it not rarely happens that this ticket is retained by the pawner, and not delivered over to the employing owner. It was to meet such and similar contingencies (among other things) that the Pawnbrokers Act, 1872 (in substitution of the Acts which previously existed on the subject) was passed, partly for the protection of pawnbrokers, partly also for the protection of pawners and the owners of property pledged.

We come now to consider the provisions of the statute itself, in construing which it must constantly be borne in mind that it recognises a clear distinction between the pawner of goods and the owner, for whom or by whose consent they are pawned. This is apparent on reading s. 12, which makes it imperative upon the pawnbroker to keep such books as are described in Sched. 3 to the Act, by reference to which it will be seen that in the pledge-book (Form No. 1) the name and address of the pawner (who by s. 5 is defined as "a person delivering an article for pawn") and also the name and address of the owner, "if other than the pawner," are required to be inserted in separate columns. It is obvious that in using the word "owner" in the form in which the pledge-book is to be kept, the legislature contemplated only the owner assenting to or on whose behalf the pledge is made, for it would be absurd to suppose that they would recognise the taking by a pawnbroker knowingly of a pledge without the owner's assent. By s. 14 a pawnbroker is required to give to the pawner a pawn ticket, and he is prohibited

from taking a pledge in pawn unless the pawner takes the pawn ticket, and on reference to the form of ticket given in Sched. 3, it will be seen that the name of the pawner is inserted, and not that of the owner. By s. 16 every pledge is redeemable within twelve months from the day of pawning [now six months: see Pawnbrokers Act, 1960, s. 2]; the Act does not in words say by whom the pledge is redeemable, but it is obvious that, prima facie, the pawner who makes the pledge is the person to redeem it, for the contract, as we have pointed out, is between him and the pawnbroker.

We now come to s. 25, upon which we think great light is thrown by the matters to which we have adverted. It enacts that:

> "The holder for the time being of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, and, subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn ticket, and he is hereby indemnified for so doing."

That is followed immediately by s. 26, which enacts that:

> "A pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn ticket for it is delivered to him."

It is clear to our minds that in these two sections the legislature intended only to provide for the delivery back of the article pledged to the person entitled to redeem, and, as between the pawner and the pawnbroker, to compel the latter to recognise, in the absence of grounds for belief to the contrary, the possessor of the ticket as the person so entitled and to presume him to be the lawful holder of it without further investigation of his title. The legislature also intended, should it so happen that the ticket is presented and the pledge redeemed by a person who has, in fact, no title to the ticket, to protect and indemnify the pawnbroker against any claim by the real pawner, or anybody to whom he may have transferred his title, or the owner who has sanctioned the pledge.

This construction seems to us to give full effect to and to be the true interpretation of s. 25. In our judgment, that section in no degree affects an owner whose property has been pledged against his will. He is in no sense "a person entitled to redeem the pledge," or privy to the contract of pawn. His claim rests on a title paramount, which is unaffected by the dealing between the pawnbroker and his customer. Section 25 does not say that the holder of the ticket shall be presumed to be the owner, but that he shall be presumed to be the person entitled to redeem, or, in other words, the person entitled to represent the pawner, whose title is altogether inconsistent with that of an owner whose property has been unlawfully pledged against his will. To our mind, it is very clear that the legislature did not, in the sections relating to the redemption of pledges, intend prejudicially to affect the rights of such owners as we have last referred to, otherwise a valuable jewel, pledged for the sum of 5s. or 10s. by a fraudulent person without title, would, if unredeemed within a year, become, under s. 17, the pawnbroker's absolute property—a state of things too monstrous to bear a moment's consideration.

In the course of the argument there was much discussion upon s. 29 [set out p. 954 ante]. In that section we find nothing militating against the views which we have expressed. That section was, as is stated in the preamble to it, intended for the protection of owners of articles pawned and of pawners not having their pawn tickets to produce—that is to say, persons entitled to redeem, but who, for some reason or the other, are unable to produce their tickets, and it points out the machinery by which this protection is to be made available. The first words of sub-s. (1) evidently contemplate the case of such an owner as the Act requires to be named in the pledge-book, to which we have already referred—viz., an owner whose property has been pledged by his authority, and which, therefore, of course, must be redeemed before the pawnbroker can be called upon to deliver it back.

A It is true the section does not in terms limit its operation to such owners, and we can well understand and appreciate the reason for this. It probably is that the legislature had it in view to enable an owner whose goods are pawned without his authority, if he thinks fit so to do, to put himself in the same position as an owner whose goods have been pawned by his consent—that is to say, to abandon his legal right and to adopt the pledge, and so give himself a title to redeem it, as many B a person would doubtless gladly do, where an article of value is pledged for a trifling sum, rather than incur the trouble and expense of insisting upon his paramount title; but if an owner avails himself of this privilege, which it is at his option to do, he must adopt the machinery provided for him. We do not deem it necessary further to discuss this section, in which not a syllable is to be found indicative of an intention to interfere with the common-law right of owners of C property unlawfully pledged. Sections 30 and 36 appear to us only to afford additional protection to such owners.

After much consideration, we have arrived at the conclusion that s. 25 justifies the pawnbroker only to this extent—viz., in treating the holder of a pawn ticket as the person lawfully entitled to hold it, and that the indemnity given by that section is limited to and protects the pawnbroker only against the pawner, the D owner who has authorised the pledge, and all those who claim title under them; and that none of the provisions of the statute was intended to affect, nor do those provisions affect, the common law right of an owner of property pledged against his will, who claims by title paramount to that of the owner. The plaintiffs are, therefore, entitled to judgment.

E *Appeal allowed.*

Solicitors: *J. N. Mason*; *C. Thorpe.*

[*Reported by* HENRY LEIGH, ESQ., *Barrister-at-Law.*]

F

G

Re GOLD CO., LTD.

[COURT OF APPEAL (James, Baggallay and Bramwell, L.JJ.), January 17, 18, 20, 1879]

H [Reported 11 Ch.D. 701; 48 L.J.Ch. 281; 40 L.T. 5; 43 J.P. 652; 27 W.R. 341]

Company—Winding-up—Compulsory winding-up—Grant of order after commencement of voluntary winding-up.

Company—Shares—Issue—Powers of directors—Issue of shares as fully paid-up—Possibility of fraud.

I A voluntary winding-up is a bar to the making of a compulsory winding-up order on a shareholder's petition, unless there has been fraud in the passing of the resolution for a voluntary winding-up or the resolution has been passed by the preponderating influence of directors or others whose conduct is alleged to require investigation.

A company was incorporated in 1873, with a registered capital of £100,000 in £1 shares, for acquiring and working a mine. By art. 11 of the articles of association it was provided that the directors might allot and issue shares on such terms as they should think fit, and that if at any time it should appear

to them that the capital of the company for the time being subscribed would be sufficient for the purposes of the company, they might allot any shares which then remained unallotted to and among the then shareholders in proportion to the number of shares respectively held by them, and such shares might be so allotted as fully or partially paid-up shares, although no moneys might be received by the company in respect of such shares from any allottee thereof. Within two months after the incorporation of the company, when 25,000 shares had been allotted, some for cash and others for various alleged considerations, a contract was signed between the company and all persons who were then holders of shares by which it was agreed that all the remaining 75,000 shares should be divided between the existing shareholders in proportion to their holdings, and allotted to them as fully paid-up shares. This contract was registered, and the allotments were made accordingly, without any payment being made in respect of the shares so allotted. In May, 1877, resolutions were duly passed for a voluntary winding-up of the company, and appointing the secretary of the company liquidator. After the voluntary winding-up had gone on for several months, a shareholder who had bought 100 shares in the company, at £1 0s. 9d. per share, from one of the subscribers to the memorandum of association, who was also one of the allottees of the freely allotted shares, believing £1 to have been paid on each share, presented a petition for the compulsory winding-up of the company on the ground that the allotment of the 75,000 shares was fraudulent and required investigation, and that the directors and their friends ought to be made to account for the profit made by the sale of those shares.

Held: the petitioner was precluded by the voluntary winding-up from obtaining an order for compulsory winding-up.

Per Curiam: Article 11 of the articles of association, which empowered the directors to allot and issue shares as fully paid-up, was a most improper article, being likely to lead to fraud and (per BRAMWELL, L.J.) almost certainly leading to fraud in the present case.

Notes. Considered: *London Trust Co.* v. *Mackenzie* (1893), 62 L.J.Ch. 870; *Re Bishop*, [1900] 2 Ch. 254. Explained and Followed: *Re Hadleigh Castle Gold Mines*, [1900] 2 Ch. 419. Considered: *Re National Distribution of Electricity Co.*, [1902] 2 Ch. 34. Referred to: *Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss* (1880), 14 Ch.D. 390; *Re British Seamless Paper Box Co.* (1881), 50 L.J.Ch. 497; *Re Phoenix Electric Light and Power Co.* (1883), 48 L.T. 260; *Re Varieties*, [1893] 2 Ch. 235; *Re Haycroft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230.

As to the effect of a voluntary winding-up on a petition for a compulsory winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 540, 541, and cases there cited; and as to the allotment of shares, see ibid., pp. 235 et seq.

Cases referred to:

(1) *Re West Surrey Tanning Co.* (1866), L.R. 2 Eq. 737; 14 W.R. 1009; 10 Digest (Repl.) 1110, *7685*.

(2) *Re Imperial Bank of China, India and Japan* (1866), 1 Ch. App. 339; 35 L.J.Ch. 445; 14 L.T. 211; 12 Jur.N.S. 422; 14 W.R. 594, L.JJ; 10 Digest (Repl.) 1115, *7732*.

(3) *Re Bank of Gibraltar and Malta* (1865), 1 Ch. App. 69; 35 L.J.Ch. 49; 13 L.T. 386; 11 Jur.N.S. 916; 14 W.R. 69, L.JJ.; 10 Digest (Repl.) 1120, *7780*.

(4) *Re Fire Annihilator Co.* (1863), 32 Beav. 561; 2 New Rep. 99; 8 L.T. 412; 9 Jur.N.S. 633; 11 W.R. 654; 55 E.R. 220; 10 Digest (Repl.) 1112, *7702*.

(5) *Re Littlehampton, etc., Co., Ltd.* (1865), 34 Beav. 256; 11 L.T. 725; 13 W.R. 379; affirmed, 2 De G.J. & Sm. 521; 12 L.T. 8; 11 Jur.N.S. 211; 13 W.R. 420; 46 E.R. 476; sub nom. *Re Littlehampton, Havre and Honfleur S.S. Co., Ltd., Ex parte Ellis*, 34 L.J.Ch. 237, L.JJ.; 10 Digest (Repl.) 1110, *7677*.

A Also referred to in argument:

Re Beaujolais Wine Co. (1867), 3 Ch. App. 15; 17 L.T. 399; 32 J.P. 195; 16 W.R. 177; sub nom. *Re Beaujolais Wine Co., Ex parte Wragge*, 37 L.J.Ch. 220; L.JJ.; 10 Digest (Repl.) 1114, *7729*.

Re London Flour Co., Ltd. (1868), 17 L.T. 636; 16 W.R. 474; reversed, 19 L.T. 136; 16 W.R. 552, L.JJ.; 10 Digest (Repl.) 1045, *7238*.

B *Re Baglan Hall Colliery Co.* (1870), 5 Ch. App. 346; 39 L.J.Ch. 591; 23 L.T. 60; 18 W.R. 499, L.J.; 9 Digest (Repl.) 90, *399*.

Society of Practical Knowledge v. *Abbott* (1840), 2 Beav. 559; 9 L.J.Ch. 307; 4 Jur. 453; 48 E.R. 1298; 10 Digest (Repl.) 1289, *9118*.

New Sombrero Phosphate Co. v. *Erlanger* (1877), 5 Ch.D. 73; 46 L.J.Ch. 425; 25 W.R. 436, C.A.; affirmed sub nom. *Erlanger* v. *New Sombrero Phosphate* C *Co.* (1878), 3 App. Cas. 1218; 39 L.T. 269; 27 W.R. 65; sub nom. *New Sombrero Phosphate Co.* v. *Erlanger*, 48 L.J.Ch. 73, H.L.; 9 Digest (Repl.) 41, *75*.

Phosphate Sewage Co. v. *Hartmont* (1877), 5 Ch.D. 394, 447; 46 L.J.Ch. 661; 37 L.T. 9; 25 W.R. 743, C.A.; 9 Digest (Repl.) 41, *74*.

D **Appeal** by the Gold Co., Ltd., from a decision of MALINS, V.-C., granting a petitioner an order for the compulsory winding-up of the company.

J. Pearson, Q.C. (with him, *J. Wilkinson*), for the company.
Bristowe, Q.C. (with him *Deane*), for shareholders in the same interest.
Higgins, Q.C., and *Oswald* for the petitioner.
Buckley for shareholders in the same interest.

E

JAMES, L.J.—The first question raised on this appeal is a very important general question, far beyond the mere question involved in the case before us, and it is whether the petitioner, being a shareholder, has a right to what is called a compulsory order for winding-up, after there has been a voluntary winding-up resolved on by the company. If the question were res integra, I myself would F have come to the conclusion, upon the true construction of the Companies Act, 1862, that the voluntary winding-up is an insuperable bar to the making of a compulsory order for winding-up. Section 145 of the Act provides that a voluntary winding-up shall be no bar to an application by a creditor for a compulsory winding-up, and expressio unius, generally speaking, est exclusio alterius. Beyond that, the Act does appear to contain a great number of provisions intended, and, G it seems to me, calculated to prevent any mischief which might otherwise arise from any wrong done to a shareholder by the voluntary winding-up.

There have been several cases in the courts in which, notwithstanding that language in the Act, a contributory has obtained an order for winding-up after a voluntary winding-up. The leading case, in my view of the subject, and the one which seems to me to establish the principle, is *Re West Surrey Tanning Co.* (1), H where the court came to the conclusion that the resolution to wind-up voluntarily was under the circumstances a sham. There was one man, whose conduct was impeached and whose dealings and transactions with the company required investigation, and he had a complete majority of votes, so that he could by his own votes have determined that no proceedings should be taken against himself, and that there should be no investigation into his dealings. I can conceive a case in which that I might apply to the majority of the shareholders, that is to say, where the majority of the existing shareholders were so mixed up with the matters complained of and the matters requiring investigation that the resolution of a general meeting would be a decision by an interested judge, if I may use the expression—by persons incompetent to decide by reason of their personal interest in the matter. I am of opinion, that to enable the court to make such an order as the vice-chancellor has made, the case must be brought up to a case of that kind, that is to say, to a case in which from the circumstances the court sees that the shareholders cannot be trusted to determine the matter for themselves.

I cannot find anything like that case made out or even alleged in the present case, because, although all the shareholders at one time were parties to the transactions complained of, which I shall consider afterwards, the case of the petitioner is that there were dealings in the shares on the Stock Exchange and there were transfers of shares, the result of which was that there are now more than 300 shareholders holding 40,000 or 50,000 shares in the company, all of whom are in the same interest with the petitioner, acquired their shares in the same manner as he did, and have exactly the same ground of complaint as he. I cannot find anything in this case to satisfy the court, or to entitle the court to say that it can deprive those shareholders—for they are the persons interested—of the right which belongs ordinarily, and, except under very exceptional circumstances, to the shareholders of every joint stock company or corporation of this kind, of determining among themselves, for themselves, by a majority, according to their view of what is most for their interest, and what ought to be done or ought not to be done, either in the disposal of the property of the company, or in making any claims against any supposed debtors to or persons liable to the company. I am of opinion, therefore, that in this case there was no ground for a compulsory order to wind-up.

That, however, does not dispose of the case, because it was suggested, and, I think, properly suggested, by counsel for the petitioner that, although we could not for those reasons grant the order for a compulsory winding-up, there might be, and ought to be, another less order. The petitioner asks, no doubt, for a compulsory winding-up, but he says he is entitled, at all events, to have what is called a supervision order, that is to say, an order for placing the matter under the supervision of the court, which would enable the court to do justice as between the different classes of shareholders, or some other order that he may use the name of the company in instituting proceedings to obtain relief. Therefore, it is necessary to consider whether the petitioner is entitled to any relief.

The deed of settlement contains certainly a most extraordinary provision, a provision which the vice-chancellor has denounced in very strong terms, and I am not prepared to differ from him with respect to it; but still it was one of the clauses, one of the terms of the constitution of the company, and the petitioner became a shareholder in a company of which that was one of the terms and conditions. First of all it was intended to issue 25,000 shares, and that clause was one enabling the directors, if they thought fit, if they came to the conclusion that they did not want any more money, to issue 75,000 among the holders of the 25,000 shares. However, there is that provision, and it was made by an instrument duly registered within the provisions of the Companies Act, 1867, so as not to be obnoxious to the special provision in s. 25, which requires that all shares shall be issued for money, and not otherwise, unless by an agreement duly registered [see now s. 52 (1) of Companies Act, 1948 : 3 HALSBURY'S STATUTES (2nd Edn.) 452]. By that instrument, all the persons then interested in the company being parties to it, 25,000 shares were allotted for that which all the then shareholders considered to be a sufficient consideration. The 25,000 shares were allotted, partly for money, partly for services rendered, partly for debts or sums said to have been advanced to the company. The 25,000 shares were allotted to the then shareholders, and immediately afterwards the directors, in pursuance of the clause I have mentioned, allotted 75,000 shares between the holders of the 25,000 shares, that being with the assent of the holders of the 25,000 shares, who accepted the allotment. The fact of that allotment, and the circumstances under which it was made, were also registered so as to escape the provisions of the Companies Act.

What was the legal result of what was so done? All the persons interested in the company by this transaction in effect divided the property between themselves in fractions, of which the common denominator was £100,000, or was called £100,000. Of course where the shares are all paid-up, and nothing remains to be called, all the company has got is its property. Therefore, they divided the whole property between themselves, as I have said, into fractions of which the denominator was 100,000. One can see a motive for it, of course, which I shall afterwards

A mention. However, that was the result. On whom was that a fraud, or to whom was it a wrong? It could not be a fraud upon or a wrong to the existing shareholders, because every one of them was a party to the transaction. It could not be a fraud upon or a wrong to future shareholders—I mean in the sense of allottees of shares—because the very essence of the transaction was that no shares were to be or could be issued thereafter. It was no fraud upon or wrong to the existing B creditors, if existing creditors there were, because it appears that, if there were any existing creditors, they either were satisfied or paid, or they acquiesced in what was done, and volenti non fit injuria. It was no legal wrong to any future creditors, because by the transaction the most distinct notice was given to any person not a shareholder that he had no uncalled capital to look to, that there were no shares remaining to be issued, that there was to be no money to be derived either by C the issue of shares or by calls on existing shareholders, and if anybody chose to give credit under the circumstances to such a company, he was giving credit to the property of the company, whatever it was, just in the same way as I give credit to the Bank of England when I take a £5 note, or as anybody gives credit to any other corporation which has all its capital paid up.

What is the fraud upon or wrong to persons like the petitioner who went and D bought shares in the market? The petitioner got exactly what was offered to him. He got for the £100 which he gave the thousandth part of the mine, as it stood. He derived his title in fact from and through the very transactions which are complained of, the shares being paid-up shares, most of which were obtained in that way. He obtained the shares from a person who was a party to the transaction which I have described, and he obtained them with full notice in point of E law that every other shareholder in the company was in exactly the same position as himself, that is to say, that no shareholder was to pay anything, and that there were no shares to be issued, and, therefore, in that sense, there was no wrong done to him. In truth, when his case, as alleged and proved by him, comes to be looked at, it is a case, as it seems to me, wholly outside the provisions for winding-up companies. His case is that by this mode of creating shares, by this mode of F dealing with the shares, and by subsequent devices and practices in the stock market he was deluded into giving £100 for that which was not worth 100 farthings.

The vice-chancellor used strong language, but I cannot help thinking that he did not use too strong language, in describing what was done, as against some of the persons connected with it. I cannot help thinking that it was intended by some persons connected with this transaction to call the capital £100,000 with a view G of giving it a false reputation in the market, and inducing persons to think they were getting something of value when they were getting in fact that which was utterly valueless. But that is a wrong done to each individual purchaser. Anybody who has, as this petition says he has, been deluded into giving money for that which was an utter sham, or nearly so, has good ground of complaint that he was deluded into giving money in that way, but his complaint is an individual H complaint; it is a wrong done to him personally; it is not a wrong done by the company or to the company. It is not a wrong done by persons in a fiduciary character towards the company for whom they were trustees, but it was a wrong done by the individual, whoever he was, who deluded him into making the purchase. It was a wrong done to him by those persons who enabled that fraud to be practised, who assisted in perpetrating the fraud upon him, and against whom, therefore, he I may have the relief which the law entitles him to have.

That has nothing at all to do with winding-up, either compulsorily or otherwise. It is not the function of a winding-up order to give remedies for wrongs connected with the dealing in shares, or to give relief or redress to the man to whom the wrong is done in his being induced to become a shareholder—a wrong not done to him in his character of shareholder—not done to anybody whose shares he takes, but done to him in his character of a purchaser of shares in the market. That wrong is one for which, as I have said, he may have redress. There may be circumstances which might possibly have induced the public authorities to intervene

in the matter; but it is not, according to my view, within the province of the court in the winding-up of a company, to give relief for the purpose of enabling such a complainant to get redress, or for the purpose of enabling him to investigate the books and documents or transactions of the company by way of discovery to assist him in making out his case against the persons against whom he has a case. In my opinion, therefore, this court cannot give him any relief whatever. I say nothing about the neglect, the length of time which elapsed before the petitioner presented his petition, though that would, of itself, have been a very important matter to consider. I do not wish to weaken what I have said on the general principle by laying any stress upon the delay; but it would have been, I think, a very serious impediment in the way of his obtaining any relief on this petition, that he allowed the voluntary winding-up to go on for months with full notice of what had been done, and allowed it to be completed before he took the proceeding which he has done. I, therefore, say that in my opinion the petition has failed, and that the order of the vice-chancellor ought to be discharged with costs.

Although all the persons are not before us, I do not feel any hesitation in expressing my opinion, but I cannot help agreeing with the vice-chancellor that I hope such a clause as that to which I have referred will never again be inserted in a deed, and that no such transaction will again be resorted to; because, if there was not actual fraud proved—and I do not like to say there was actual fraud in anybody connected with this transaction—if there was not actual fraud proved, the transaction was such as the vice-chancellor truly says was very likely to lead to fraud. I agree with the vice-chancellor in expressing my strong disapprobation of such machinery having been resorted to, which, at all events, might have been the means, and not improbably was the means, of fraud on those unwary persons who might have been induced to buy in the market such things as they did buy in this case, for large sums of money.

BAGGALLAY, L.J.—The petitioner in this case is the holder of 100 shares, all fully paid-up, in the company which he now seeks to have wound-up under the order of the court. There are one or two circumstances in the case which are not at all in dispute, which I will allude to, because I think they will have a material bearing on the ultimate disposal of the case. This company was incorporated in November, 1873. In June, 1875, the petitioner acquired his shares by purchase. The resolution for a voluntary winding-up was passed in May, 1877, and it was not till some time in the year 1878 that he presented this petition. Now he comes before the court, alleging irregularities in the formation of the company, irregularities in the conduct of its business by the directors, and irregularities as far as regards the obtaining of the resolution for the voluntary winding-up. He asks relief by the terms of his petition in the form of a compulsory order for winding-up; but it has been urged upon us that he may be entitled either to a compulsory order, or, if not to a compulsory order, to a continuation of the voluntary winding-up under supervision, and if to neither of those two, that he is entitled to that which was granted in *Re Imperial Bank of China, India and Japan* (2), by the lords justices, namely, leave to use the name of the voluntary liquidator, indemnifying him, for the purpose of prosecuting such proceedings as he may be advised against the directors.

The petition is opposed on three grounds—first, that he is a paid-up shareholder, all the shares he holds having been paid up in full; secondly, that, being a contributory, he was not at liberty to present a petition for an order for compulsory winding-up or for a continuation of the winding-up under supervision; and thirdly, on the general merits of the case. The first ground of opposition, that he was the holder of fully paid-up shares, was taken as a preliminary objection and disposed of. Though, no doubt, a shareholder who has paid up in full may, under certain circumstances, present a petition and obtain a winding-up order from the court, there must be very special circumstances shown for that purpose, as, for instance, that by the course which is suggested there may possibly be something to be

returned to the shareholder, or to him and to other shareholders. As regards the second ground of objection, namely, that, the petitioner being a contributory and there being a voluntary winding-up, that voluntary winding-up is a bar to his presenting a petition for a compulsory winding-up, I entirely agree with what JAMES, L.J., has just now said—that, if the matter were res integra, I should be very much disposed to consider that it was a bar to him as a contributory. I do not, however, think that there is authority for saying that it is not a bar.

In *Re Bank of Gibraltar and Malta* (3), TURNER, L.J., expressed a very strong opinion that it was not within the jurisdiction of the court to entertain a petition presented by a contributory after there had been a voluntary winding-up. A variety of cases have been cited, and in fact I think every important case on the subject is cited in MR. BUCKLEY'S very able and very useful book on company law. I think the result of the cases is that the court will not entertain a petition from a contributory after there has been a voluntary winding-up, unless it is shown that there has been fraud. There may be special circumstances, perhaps not amounting to fraud in the ordinary and every-day meaning of the word, but which are yet almost equivalent to fraud, and show that there ought to be a compulsory order. That was the case, I think, in *Re Fire Annihilator Co.* (4). There there had been a voluntary winding-up; it had been going on for five years and nothing had been done satisfactorily under it, and, therefore, the court treated the matter as if there had been no voluntary winding-up at all, and made a compulsory order.

The case that was relied upon by the vice-chancellor as one which supported his decision to grant the winding-up order on the present application was *Re Littlehampton, etc., Co., Ltd.* (5); but in that case the petition was presented before even the preliminary steps had been taken for obtaining a voluntary winding-up. No doubt a resolution for the voluntary winding-up was passed before the compulsory order was made, but the compulsory order had been already applied for. If I am right in my dates, the petition for a compulsory winding-up was presented on Jan. 4, and it was not till Jan. 12 or 13 that even notice was given for the holding of the first meeting at which the resolution to wind-up voluntarily was passed, and, therefore, in point of fact, there had been a commencement of the exercise of the jurisdiction of the court at the time the petition was presented, and had been answered before any voluntary resolution had been passed.

Again, in *Re West Surrey Tanning Co.*, (1) I have looked into the facts of the case, and I find that there too there had been no complete voluntary winding-up resolved upon. A petition was presented in the interval of time between the first resolution and the meeting at which that resolution was confirmed, and, therefore, the court, again, had obtained jurisdiction over the case, as it appears to me, before there had been any complete voluntary winding-up. Even in that case there were special circumstances which, I think, almost justified the interference of the court, namely, that, in the opinion of the court, the voluntary winding-up had been obtained, if not, as I said just now, by fraudulent means within the ordinary intent and meaning of the word, by an overpowering majority of shareholders, all under the influence of a single person. I think the answer to any argument based upon *Re West Surrey Tanning Co.* (1) is that the court had commenced its jurisdiction in the matter before there had been a complete voluntary winding-up resolution.

A suggestion was made by JAMES, L.J., in the course of the argument, which, I think, is one of considerable weight, namely, that if you make a compulsory order for winding-up after a voluntary winding-up, you have this difficulty, which no doubt is a difficulty you might have to deal with on a creditor's petition, namely, that you have a different period for the commencement of the winding-up. The voluntary winding-up dates from the time the first resolution is passed; but the compulsory winding-up dates from the time when the petition is presented, which certainly is an inconvenience not rashly to be incurred. [By s. 229 (1) of the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 452), where, before the presentation of a petition for the winding-up of a company by the court, a resolution has been passed by the company for voluntary winding-up, the winding-up of

the company shall be deemed to have commenced at the time of the passing of the resolution.] Therefore, though I do not think it necessary to express any decided opinion on the present occasion whether a contributory, after a voluntary winding-up has been resolved upon, can present a petition for a compulsory winding-up of the company, I still desire to intimate a very strong bias in my own mind at the present time in favour of the view that no such petition can properly be presented. But I think there is quite sufficient to dispose of this case without relying on that objection. I think, also, that the objections are equally great to a contributory obtaining a supervision order, and they have been so treated from time to time. After there has been a resolution for a voluntary winding-up, it has been held that a contributory must prove some very special circumstances before he can obtain an order for a compulsory winding-up. No doubt, there are some cases in which a petition by a contributory for a compulsory order, after a voluntary winding-up, has been acted upon by the court, but those have been cases in which creditors have appeared, and have supported the petition for the winding-up. And, of course, for the purpose of saving the necessity of dismissing one petition and causing another to be presented immediately afterwards, the court has more than once made an order for a compulsory winding-up where a petition has been supported by a creditor, although that creditor has not concurred in the petition.

It has been argued that the resolution for a voluntary winding-up ought not to stand in the petitioner's way, because it was obtained by fraud. Well, if the resolution for a voluntary winding-up had been obtained by fraud, and if that fraud had been clearly proved, I am by no means certain this would not be a case in which the court would entertain his petition and grant relief. But what are the facts? He first of all endeavoured to establish a technical objection that the requisite majority of three-fourths had not been obtained. However, he was precluded by the terms of the section of the Act of Parliament, which says that where a poll is not demanded, there the decision of the chairman that the resolution has been carried is to be quite sufficient without any proof of the number of voters or the proportion of their votes. Had a poll been demanded, the voting would have been by a numerical calculation of the votes held by the various shareholders. Possibly there was a very sufficient reason why at that meeting no poll was demanded, apart from the question that it requires five shareholders to demand a poll, and he could not succeed in finding as many as five to support his views. We must also bear in mind that there were only seventeen shareholders present at this meeting, and there were over 300 shareholders in the company, who for some reason or other did not think it necessary to attend the meeting. They knew what the meeting was summoned for, because the Companies Act, 1862, requires that when a meeting is convened for the purpose of winding-up a company, that must be expressly stated in the notice summoning the meeting. They all knew, therefore, what the object was, and from their staying away I think we may fairly assume that they were indifferent to what was to be done. I think it would be impossible to say that those who attended were all friends of the directors, for probably there were some who were not friends, the shares originally held by the directors having been to a great extent parted with before the resolution for a voluntary winding-up was passed. I think, therefore, that any allegation to the effect that there were irregularities with respect to obtaining the winding-up resolution is entirely displaced by the evidence.

I agree with the observations which were made by the vice-chancellor to the effect that he did not desire to express any opinion whether art. 11 of the articles of association was inserted in the articles of association with any fraudulent intent, adding: "All I know is, it is a clause which may be very well turned to a fraudulent purpose, and I am by no means satisfied that it was not so turned in this case, although I give no positive opinion on the subject." Apart from what the object or the purpose of the frame of that clause may have been, I must confess it appears to me to be an attempt to evade the provisions of the Companies Act, 1867, with regard to the reduction of capital. It may have been such an evasion

as keeps within the law, but if at any proper time the question had been raised whether that clause was ultra vires or not, I must confess there would have been strong reasons for holding that it was.

BRAMWELL, L.J.—I am of the same opinion. I entirely agree with all that has been said by my brethren.

I think that art. 11 of the articles of association was a most improper article, and, although one speaks with hesitation, inasmuch as we have got neither the whole of the particulars, nor the parties before us to be heard in their defence, it seems to me almost impossible to think that it was not put into the deed for a fraudulent purpose. Let us see what it is. £25,000 are subscribed in one way or another. By virtue of art. 11, and the resolution come to by the directors immediately after they were appointed, and before they could bona fide have known whether they would want more money or not, by virtue of art. 11, the apparent subscribed capital of the company, although £25,000 only had been subscribed, is made £100,000, and every man who was formerly a holder of one £1 share became a holder of four £1 paid-up shares. So far as the company was concerned, that did it no injury. Each man who held a share beforehand held one twenty-five-thousandth part of the subscribed capital of the company, and the effect of what was done was simply to alter the denominator from £25,000 into £100,000, and to make each holder of a share the holder of four one-hundred-thousandth parts of the capital of the company, which is the same thing, and, therefore, as far as the company was concerned, no harm was done to it, although they chose to call these four £1 shares paid-up shares instead of calling them four 5s. paid-up shares, which would have been the truth.

The mischief that was done was done, not to the company or to any then shareholder in the company, for they were all parties to it, and one got as much benefit as the others did, or rather no benefit at all. The mischief that was done was that they could, with these, what I must call pretended shares, go into the market, and any man, having a £1 share offered to him for purchase, might think it was worth £1, or perhaps £1 with 1s. or 2s., or perhaps 5s. premium; but if he had been told the truth, that it represented 5s. only in money paid, it is not to be conceived that he would have given £1, which would have been putting it at a premium of £300 per cent. Therefore, the effect of what was done was that people who did not know the truth of the transaction, and who supposed they were buying a share which represented £1 paid, were in truth buying shares for which only 5s. had been given. I have not the slightest doubt in the world that many people were deluded into buying these shares upon the footing that they were buying that which represented a payment or value of £1 which had been given by the original allottee. That is a most mischievous thing. I am perfectly certain that all the shareholders were not fraudulent persons, for two reasons, both entirely satisfactory to my mind: one is, that among them are the names of persons who, I am certain, are incapable of fraud; and another is, that they did not all sell these shares, but kept them—many of them kept them—and therefore made no profit out of this thing. Speaking with reserve and admitting the force of that observation, while there were some persons who were perfectly free—I will not say from blame in the matter, but who had been no doubt accepting what was done—I have not the slightest doubt whatever that somebody, by this article and what was done under it, intended the delusion upon the public which has been practised to the extent of about 50,000 shares in this case. I am by no means clear that a remedy might not be had against such a person if anyone could prove it. I suppose there would be some public announcement of this thing; the company would be announced as having a capital of £100,000 paid up, and the shares would purport to be the same thing, which is untrue. If anybody could prove that he had been deceived by that, he could maintain an action against the fraudulent persons who had been guilty of it and caused damage to him. Another thing which it may be as well for

gentlemen to bear in mind who have such schemes as this in their heads is that I am by no means clear that, if they were indicted for a conspiracy, they could not very properly be convicted, and suffer punishment for it, for it is perfectly certain that in this case a false impression must have been created.

Appeal allowed.

Solicitors: *Stevens, Wilkinson & Harries*; *Morley & Shirreff*; *Wild, Barber & Browne.*

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

GREEN *v.* REGINAM

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley, Lord Penzance and Lord O'Hagan), June 22, 23, 1876]

[Reported 1 App. Cas. 513; 35 L.T. 495; 41 J.P. 196]

Statute—Custom—Abrogation—Need for clear words—Abolition of subject-matter with which custom connected.

As a general rule a custom or a right of a similar description is not to be taken away by the provisions of a statute without clear, distinct and precise words. Where that to which the custom or right has been attached is abolished by the statute and something else is substituted the custom or right will not attach to that which is substituted.

Statute—Description—Strict construction—Variation to accord with supposed intention of legislature.

Where a statute contains a description, and, applying that description to the facts of the case, it is found that there is one set of facts or circumstances, one person, or one thing, as the case may be, which entirely satisfies the description which the statute gives, the words of that description, on a surmise as to what the legislature intended, must not be departed from, amplified or varied so as to include some other set of circumstances, other person, or other thing which under that amplified form will come under the description.

Notes. As to construction of statutes, see 36 Halsbury's Laws (3rd Edn.) 382 et seq.; and for cases see 42 Digest 609 et seq.

Cases referred to in argument:

Craven v. *Sanderson* (1838), 7 Ad. & El. 880, 897, n; 112 E.R. 700, 707; 16 Digest (Repl.) 442, *2493*.

Stead v. *Heaton* (1792), 4 Term Rep. 669.

R. v. *North Riding of Yorkshire Justices* (1837), 6 Ad. & El. 863; 2 Nev. & P.K.B. 103; Nev. & P.M.C. 313; Will. Woll. & Dav. 395; 6 L.J.M.C. 110; 1 J.P. 169; 1 Jur. 404; 112 E.R. 330; 22 Digest (Repl.) 150, *1360*.

R. v. *Nantwich Inhabitants* (1812), 16 East. 228.

R. v. *Marsh* (1836), 5 Ad. & El. 468; 2 Har. & W. 255; 6 Nev. & M.K.B. 668; 3 Nev. & M.M.C. 728; 111 E.R. 1243; 19 Digest (Repl.) 305, *762*.

Appeal from a decision of the Court of Exchequer Chamber reversing a decision of the Court of Queen's Bench, upon a return to a writ of mandamus.

The parish of Doddington, in Cambridgeshire, comprised the four townships of Doddington, Wimblington, Benwick, and March. The parish was of very large extent, comprising nearly 37,000 acres, with a population of more than 9,000 people.

In 1847 a private Act of Parliament (10 Vict., c. iii) was passed at the instance of the then patrons of the living to sub-divide the parish into three, Doddington and Wimblington to be one, Benwick another, and March the third. The division was to take effect upon the death of the then incumbent, which took place in 1868. The four townships were quite distinct from one another for all civil purposes, and the Act only constituted them separate parishes "for all ecclesiastical purposes," and contained a section, s. 44, preserving all civil rights. By s. 5 it was provided, that when the division should have taken effect

> "two fit and proper persons shall be chosen churchwardens for each such parish at the same time, and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington."

and that the new rectors should have "the same powers, privileges, rights, and immunities as the present rector of Doddington." At the date of the Act vestries were held at Doddington, where the parish church was, at which two churchwardens were appointed, one by the rector and the other by the parishioners, in the usual common law manner, under the name of the churchwardens of Doddington, who acted for the whole parish except the hamlet of March. At March there was a chapel and vestries were held there, with which the inhabitants of the rest of the parish never interfered and two churchwardens for the hamlet of March were elected by the parishioners. This right had been the subject of previous litigation, and had been established by a verdict at the Cambridgeshire Assizes in 1782. In 1868 the appellant, Mr. Green, was appointed to the new rectory of March, and claimed the right of appointing one churchwarden. The parishioners resisted the claim, and at the instance of certain of them a writ of mandamus was issued commanding the appellant to convene a meeting for the election of two churchwardens by the parishioners. To this writ a return was made, and by consent the facts were stated in the form of a Special Case. Upon argument, the Court of Queen's Bench (BLACKBURN and ARCHIBALD, JJ.), gave judgment for the appellant, and against the claim of the parishioners, QUAIN, J., dissenting. The case was carried to the Exchequer Chamber, where the decision of the Queen's Bench was reversed by BRAMWELL, CLEASBY, POLLOCK and AMPHLETT, BB., LORD COLERIDGE, C.J., BRETT and DENMAN, JJ., dissenting. The appellant appealed to the House of Lords.

Prideaux, *Q.C.*, and *McIntyre*, *Q.C.*, for the appellant.
Bulwer, *Q.C.*, and *F. M. White* for the prosecutors of the rule.

LORD CAIRNS, L.C.—The appeal in this case arises out of a proceeding by way of mandamus, in which the appellant, the rector of a parish in the diocese of Ely called March, contends that he has the right, in the ordinary way, of appointing one of the churchwardens of the parish. Those who have applied for the mandamus, on the other hand, claim that the parishioners have the right of appointing both the churchwardens. That question must be solved by reference to one section of a private Act of Parliament, which was passed in the year 1847.

Let me ask your Lordships to consider whether the facts of this case, regarding which there seems to be no dispute, make any alteration in the construction of the Act of Parliament, which, after all, must be the guiding rule by which we have to determine the present case. The learned judges in the court below, who have decided in opposition to the appellant, apply these facts, as it appears to me, in two ways. In the first place they apply them in the positive construction, if I may use the expression, of s. 5 of the Act, and that I will consider in a moment. They also apply them in another way. They say: You have here a custom established in the hamlet of March for the parishioners of that part of the parish to choose officers, who are called their churchwardens. That custom they set a value upon to such an extent that in the middle of the last century they had it established by proceedings at law. You cannot suppose, say the learned judges, that a custom of this kind is to be taken away by an Act of Parliament without

express words, and, if there be no express words taking away the custom, it must be held to remain.

I will say a word upon the second of these arguments first. I have to remark upon it that there is no doubt that, as a general rule, customs, or rights of a similar description are not to be taken away by inference, or without distinct words. But the error, as it appears to me, which the learned judges have fallen into upon this point is this. This custom was a custom connected with and attaching to the hamlet or chapelry of March, qua hamlet or chapelry. The Act of Parliament does not continue the hamlet or chapelry of March. If it did, it might well be said that incidents of this kind were continued along with it. The Act of Parliament makes, ecclesiastically speaking, a tabula rasa of the whole of the ecclesiastical arrangements within the area of the old parish of Doddington, and having made that tabula rasa it proceeds to erect and to create three new well-known and clear ecclesiastical divisions, namely, parishes or rectories, within the old area. It enacts that each of these three new ecclesiastical divisions is to be created after the pattern of the old and entire rectory, and that each new rectory is to have the incidents of the old one. It, therefore, ceases to be a question whether a custom attaching to the old chapelry or hamlet of March is or is not taken away by express words. The hamlet itself, as an ecclesiastical division, disappears; that to which the custom attached is no longer in existence, and, therefore, that has been done by the Act of Parliament which is much stronger than the abolition of a custom by express words—that is abolished on which alone the custom could exist, and to which alone it could apply.

In the court below the judges who decided against the appellant said that the meaning of s. 5 of the Act is this. The churchwardens, in a new parish, for example, March, are to be chosen in the same way as churchwardens were appointed in any part of the old parish. In the old parish there were churchwardens appointed at Doddington, and there were churchwardens appointed at March, and the effect of s. 5 is that new churchwardens are to be appointed throughout the whole area, as former churchwardens were appointed throughout the whole area. If you find that in one part of the old area churchwardens were appointed in one way, and in another part of the old area in another way, when you make your new divisions you are in each new division to appoint your new churchwardens as nearly as possible in the way in which churchwardens were appointed in that particular area.

That is the argument of the learned judges, but your Lordships will perceive that the argument proceeds altogether on an interpolation into the Act of Parliament of a word which does not occur there, and the excision from the Act of Parliament of a word which is there. The learned judges substitute for the plain expression, "in the same manner as churchwardens are now chosen and appointed *for* the said parish of Doddington," the words "in the same manner as churchwardens are now chosen and appointed *in* the said parish of Doddington." But what says the Case? The Case, which binds both parties, says: "Separate churchwardens were appointed at the Doddington vestries by the name of the churchwardens for the parish of Doddington." Is it to be said that you ought to alter the wording of the Act of Parliament in this important way, and that having words describing an office in apposite and proper terms, "churchwardens *for* the parish," you are to alter that expression and say that it points to any person who *in* the parish is appointed a churchwarden, although he be not one of the churchwardens *for* the parish, but a churchwarden for March? Nothing could be more violent than that construction. But what say the learned judges to the second part of that section, which provides for:

> "the rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of Doddington now exercises."

Say the learned judges: That means that if the rector has no power he is not to exercise any power. But if that had been the intention of the Act of Parliament,

A the expression ought to have been, "the rector of the new rectory of Doddington retaining the same right and power in the appointment of churchwardens for that rectory as he now exercises." That would have been a clear and distinct way of expressing what would, according to the supposition, have been meant. The learned judges absolutely reduce to silence, quoad March, the second part of this section, and make it altogether inapplicable.

B Looking at the Act of Parliament I feel no doubt that on its true construction it does not give to the parishioners of March the right of appointing both the churchwardens. Looking at the statements in the Special Case, and applying them to the Act of Parliament, I cannot find anything in those statements which should alter the plain and natural construction of the Act. I, therefore, submit to your Lordships that the decision of the Court of Queen's Bench is correct, and the C decision of the Court of Exchequer Chamber erroneous, and that this appeal ought to be allowed.

LORD CHELMSFORD.—The case depends entirely upon the meaning of the words of s. 5 of the Act for dividing the parish and rectory of Doddington into three separate and distinct parishes and rectories. In construing the Act, the object of it must constantly be kept in mind. It was to put an end to the existing D parish of Doddington, and to create out of different parts of it three entirely new parishes. It was, of course, absolutely necessary to make provision for the performance of parochial functions, and the appointment of new parochial offices in the new parishes. The Act evidently intended that the three new parishes should be similar in all respects, unless otherwise provided, and that they should be formed upon the model of the parish of Doddington, out of which they were taken. E There is nothing throughout the Act to show that the new parish of March was intended to be distinguished in any respect from the other newly-constituted parishes.

It was argued for the prosecutors of the rule, that as before the Act there was a custom in March to choose persons who were called, though improperly, "churchwardens," the rector of Doddington never interfering in such appointment, the F words in s. 5 "in the same manner as churchwardens are now chosen and appointed for the parish of Doddington," must be read as not comprehending March, which ought to be regarded as having been intended to be left in this matter in statu quo. But the separate appointment of wardens for March, and the non-interference of the churchwardens of Doddington with their functions, have nothing whatever to do with the manner of choosing and appointing churchwardens for Doddington, G which are the words of reference to the appointment of churchwardens in the new parishes. They amount, at the utmost, to evidence of the extent of the powers and duties of the churchwardens of Doddington after their appointment. Under the Act the old chapelry and township of March is put an end to, and it appears to me that everything connected with it in this character, its incidents, privileges, and customs, is abolished. I cannot imagine, if their appointment of church- H wardens was intended to be preserved, that this should not have been expressly provided for. A new parish is created instead of the old chapelry, and this must necessarily have the effect of changing its character, in respect at least to parochial officers. A rector, too, is placed over the new parish, who is clothed by the Act with the same powers, privileges, rights, and immunities as belong to, and are exercised by, the rector of Doddington. There can be no doubt that the rector of I Doddington had a right to intervene in the choice of churchwardens, and s. 5 of the Act provides for the choice of churchwardens

> "in the same manner as churchwardens are now chosen for the parish of Doddington, the rector of each of the new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of Doddington now exercises."

It is said that this provision is obscure, but I confess it is, to my mind, perfectly clear. We are referred by the Act to the manner in which churchwardens are

chosen in the parish of Doddington, and the rights exercised by the rector of Doddington in the appointment of them. When these are ascertained, and there is no doubt about them, they are applicable to the new rectories and the new rectors. As I have already observed no separate notice is taken of March throughout the Act, which seems to lead fairly to the conclusion that it was intended to be placed as to the appointment of churchwardens, and in all other respects, on the same footing as the other new parishes, all of them being established upon the model of the parish of Doddington. The argument for the exception of March from the provision as to the appointment of churchwardens is founded merely on implication, which cannot, in my opinion, prevail against the rights expressly and clearly conferred upon the rector in the choice of churchwardens in the same manner as upon the other newly-created rectors by s. 5 of the Act. I agree with my noble and learned friend, that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD HATHERLEY.—I have come to the same conclusion after hearing the very able arguments of counsel at the Bar, and after very seriously considering the opinions of the learned judges who have so remarkably differed in their construction of this section, for the case depends almost entirely upon one section, namely, s. 5 of the Act of 1847. From a very early period of the argument it appeared to me that, looking at the Act alone, especially at the wording of s. 5, without regarding any of the circumstances under which the Act was passed, there could scarcely be any doubt as to what the construction of the Act must be, namely, that it was intended that for the future, after the new parishes were constituted, the election and appointment of churchwardens should be such as took place, and had always taken place, in the parish of Doddington. [His Lordship dealt with the construction of the Act, and continued:] A well-known passage from Lord Coke (Co. Litt. 115 a) was cited by Quain, J., in the Court of Queen's Bench, namely, that you are not to do away with existing special rights by general affirmative words. But if the affirmative words are clear, plain, and precise, and the two things will not co-exist or stand together, then I apprehend you are compelled to come to a construction which is sensible in itself, and also a natural and ordinary construction. Finding that the two things will not stand together, you are compelled to adopt that construction which the plain sense of the words requires, although it may in some degree interfere with what had been done on previous occasions within the same district. This Act, for purposes beneficial to all the inhabitants ecclesiastically, sub-divides this great parish into three parishes; it constructs each of these three parishes on the model of the old parish, and gives them a frame of church government, as far as the question of churchwardens is involved, similar to that which existed in the mother parish of the whole. I concur in the resolution which has been proposed by my noble and learned friend the Lord Chancellor.

LORD PENZANCE, concurring, also dealt with the construction of the statute, and said: If you have a thing described in a statute, and you find, upon applying that description to the existing facts, that there is one set of facts or circumstances, one person, or one thing, as the case may be, which entirely satisfies the description which the statute gives, then you have no right, upon any surmise as to what the legislature intended, to depart from that simple description, and to amplify or vary the words of the description so as to include some other set of circumstances, some other person or thing, which, under that amplified form, will come under the description. It is a principle of construction that no such thing should be done, subject to this, that if, upon the face of the Act of Parliament, you find that, giving the ordinary sense and meaning to the words, you are involved in some inconsistency in any of the other clauses, it may then be necessary to search about and see whether the palpable and obvious construction at which the words point may not be varied in order that the inconsistency may be avoided. There is no such inconsistency here. It is not suggested that this creates any difficulty whatever except this. It is said that if you give to these words their plain and natural

meaning you will then be depriving the inhabitants of March of some legal right which they had when the statute passed, and that you ought not to do that without express words. It is obvious that that argument does not go far enough, if I am right in the canon of construction to which I have just alluded.

LORD O'HAGAN concurred.

Appeal allowed.

Solicitors: *Garrard, James & Wolfe*; *Meredith & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

PISANI *v.* ATTORNEY-GENERAL FOR GIBRALTAR AND OTHERS

[PRIVY COUNCIL (Sir James Colvile, Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier), May 13, 14, June 23, 1874]

[Reported L.R. 5 P.C. 516; 30 L.T. 729; 22 W.R. 900]

Appeal—Proceeding outside cursus curiae—Consent of parties—When appeal competent.

When proceedings are taken out of the ordinary cursus curiae with consent of the parties, the decree of the court below cannot be regarded as the award of an arbitrator so as to deprive either party of the right of appeal unless there has been an attempt to give the court a jurisdiction which it does not possess, or unless the procedure has been so violently strained as to be put entirely out of its course so that a court of appeal cannot properly review the decision.

Notes. Considered: *Wyndam* v. *Jackson*, [1937] 3 All E.R. 677. Referred to: *Ware* v. *Whitlock*, [1923] 2 K.B. 418.

As to references by agreement to courts of law, see 2 HALSBURY'S LAWS (3rd Edn.) 8; and for cases see 2 DIGEST (Repl.) 427. As to appeals from courts outside the United Kingdom, see 9 HALSBURY'S LAWS (3rd Edn.) 375; and for cases see 16 DIGEST (Repl.) 155.

Cases referred to:

(1) *White* v. *Duke of Buccleuch* (1866), L.R. 1 Sc. & Div. 70, H.L.; 2 Digest (Repl.) 427, *52*.

(2) *Bickett* v. *Morris* (1866), L.R. 1 Sc. & Div. 47; 2 Digest 428, **45*.

(3) *Stewart* v. *Forbes* (1849), 1 Mac. & G. 137; 1 H. & Tw. 461; 19 L.J.Ch. 133; 13 Jur. 523; 41 E.R. 1215, L.C.; 16 Digest (Repl.) 126, *86*.

(4) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; 1 Jur. 911; 7 E.R. 365, H.L.; 3 Digest (Repl.) 404, *64*.

Appeal from a decree of the Supreme Court of Gibraltar on the equity side, dated Nov. 29, 1869. Preliminary objections were taken upon both sides to the hearing of the appeal upon the merits.

Kay, Q.C., and *W. W. Karslake* for the appellant.

Fry, Q.C., and *Bagshawe, Q.C.*, for the respondents.

SIR MONTAGUE SMITH.—Their Lordships desire to state shortly the grounds why they cannot yield to either of the preliminary applications which have been made to them: one by counsel for the appellant to reverse the decree without hearing this appeal on the merits; the other by counsel for the respondents to dismiss the appeal.

It will be sufficient for this purpose, without going at length into the facts of the case, to mention that the suit was an information by the Attorney-General, claiming, for the Crown, lands which had belonged to a lady, Manuela Porro, as escheated for want of heirs. He made defendants to the information Pisani, the appellant, who claimed under a deed of purchase; a person called Benaim, who asserted that Pisani was trustee for him; and also the present respondents, Lepri and the two Shakerys, the former being the trustee and the latter the infant cestui que trusts under a will of Miss Porro made in the year 1858. The Attorney-General failed to establish the title of the Crown by escheat, and thereupon the suit as originally framed ought to have been dismissed. But in the course of the cause the opposing claims of the defendants among themselves became clear, and it was proposed that the information should be amended for the purpose of enabling the court to determine and declare what those rights were. Such an alteration of the suit could only have been made, it is admitted, by consent; and the question raised by counsel for the appellant was whether there was an agreement to the effect that the suit should be so altered as to give the court power to declare in that suit the rights of the defendants between themselves. He denied that such an agreement was, in fact come to.

Their Lordships have come to the conclusion that there was an agreement by the defendants, not merely to an amendment of the pleadings, but that their rights as between themselves should be declared, whatever might be the event of the suit regarding the claim of the Crown. It is enough, upon this preliminary application, to say that this agreement is proved; their Lordships reserving to themselves full power to determine in what way justice can best be done between the parties, when they come to hear the merits of the appeal. An objection was taken that the agreement was invalid, and did not bind any of the parties, because there were two infants, defendants, for whom consent could not be given. It is to be observed that, in the state in which matters stood at the time when the agreement was come to, it was apparently for the benefit of the infants, who thereby obtained the assistance of the Attorney-General, that such an agreement should be made; and further, whether that be so or not, their Lordships think that Mr. Pisani, after entering into it with a knowledge of the fact that the parties were infants, cannot be now heard to object that his consent does not bind him.

Then, to come to the application of counsel for the respondents. He not only contended that the agreement was made and was binding, but urged what is really a preliminary objection, that the decree, so far as it declares the rights of the defendants, must be regarded as the award of an arbitrator, and consequently that the appeal is incompetent. Their Lordships would be most unwilling to uphold the agreement at all if this were to be the effect of it, because, in their opinion, such a result would be opposed to the intention of the parties. They clearly meant to keep themselves in curia, and the judge clearly so understood them. It is plain also that the parties and the judge thought that an appeal was open. It is true that there was a deviation from the cursus curiæ, but the court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal.

The cases referred to by counsel do not bear out his contention. The first he cited, and the only one where the appeal was declared incompetent, is *White* v. *Duke of Buccleuch* (1). In that case the court made an order ultra vires. The interlocutor directed a surveyor to set out a road, deputing to him an authority which the court had no power to give. The interlocutor appears to have had this vice, that the court either had no jurisdiction to make such an order at all as to the road, or, having it, could not delegate it to the surveyor. LORD CHELMSFORD,

L.C., in giving his opinion to the House, puts the objection upon the ground that the court had made an interlocutor which was ultra vires. He says (L.R. 1 Sc. & Div. at p. 76):

> "The court below had no power whatever to direct a road to be laid out equally convenient to that to which the public were clearly entitled. They have not given the public any way which they had been accustomed to use, but they have consulted the convenience of the defender, and they have directed Mr. Wylie [a civil engineer], to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the defender. There is no doubt whatever, therefore, that in this interlocutor, the court having proceeded ultra vires, all the subsequent interlocutors which were founded on this as their basis were taken out of the judicial course, and consequently were not a subject of appeal."

In another case, *Bickett* v. *Morris* (2), the Lord Ordinary had heard, by consent, a case which ought to have been tried in the Jury Court. There was in that case the assumption on the part of the Lord Ordinary of the duty of another tribunal, and the observations made by LORD CHELMSFORD, L.C., point to that state of things. The objection is noticed in this way (L.R. 1 Sc. & Div. at p. 52):

> "The first question to be considered is the competency of the present appeal. It appears to me that this is one of the actions appropriate to the Jury Court under s. 28 of [the Court of Session Act, 1825], being an action on account of injury to land in which the title was not in question. By the word 'title' I do not understand it to be meant the right to do the act which occasioned the injury, but the title to the land itself to which the injury is alleged to be done."

Then he says, after going through the facts (ibid. at p. 53):

> "The cause ought, therefore, in regular course, to have been remitted to the Jury Court, and the Lord Ordinary had no authority to order the proofs to be taken by commission."

But in that case their Lordships did not hold that the appeal was wholly incompetent, for they retained it, and heard the cause on the merits. They held the objection had been waived by the appeal which had been made from the Lord Ordinary to the Inner Court. That case, therefore, shows that the House of Lords considered that it was discretionary with the House to hear the appeal or not; that it was not beyond their jurisdiction to hear it; and that the objection pointed to an irregularity only, capable of being waived.

The remaining case referred to was before LORD COTTENHAM, L.C., *Stewart* v. *Forbes* (3). There SHADWELL, V.-C., had undertaken to determine a fact proper for the jury. On looking into that case, it appears that LORD COTTENHAM, L.C., at first inclined not to hear the appeal, but in the end thought himself bound to hear it. He says this (1 Mac. & G. at p. 145):

> "In a celebrated case of legitimacy, *Morris* v. *Davies* (4) LORD LYNDHURST adopted a similar course [that is a course similar to that of the Vice-Chancellor in the case then under appeal] and upon appeal to the House of Lords from his decision the House thought itself bound to consider and decide upon the case so entertained by the Court of Chancery, though not according to the usual course of its jurisdiction. I did not, therefore, feel myself at liberty to decline hearing the cause, although the parties had, by their consent, recorded in the decree appealed from, precluded themselves from asking for, or me from directing, an investigation of their claims before a jury—the only proper tribunal for the purpose if the matter were really one of doubt."

Therefore, in the end, LORD COTTENHAM, L.C., came to the conclusion that he was not at liberty to decline to hear the appeal. He goes on to say (1 Mac. & G. at p. 145):

"Besides which, I thought that the plaintiff ought to be permitted to show, if he could, that what he claimed was so free from doubt as to entitle him to the decree which he now asks."

That is really a subordinate reason. His first ground is that he thought he was bound to hear the appeal.

Morris v. *Davies* (4), to which LORD COTTENHAM, L.C., referred, seems to their Lordships to be a strong authority against the objection of counsel for the respondents. In that case there had been a trial before a jury, a motion for a new trial, and a decision that a new trial ought to be granted. But instead of sending it down for a new trial LORD LYNDHURST, by the consent of the parties, heard and disposed of the case. Upon an appeal to the House of Lords an objection was formally taken by the Attorney-General to the competency of the House to hear the Appeal (5 Cl. & Fin. at p. 222):

"The Attorney-General and Mr. Temple, for the respondents, took a preliminary objection, insisting that no appeal lay from a decree to which all the parties by their counsel consented to submit in order to save the expense and delay of another trial at law. The parties could not be then placed in the same relative situation for a new trial if the decree should be reversed."

After an argument by the counsel for the appellant, LORD LYNDHURST said (ibid. at p. 233):

"When I proposed to the parties to decide the question upon the evidence they were to lay before me instead of sending it again for trial before a jury, I did not consider that my decree was to be exempt from appeal. I never contemplated such a consequence. The saving expense and further delay was my object."

This appears to have been the object in the present case; the parties, as it appears to their Lordships, never contemplated that they were doing other than keeping the cause in curia, or that the judge was to hear it otherwise than as a judge, or that it was not to go on subject to all the incidents of a cause regularly heard in court, of which an appeal is one of the most important. The judge clearly so understood the arrangement.

To recur to *Morris* v. *Davies* (4), LORD COTTENHAM, L.C., says (ibid. at pp. 223, 224):

"The House cannot entertain the objection to the regularity of the appeal. That objection was disposed of by the appeal committee upon evidence which is not before the House. We have only the record of the decree before us, and in that no consent appears not to appeal. If it were alleged that the appeal was brought in breach of good faith the House might put off the hearing until the objectors produced proof of that allegation. It is admitted that there was a consent, but how far it was meant to extend is the matter in dispute. It nowhere appears that the parties agreed that the decree should be final and conclusive."

In *Morris* v. *Davies* (4) there was a consent that the cause should be heard in an unusual way, upon which LORD LYNDHURST acted, and, although it was not put into his decree, it was regarded as a perfectly binding consent, which might be proved aliunde. The House of Lords gave effect to this consent according to the intention of the parties, for it was allowed to operate so as to make LORD LYNDHURST'S judgment, which would have been otherwise irregular, a regular judgment, and was not allowed to operate so as to deprive the party of his right of appeal, which had not been stipulated for. That case is in these points not unlike the present.

For these reasons, considering also that this objection was not taken in the court below, when an application was made for leave to appeal; that it was not taken here, as it might have been, by a petition to the Queen before the appeal came on for hearing; and considering, also, that this Board has always exercised a large

A discretion in dealing with matters of procedure on appeals from colonial courts, their Lordships think that they ought to hear this appeal on its merits.

The appeal was then heard on its merits.

Solicitor—Duty to client—Sale of property by client to solicitor—Diligence to protect client—Avoidance of obtaining advantage through position of adviser—
B *Purchase in consideration of annuity—Duty to point out other modes of sale and to ascertain value of client's life and state of property to be sold—Desirability of independent advice.*

A solicitor who buys property from his client cannot support the transaction unless he can prove that his diligence to do the best for the client was as great as if he had been acting for the client in a sale to a stranger. If it appears
C that in the transaction he got an advantage which with due diligence he would have prevented another purchaser from getting, the contract cannot stand. He must take no advantage of his professional position, and the client so dealing with him must be free from the influence which a solicitor necessarily possesses. In the case of a purchase from a client in consideration of an annuity, to be payable to the client, as a general rule the solicitor should take the utmost
D care before entering into it, and especially it is his duty to point out other modes of sale which might be more advantageous, and to ascertain accurately the value of the client's life and the state of the property to be sold, but in this respect every case must be decided on its own circumstances.

Notes. Referred to: *Readdy* v. *Pendergast* (1886), 55 L.T. 767; *Moody* v. *Cox*
E *and Hatt* (1917), 116 L.T. 740.

As to purchases by solicitor from client, see 36 HALSBURY'S LAWS (3rd Edn.) 89–91; and for cases see 42 DIGEST 79–85.

Cases referred to:

(1) *Gibson* v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 42 Digest 80, *724*.

(2) *Savery* v. *King* (1856), 5 H.L.Cas. 627; 25 L.J.Ch. 482; 27 L.T.O.S. 145;
F 2 Jur.N.S. 503; 4 W.R. 571; 10 E.R. 1046, H.L.; 42 Digest 81, *725*.

(3) *Holman* v. *Loynes* (1854), 4 De G.M. & G. 270; 2 Eq. Rep. 715; 23 L.J.Ch. 529; 22 L.T.O.S. 296; 18 Jur. 839; 2 W.R. 205; 43 E.R. 510, L.C. & L.J.; 42 Digest 83, *745*.

(4) *Edwards* v. *Williams* (1863), 32 L.J.Ch. 763; 8 L.T. 477; 11 W.R. 561, L.JJ.; 42 Digest 85, *764*.

G Also referred to in argument:

Cane v. *Lord Allen* (1814), 2 Dow. 289; 3 E.R. 869, H.L.; 42 Digest 79, *710*.

Montesquieu v. *Sandys* (1811), 18 Ves. 302; 34 E.R. 331, L.C.; 42 Digest 84, *761*.

Spencer v. *Topham* (1856), 22 Beav. 573; 28 L.T.O.S. 56; 2 Jur.N.S. 865; 52 E.R. 1229; 42 Digest 83, *746*.

H *Gresley* v. *Mousley* (1862), 3 De G.F. & J. 433; 31 L.J.Ch. 537; 6 L.T. 86; 8 Jur.N.S. 320; 10 W.R. 222; 45 E.R. 946, L.JJ.; 42 Digest 80, *719*.

Salmon v. *Cutts*, *Cutts* v. *Salmon* (1850), 4 De G. & Sm. 125; affirmed sub nom. *Cutts* v. *Salmon* (1852), 21 L.J.Ch. 750; 19 L.T.O.S. 53; 16 Jur. 623; 42 Digest 81, *727*.

Barnard v. *Hunter* (1856), 28 L.T.O.S. 152; 2 Jur.N.S. 1213; 5 W.R. 92, L.C.;
I 42 Digest 81, *732*.

Re Dagenham (Thames) Dock Co., Ex parte Hulse (1873), 8 Ch. App. 1022; 43 L.J.Ch. 261; 38 J.P. 180; 21 W.R. 898, L.JJ.; 40 Digest (Repl.) 243, *2043*.

Appeal by the defendant to the action, Pisani, from a decision of the Supreme Court of Gibraltar holding that a conveyance in fee simple of real property in Gibraltar, made by Miss Manuela Porro to the appellant on Jan. 25, 1868, should be delivered up to be cancelled. The conveyance was made in consideration of an

annuity of $1,500 per annum. Miss Porro died on Mar. 26, 1868. The respondents claimed to be entitled under a will of Miss Porro. The case of the respondents to impeach the conveyance was that Pisani, who was a barrister, and practised also, as was usual in Gibraltar, as an attorney, was the legal adviser of Miss Porro, and that, having purchased while he was such adviser, he had not discharged the burden, cast upon him by that relation of showing that the bargain was the best that could be made for his client.

The facts were stated by the Privy Council as follows: The property in question was devised by the father of Miss Porro, who died in 1855, to his widow and six children; and Miss Porro, in consequence of the deaths of the other devisees, claimed to be the sole owner of it. No doubt seemed to rest on the deaths of any of the devisees, except one brother, José. José left Gibraltar about thirty-three years before the transaction in question, and from letters which Miss Porro received soon afterwards she believed he had been murdered near Madrid. Nothing more appeared to have been heard or known of him. Miss Porro was about fifty-nine years of age at the time of the conveyance. The property was held in fee simple, and consisted of a large house and other buildings. The house was in a dilapidated condition, and required a large outlay to put and keep it in repair. It was let to poor tenants and to women of bad character, and the rents were varying and precarious. A lease was put in, dated December, 1866, by which a part of the house was let, and which contained the significant condition that, in the event of the government or the police opposing the residence of prostitutes in the house, the contract might be avoided by the lessee. It was not to be wondered at that a lady should be desirous of getting rid of this troublesome and disreputable property. Accordingly she had, during many years, made efforts to do so, and had made up her mind to dispose of it for an annuity.

An unimpeachable witness, M. Lepri, said that Miss Porro offered the property to him before 1858 for an annuity of $60 per month. He refused the offer because he did not know what had become of the brother José. He also said the house was inhabited "by a loose and disreputable class of tenants." In 1867 Miss Porro proposed to sell the property for an annuity to Mr. E. Recano, who refused to buy. It appeared from M. Lepri's evidence that, hearing of her renewed attempts to get an annuity, he applied to Miss Porro on behalf of a Mr. Shakery, and she then offered to sell the property to Shakery for an annuity of $100 per month, but he declined it, raising a difficulty about the brother José. The fact must then have been plain to him which, from all the evidence in the case was beyond dispute, that Miss Porro had a fixed intention to part with the property for an annuity. Besides her desire to get rid of a troublesome and disreputable property, and to increase her income by an annuity, Miss Porro was anxious to do so speedily, as she wished to leave Gibraltar so that she might go to live at Seville.

Then came two transactions which immediately preceded the sale to Pisani, and were, indeed, connected with it, viz. abortive sales to Larios and Bergel. It is necessary to notice at this stage that Miss Porro had employed for eighteen years M. Gonzalez (whose description was not given, but who appeared to have been a man accustomed to business) to manage her property. She spoke of him as "her confidential adviser." Other persons, and among them Belilo and Benoliel, were also engaged in the endeavour to sell the property for an annuity. In December, 1867, Miss Porro agreed to sell to Larios, for an annuity of $1,560. The bargain was arranged by Gonzalez, and the conditions of sale prepared by him. M. Recano, a barrister, was employed to prepare the deeds, which were, in fact, executed by Larios. It seemed that Miss Porro felt some doubt respecting the transaction, and sent for Mr. Pisani to come to her. This was the first occasion on which they met. In this interview Pisani, who was a nephew of Larios, was consulted as to the correctness of the deeds, and he then told Miss Porro there was some question as to the state of Larios' mind, and suggested a medical certificate. Gonzalez afterwards called on Pisani, and told him there was difficulty in obtaining such a certificate. Pisani then suggested that the two sons of Larios

A should execute a deed of guarantee to secure the annuity. Such a deed was accordingly prepared, not by Pisani, but by Recano, on instructions from Gonzalez. The sons, however, refused to sign it, and the matter ended. No imputation was made upon Pisani for the advice he gave on this occasion, nor was there any attempt to show that what he stated with regard to Larios was not warranted by the fact.

A week or two after the sale to Larios had gone off, Miss Porro sent for Belilo, B and it appeared that she wished him to find another purchaser. Belilo gave the particulars to Mr. Bergel, a man of position and wealth, who made an offer of $1,500. During this treaty, Pisani was spoken to, it would seem, in the first instance, by Belilo, and saw both Miss Porro and Bergel on the subject of the sale. It appeared that he so far recommended her to accept Bergel's terms that he told her he thought $1,500 from a man like Bergel preferable to $1,560 from Larios. C Miss Porro ultimately agreed to accept Bergel's offer, provided she was kept free of all legal and other expenses in the sale. This was assented to by Bergel, subject to a good title being made out. Pisani prepared the conveyance, but before executing it, Bergel required to be satisfied about the brother José, and whether there was proof of his death. Pisani told him all the circumstances, and what Miss Porro knew and believed; insisted there could be no doubt of José's death, and urged D the acceptance of the title. Bergel, after consulting another lawyer, refused to complete the purchase, because, to use his own words, the title did not suit him. Pisani was very angry at this refusal. Their Lordships saw no reason to doubt that Pisani acted in perfect good faith throughout this transaction with Bergel. Upon the refusal of Bergel, Pisani proposed to Belilo, and afterwards to Miss Porro herself, that he and his brother should purchase on the same terms Bergel had E agreed to. Miss Porro assented to this proposal, and afterwards, on his brother refusing to join in the purchase, she agreed to sell to Pisani alone. Accordingly, he prepared deeds of conveyance, which he left with Miss Porro, suggesting that she should get another professional man to peruse them. She, however, consulted Gonzalez about them, who advised that clauses should be inserted to the effect that Pisani should keep the premises in repair, and make no alteration in them F in Miss Porro's lifetime without her consent, and that if the annuity should be in default for twelve months he should forfeit what he had previously paid on account of it. These suggestions appeared to have been fairly carried into effect by the deed.

Miss Porro died suddenly on Mar. 26, 1868, from pyæmia. It was not connected with any previous disease, but Miss Porro's constitutional temperament rendered G her more than ordinarily liable to pyæmia.

Kay, Q.C., and *W. W. Karslake* for the appellant.
Fry, Q.C., and *Bagshawe, Q.C.*, for the respondents.

June 23, 1874. **SIR MONTAGUE SMITH** said that the case might be considered H as if the respondents had brought a suit to impeach the appellant's conveyance, stated the facts, and continued: Counsel for the respondents absolved Pisani from the charge of conscious fraud, and admitted that there was no evidence to support the imputation that he acted in the belief that Miss Porro was suffering from disease likely to shorten her life. The learned counsel rested his case entirely on Pisani's relation of attorney to Miss Porro, and on the principles acted on by courts of equity when that relation exists.

I Several decisions on this subject were referred to. It results from them that the court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser. The principle is thus stated by LORD ELDON in *Gibson* v. *Jeyes* (1) (6 Ves. at p. 271):

> "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was

only an attorney dealing for that vendor with a stranger; that must be the rule. If it appears that in that bargain he has got an advantage, which with due diligence he would have prevented another person from getting, a contract under such circumstances shall not stand."

The doctrine of the court is stated much in the same way by LORD CRANWORTH, L.C., in *Savery* v. *King* (2). The Lord Chancellor says (5 H.L.Cas. at pp. 655, 656):

"Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess; and that the solicitor has done as much to protect his client's interest as he would have done in the case of the client dealing with a stranger."

Counsel for the respondents insisted that, in applying these rules to the case of a purchase from a client in consideration of an annuity, the utmost care should be taken by the attorney before entering into it; and especially that it was his duty to point out other modes of sale which might be more advantageous, and to ascertain accurately the value of the client's life, and the state of the property to be sold, and he strongly relied on the observations of TURNER, L.J., in *Holman* v. *Loynes* (3). Their Lordships have no doubt that, as a rule, this would be the duty of the attorney; but every case must be decided on its own circumstances, and they think there are grounds for holding that the advice and investigation referred to were not called for in the peculiar circumstances of the present sale.

In the first place, Mr. Pisani was not the general or confidential adviser of Miss Porro. He was called in as a stranger, for the first time, to advise her on the sufficiency of the deeds upon the sale to Larios, all the conditions of which had been before settled under other advice. The further security he suggested was even then prepared by Recano. He intervened in the treaty for the sale to Bergel, without apparently having been employed by Miss Porro to obtain a purchaser. But no doubt he did interpose in that treaty, and became the attorney of both parties in preparing the deeds and completing the purchase. This was the extent of his employment on behalf of Miss Porro, except in a small unexplained matter relating to a distress.

In *Edwards* v. *Williams* (4) where a solicitor, employed by a woman to procure an advance upon an annuity to which she was entitled, took a transfer of it to himself, of a kind which raised a doubt whether it was a sale or a mortgage, and no other solicitor was employed, the woman brought a suit to set aside the transaction. KNIGHT-BRUCE, L.J., in giving judgment, said (32 L.J.Ch. at p. 765):

"He could not view the case as one strictly between solicitor and client. It happened, it was true, that one of the parties was a solicitor, and the other of them had no legal advice except from that solicitor; but there had existed no previous relation of solicitor and client between them, and, therefore, that confidence which was the basis of the rule of the court in similar cases did not appear to have existed, and he could not consider the case came within it."

TURNER, L.J., took the same view.

Their Lordships do not go the length of that case in the present. They think that the relation of solicitor and client existed, so far as to make it necessary for Pisani to show that the bargain he made with Miss Porro was a fair one; but in dealing with the facts, the circumstances of the employment may be considered, and the amount of influence estimated; and they find no reason to suppose that, in this case, a high degree of confidence existed, or that much influence had been acquired.

Upon the general facts it is indisputable that Miss Porro had, for a long time before Pisani was called in, and upon other advice, resolved to sell the property for an annuity; this was a natural desire, for she wanted to increase her income,

A and had no relations. She had made proposals to friends and strangers, and had actually sold the property to Larios in this way, after consultation with her confidential adviser, Gonzalez, and after having had an opportunity of consulting Mr. Recano. Under these circumstances their Lordships cannot think that Pisani was guilty of any breach of duty in not suggesting to her other modes of disposing of the property.

B Then as to the terms of the sale in question. It was said on Pisani's behalf that he did no more than take up the bargain which Bergel had abandoned. This is really what occurred, but the onus still lies upon him to show that the bargain was a fair one, and the more as on the treaty with Bergel he had himself proposed to Miss Porro the abatement of the annuity from $1,560 to $1,500. Their Lordships have thought it right carefully to examine the evidence relating to this treaty, for, C unless there was perfect bona fides on the part of Pisani in the transaction with Bergel, it would have been impossible to sustain his own subsequent purchase. They are, however, on a review of it, satisfied that he acted with good faith; that, in proposing to Miss Porro to accept the offer of $1,500, he had reason to think it was as much as could be obtained from Bergel or any other eligible purchaser; and that he did all in his power to induce Bergel to complete the purchase. But D bona fides alone would not be sufficient, for Pisani, having taken Bergel's bargain, is bound to show that it was, in fact, a fair one, and that he has not lost, for want of due diligence, better terms for his client.

On the question of value, the dilapidated nature of the property and the disreputable character of the tenants, the fact the annuity had been hawked in Gibraltar for many years, and refused even at a lower rate by those who knew all E the circumstances; and the cloud which rested on the title, from the uncertainty as to José's death, which had been made an objection, whether well or ill founded, by Lepri and Shakery, must be borne in mind as circumstances likely to depreciate the marketable value of the property. When, with a knowledge of all these circumstances, and under the advice of her confidential agent, Gonzalez, Miss Porro sold the property to Larios for an annuity of $1,560, it may reasonably be presumed that F this was the highest offer that could be obtained. Some evidence was given of the rents, outgoings, and repairs, and of the value of the property; but it does not furnish an inference that the sale to Larios was not for the largest annuity that could be obtained.

As to the duty of Pisani when originally called in, and when he took part in negotiating the treaty with Bergel. Undoubtedly, if the sale for an annuity had G been a new matter, it would have been his duty to suggest inquiries as to the value of Miss Porro's life, and the state and value of the property. But their Lordships cannot say that, when consulted at this late period, there was any want of due diligence in his regarding the sale to Larios, made with the advice of Gonzalez and Recano, as representing the value, and in not advising new inquiries, which would have involved further expense and delay. The sale to Bergel became H also an accomplished fact; and if Bergel had not thrown up the bargain, the property would have passed to him irrevocably for the annuity of $1,500. That sale which, for the reasons already given, their Lordships think was properly and bona fide concluded, became, in its turn, a criterion of the value which could then be obtained.

If, then, fresh inquiries as to value need not have been made upon the treaty I with Bergel, none were necessary when that sale went off, and another purchaser had to be found; and if there would have been no want of due diligence in selling to another at the price Bergel had agreed to give without making them, neither would there be any when Miss Porro agreed that Pisani himself, instead of a stranger, should step into Bergel's contract. His proposal was no doubt precipitate, and if there had been reason to believe that by such further delay as Miss Porro would have acquiesced in, and by further offers to others, more might have been obtained, this sale could not stand. But the evidence does not point to such a conclusion. On the contrary, after all that had occurred in the previous endeavours

to sell the property, and the recent refusals of Larios and Bergel to complete, it is not improbable that any further hawking of the property would have depreciated its selling value.

It was urged that one of the motives for Miss Porro's readiness to accept $1,500 from Bergel was that he was a wealthy man, from whom payment of the annuity would be safe, and it was suggested that Pisani was not wealthy. There is no evidence to support this suggestion, and Mr. Pisani, although subjected to very severe cross-examination, was not asked as to his means. His competency in this respect may, therefore, be reasonably assumed, and it is to be observed that, by the provisions inserted in Pisani's conveyance, and which were not in Bergel's, the property itself is made a security for the due payment of the annuity.

On the whole, their Lordships think that, having regard to the nature of Mr. Pisani's employment, he would not have been chargeable with want of due diligence if the sale had been on the same terms to a third person, instead of to himself; and they further think that, under the special circumstances of the case, it appears with reasonable certainty that a higher annuity could not have been obtained from an eligible purchaser. The case, therefore, for setting aside the conveyance, in their opinion, fails. Although their Lordships have come to this conclusion, they feel constrained to say that there is much in the transaction which cannot be approved of. They think Mr. Pisani would have better consulted his position as a barrister if he had been less precipitate in taking up the bargain, and if, instead of only suggesting, he had insisted on the intervention of another professional man. He ought not to be surprised that when Miss Porro died, although from causes which could not have been foreseen, a cloud of suspicion should rest on the transaction, and that an inquiry into it should be instituted. He must, therefore, bear his own costs of the suit and of this appeal.

In the result, their Lordships will humbly advise Her Majesty that it be declared that none of the parties are entitled to have the said conveyance of Jan. 25, 1868, delivered up to be cancelled. There will be no costs of the appeal.

Appeal allowed.

Solicitors: *James Crowdy*; *Vallance & Vallance.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL AND ANOTHER *v.* TOMLINE

[Court of Appeal (James, Brett and Cotton, L.JJ.), March 12, 13, 1880]

[Reported 14 Ch.D. 58; 49 L.J.Ch. 377; 42 L.T. 880; 44 J.P. 617; 28 W.R. 870]

B

Sea—Encroachment on land—Duty of Crown to protect realm by maintaining natural barrier—Natural barrier created by shingle bank—Interference with bank by owner—Damage to plaintiff's land—Right to injunction.

It is part of the duty of the Crown to protect the realm from the encroachment of the sea by raising artificial barriers or by maintaining the natural C defences which already exist, and it is a wrongful act for any person to interfere with the natural defences if as a result of his interference a neighbouring landowner is injured or apprehends injury.

The plaintiff was the owner of a piece of low-lying land adjoining the foreshore. The defendant was the owner of a shingle bank which formed part of the foreshore and protected the plaintiff's land. The defendant from time to D time took away part of the shingle bank and sold it for ship's ballast. As a result of these operations there was danger of the sea breaking through and flooding the plaintiff's land.

Held: although the defendant was making natural use of his land the plaintiff was entitled to an injunction to restrain him from removing the shingle.

Notes. Explained: *West Norfolk Farmers' Manure Co.* v. *Archdale* (1886), 16 E Q.B.D. 754. Applied: *A.-G. of Southern Nigeria* v. *John Holt & Co. (Liverpool), Ltd., and Others, et e Contra, Same* v. *W. B. MacIver & Co., Ltd., and Others, et e Contra*, [1914–15] All E.R.Rep. 444. Followed: *Canvey Island Comrs.* v. *Preedy*, [1922] 1 Ch. 179. Considered: *China Navigation Co.* v. *A.-G.*, [1932] All E.R.Rep. 626. Applied: *Symes and Jaywick Associated Properties, Ltd.* v. *Essex Rivers Catchment Board*, [1936] 2 All E.R. 551. Considered: *Kent and* F *Porter* v. *East Suffolk Rivers Catchment Board*, [1939] 2 All E.R. 207. Applied: *King* v. *Smith*, [1950] 1 All E.R. 553. Referred to: *Elwes* v. *Brigg Gas Co.*, [1886–90] All E.R.Rep. 559; *East Stonehouse District Local Board* (1902), 50 W.R. 698; *Musselburgh Real Estate Co.* v. *Musselburgh*, [1905] A.C. 491; *Brighton and Hove General Gas Co.* v. *Hove Bungalows*, [1923] All E.R.Rep. 369; *Port of London Authority* v. *Canvey Island Comrs.* (1931), 101 L.J.Ch. 63.

G As to removal of materials from seashore, see 39 Halsbury's Laws (3rd Edn.) 568 et seq.; and for coast protection, see ibid., vol. 7, p. 302, and ibid., vol. 39, pp. 572 et seq.; and for cases see 7 Digest (Repl.) 296 and 44 Digest 71, 79–83. As to damage by user of land, see 37 Halsbury's Laws (3rd Edn.) 115; and for cases see 36 Digest (Repl.) 282.

Cases referred to:

H (1) *Smith* v. *Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 36 Digest (Repl.) 248, *8*.

(2) *Chasemore* v. *Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 23 J.P. 596; 5 Jur.N.S. 873; 7 W.R. 685; 11 E.R. 140; 1 Digest (Repl.) 38, *285*.

I (3) *Hudson* v. *Tabor* (1877), 2 Q.B.D. 290; 46 L.J.Q.B. 463; 36 L.T. 492; 42 J.P. 20; 25 W.R. 740, C.A.; 44 Digest 82, *640*.

(4) *Isle of Ely Case* (1609), 10 Co. Rep. 141a; 77 E.R. 1139; 44 Digest 82, *634*.

Also referred to in argument:

Wilson v. *Waddell* (1876), 2 App. Cas. 95; 35 L.T. 639; 42 J.P. 116, H.L.; 33 Digest (Repl.) 867, *1154*.

Appeal from a decision of Fry, J., reported 12 Ch.D. 214, granting an injunction to restrain the defendant from removing shingle from his land so as to expose the plaintiff's land to the danger of being flooded by the sea.

The proceedings were in the nature of an information by the Attorney-General on behalf of the Crown, and an action by the Secretary of State for War, as plaintiff, against the defendant, Colonel Tomline, the lord of the manor of Felixstowe Priory in Suffolk. The plaintiff was seised in fee simple, in trust for the Queen, of certain land situate near Felixstowe Priory, which formed the site and inclosure of a martello tower known as the U Tower. The east side of this land immediately adjoined the seashore in the estuary and near the mouth of the river Deben. The eastern portion of the plaintiff's land lay very low, and was frequently below the level of the sea at high water in spring tides. A shingle bank on the beach formed a natural barrier which protected the land from the sea, and was the only barrier which prevented the sea from encroaching on the plaintiff's land. The defendant claimed the right to remove the shingle from the foreshore as lord of the manor and had for some years sold to ship-masters and others large quantities of shingle for ballast. The plaintiff alleged that in consequence of the removal of the shingle the north-east corner of his land was in immediate danger of being flooded, and that if the removal of the shingle continued the natural barrier would be destroyed, the plaintiff's land washed away, and the martello tower endangered. An injunction was, therefore, claimed to restrain the defendant from removing the shingle.

FRY, J., granted an injunction to restrain the defendant from so digging or removing, or authorising to be dug or removed, any shingle from the natural barrier of shingle as to endanger the plaintiff's land and expose it to the inroads of the sea. The defendant appealed.

Cookson, Q.C., and *Hadley* for the defendant.

The Solicitor-General (*Sir Hardinge Giffard, Q.C.*), and *Rigby* (*The Attorney-General, Sir John Holker, Q.C.*, with them) for the Crown.

JAMES, L.J.—I am of opinion that the judgment of the learned judge ought to be affirmed. Upon the question of fact the learned judge arrived at the conclusion, as warranted by the evidence, that the bank in question had been substantially interfered with by the acts of the defendant, and that those acts had resulted in an appreciable injury to a particular part of the land, and he was further of opinion, as it appears to us rightly, that the defendant was claiming as of right to continue to do that which he had done, notwithstanding the consequences of the act upon the adjoining lands of the plaintiff. For this purpose it need not be considered whether it is the land of the Crown or anybody else's land. That is not material. He was of opinion, therefore, that sufficient facts had been established in evidence to prove an intention on the part of the defendant to do that which would continue the injury, and which would conduce to damage and injure the owner of the adjoining land, and that, therefore, it was a fit case for the interference of the court by way of injunction to restrain him from doing that which would be a nuisance to his neighbours, for that is the extent of the injunction, if he were minded so to do, and that, therefore, there was a proper case established in point of fact and in point of claim on the part of the plaintiff to warrant the court determining, as between the plaintiff and the defendant, the question of right.

The learned judge was of opinion that there was a right on the part of the landowners within this natural barrier, this natural wall of shingle, to have that wall preserved from actual wilful injury or trespass by anybody, and the learned judge put it as derived from the prerogative of the Crown. He used the word "prerogative," but it appears to me, and the Solicitor-General accepts the suggestion, that the word prerogative in the context was not an accurate or appropriate term—at least, that it was not the most accurate or appropriate term to be used. I should not myself use the word "prerogative," but the way in which the learned judge substantially put it may be shortly stated thus: That it is a part of the duty of the Crown of England to protect the realm of England from the incursions of the sea by appropriate defences; and certainly, if that was part of the duty of the Crown, it was no less the duty of the Crown to protect the realm by leaving un-

impaired the natural defences which already existed from time immemorial, and probably from periods of remote geological antiquity, than to protect it by artificial defences when artificial defences are required. The learned judge further held that, it being the duty of the Crown to protect this bank, and it appears to me the learned judge was quite right in so holding, the bank itself was under the safeguard of the Royal authority, or Royal prerogative, in this sense, that any person removing this bank, which existed naturally, so as to prevent or interfere with the performance by the Crown of this public duty, would be committing a wrongful act.

It would be as much a wrongful act of a person to wilfully destroy the natural bank which the Crown was bound to protect and maintain, as it would be a wrongful act for any person to interfere with the artificial barrier which the Crown might, out of its own revenues, have set up by the erection of a sea wall. It would be a wrongful act to interfere with that which it would be the duty of the Sovereign to maintain, a wrongful act which might result in damage to a person who was entitled to the protection of the Crown, and who was entitled to call upon the Crown to protect this land from the inroads of the sea. It would be a wrongful act done in the nature of a nuisance, and the person who suffered the particular damage occasioned by the nuisance would have a right to call upon the court to interfere for his protection. Another view of it may be this: When the land was the land of the Crown, as all land in the country was, or is presumed in point of law to have been at one time, beyond all question it would have been a wrong on the part of the Crown wilfully to have removed this barrier. When the land was transmitted by grant to a subject, the subject could not do that which would have been a wrongful act on the part of the Crown. That appears to me to be the train of reasoning by which the learned judge arrived at the conclusion at which he did arrive in this case, and in which I entirely concur.

With regard to any legal principle derived from the consideration of the original possession of property in the Crown, the original obligation of the Crown, I should myself say that, upon common principles of law, where there is such a natural protection as this, a barrier against the encroachments and inroads of the sea, any person who wilfully removes that natural barrier so as to occasion damage to his neighbour would be guilty of a nuisance; and if a nuisance, it would be one which would give a right of action to the person who suffered from it.

The defence substantially raised is this: it was a defence raised something by way of analogy to what was supposed to have been decided in *Smith* v. *Kenrick* (1), that is to say, the defendant says: "It is very true that if I remove the shingle to a certain extent you will suffer by it. By natural causes the shingle has been created, and only by natural causes. The sea at different times throws up the shingle there, sometimes removing it and sometimes bringing it there, but in the result it leaves upon my land a great body of shingle, which, although varying in quantity, has a permanent existence there. It is true that that was there by the natural action of the sea. Then, if I remove it, that natural cause will produce exactly the same effect upon your lands; therefore, all I do is this: I leave you to deal with the sea as a sort of common enemy; I have done that which on my own land I had a right to do, and if the result is that you are exposed to that which is the common enemy, you must take your own course, put up a wall or do whatever you like, or leave the sea to come on to your land, and you suffer the damage from natural causes, or would have suffered from natural causes, if I had not chosen to work my own property in my own way. That, I say, is exactly what was determined in *Smith* v. *Kenrick* (1), that if water flows from my property on to your land you must take the consequences and protect yourself in the best way you can."

In my opinion, there really is no practical or useful analogy between such a case as *Smith* v. *Kenrick* (1), and the case which is before us. In *Smith* v. *Kenrick* (1), and in the other case of *Chasemore* v. *Richards* (2), the court was dealing with an occult course of water oozing through crevices, if they were crevices, or probably

more generally oozing through pores in the bowels of the earth, coming nobody knows whence, and finding its way nobody knows how into the subterraneous workings. The legal rights and liabilities flowing out of such an occult course of subterraneous waters appear to me to throw no light whatever upon such a thing as this, the existence of a great visible bank operating as a protection against the visible waves of the sea, the inroads of the ocean which, coming in there, are liable to work destruction by inundation or otherwise. It appears to me that this is too remote to afford us any analogy, and that *Smith* v. *Kenrick* (1) affords no sort of justification for the claim of the defendant. Under these circumstances, I think the judgment of the learned judge in the court below ought to be affirmed.

BRETT, L.J.—I also think that the judgment ought to be affirmed, and for the reasons given by the learned judge. I confess I think that he has, with great care and remarkable skill, brought out the only principle upon which the judgment can properly be founded. I think it is a difficult case, and I think that the rule which has been enunciated, and which he has applied, has not, so far as I know, been before this laid down or applied by any court.

I take the facts to be clearly proved in this case, and the material facts to be considered seem to me to be these: The defendant is the owner of a shingle bank, which bank is on the borders of the sea, and it is a bank which, although it shifts from time to time by the action of the sea, did always, if left alone, practically form a protection to a part of the kingdom which stood behind; and the defendant has for his own purposes used his own land in one sense in the natural mode of using that land. He has taken away from time to time a part of the shingle bank in order that it might be sold or used for ballast on board ship. Prima facie he has done nothing which, as owner, he would not have a right to do, and I should say that he has done nothing which he would not now have, to a very great extent, a perfect right to do. But he has carried on this operation on his own land to such an extent that, approximately, if he went on, he would take away from the land behind this bank the natural protection against the sea which that bank gives. So that if he continued the same operation, the whole of the bank, or so much of it would be taken away as to allow the sea to pass on to the land of this martello tower, and a part of the adjacent country, that is to say, he has so used this bank that if he continued to use it in the same way there would be a great danger of the sea breaking through upon the land which is the subject-matter of the suit, and upon other adjacent lands. Then the defendant asserted that what he was doing, and what he might do if he continued, would be done as a matter of right.

That being the state of the facts, the first difficulty which presents itself is this, that this land belonging to the defendant is not in the position of a servient tenement. There is no private right of the holders of this land of the martello tower over the land of the defendant by way of having a right of servitude and protection. The bank is a protection not only to the land which is the subject-matter of this suit, but to other land. The defendant is in possession of this bank as his own property, and, though this bank is a protection to the plaintiff's land, yet it seems to me that *Hudson* v. *Tabor* (3) is a binding authority upon us to say that there was no obligation on the part of the defendant to keep up this bank, so that if the sea by any change of the formation of the adjacent land or otherwise had been found to be wearing away this protecting bank, so that it would have been apparent to everybody that immediately, unless something were done, the sea would break through the bank, it seems to me that the defendant, the owner of that bank, would be under no obligation whatever to keep the sea out, and that even though it might have been said that he was not using ordinary care, or even though it could be said that he wilfully stood by and saw the sea washing away the bank so as to endanger the land behind it, he would not have been bound to do anything.

Therefore, it comes to a nice point. There is no dominant right of the plaintiff over the land of the defendant. There is no obligation on the defendant to keep the sea out, and, therefore, the question comes to this, whether one can find any

A principle upon which, although he is not bound to keep the sea out, yet he must not do an act which will let the sea in. I think there is such a principle, and that it is the principle which has been enunciated by the learned judge, and the principle upon which he has acted. The learned judge has used the word "prerogative." I think I can see how he arrived at the use of that word. It is said by LORD COKE, who is a great authority, in *Isle of Ely Case* (4), that by the B common law

> "the King ought of right to save and defend his realm as well against the sea as against the enemies, that it should not be drowned or wasted";

that is to say, there is a duty on the King, by reason of his being king, to defend his realm, and therefore of course all his realm and every part of his realm, against C the sea, so that no part of his realm should be drowned or wasted by the sea. Now when that was declared in a declaratory statute (23 Hen. 8, c. 5), the way in which it was introduced was this,

> "for that by reason of our dignity and prerogative royal [there is the use of the word prerogative] we are bound to provide for the safety and preservation of our realm of England."

D

I take it that the use of the word "prerogative" there means the prerogative of being king, that by reason of the prerogative of being king there is a correlative duty, and that the correlative duty by reason of his being king includes, as LORD COKE has said, the duty to save and defend the realm from the encroachments of the sea.

E I confess to my mind that is a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know no legal means, that is no process of law, common law or statute law, by which the Crown could be enforced to perform that duty; but there is that duty of imperfect obligation on the part of the royal authority, and that duty on the part of the King gives a corresponding right to the subject; but inasmuch as the duty of the King seems to me to F be a duty of imperfect obligation, the right of the subject is also an imperfect right. It is a right which, as against the Crown, the subject has no means to enforce, nevertheless the right exists. The right of the subject exists, and the duty of the King. What would have been the duty of the King? The duty of the King would have been greater than the obligation of the defendant, because the duty of the King would certainly have been, first of all, not to do anything to his bank G to enable the sea to break through; but I have no doubt that the duty of the King, although imperfect in obligation, would have been, if it were patent that the bank was becoming, by natural causes, insufficient, to restore the bank, or, if necessary, to provide a new bank. The King's duty, therefore, would be to make a bank if it were not there, to improve the bank, if it required improving, and to restore the bank if it were injured by natural causes; but certainly it would be a breach, H if one may respectfully say so, of duty on the part of the Crown to break through the bank, that is, to do the very thing which the defendant here has done. There is a duty on the part of the Crown which gives rise to a correlative right on the part of the subject; the subject has a right to have that bank in that place, or a corresponding bank.

I confess I see no answer to the reasoning of the learned judge. He says, and I this is the only place where I can see strictly that his use of the word "prerogative" may be closely criticised, "if this prerogative and right exist in the Crown." I think it would have more clearly expressed his ideas if the words had been, "if this royal duty on the part of the Crown, and this right on the part of the subject exist, it seems to me impossible to suppose that the subject can have a right to do that which the defendant claims to do"; that is, that the subject should have a right to do that which would be a wrongful act on the part of the Crown, and to do an act which it would be the duty of the Crown immediately to correct. It seems to me impossible that that can be the law, and that is the ground on which

the learned judge has acted, and that is the principle, and as at present advised I think the only principle, upon which this judgment can be affirmed. But I am clearly of opinion that that ground is a good one, and that the judgment ought to be affirmed.

COTTON, L.J.—I am of the same opinion. The case which is before us is this: The plaintiff, a landowner, seeks relief against the defendant on the ground that the defendant is so dealing with his own land as to damage the land of the plaintiff. The plaintiff happens to be an officer of the Crown in whom the land in question is vested for certain public purposes, but that, in my opinion, is immaterial. The question must be dealt with just as if there were a subject as plaintiff complaining of a subject as defendant.

What is the act complained of? I think it has been somewhat misunderstood on the part of the defendant. As I understand it, it is this: the plaintiff's land is situated a short distance from the sea, and the only land intervening between the plaintiff's land and the sea is the land of the defendant, and the complaint is that the defendant is so dealing with that land, by removing the shingle which constitutes the whole of the surface of that land, that the sea will at a time which cannot positively be stated, but within a reasonable time, undermine and destroy the land and the building of the plaintiff upon this land. That, in fact, is the evidence of Sir John Coode, and as far as I have heard there has been no contradictory evidence, and it is probable, from what we know as to the removal of shingle and the effects of the sea, that that will be the result. It was put by the defendant as if the complaint was this, that from his operations in removing the shingle the crest of the bank of shingle had been driven back, and had been driven back partly on to a corner of the land of the plaintiff. In my opinion, that is not the real ground of complaint.

Then the question which we have to consider is whether or not that prospective or apprehended injury to the land of the plaintiff is one which, if done, would be actionable, and one which the court ought to restrain by injunction. I am of opinion that it is. What the defendant says is this: "I am only dealing in the natural way with my land, and I have a right to deal with it in the natural way, that is to say, in the only way in which profit can be made out of it." I will not enter minutely into the question, which is a difficult one, as to what is the natural use of the land. The natural use of minerals is held to be the digging them out and making them merchantable; and possibly and probably the natural use of the shingle is to take it for the purposes for which it has been taken and selling it, but does that justify the defendant in doing by that means an injury to his neighbour? The right of one to use his land for natural purposes, though some loss does occur to his neighbour, is an exception to the general rule; but, in my opinion, that cannot apply where the land with which the defendant is so dealing is, before it comes into his hands, subject to an obligation which is being interfered with by the act which he does. In that case, whether it is the natural use of the land or not in the sense in which that word has been used, if he is breaking an obligation or duty attaching to the land, in my opinion his neighbour, if he is injured, has a right of action; if his neighbour apprehends an injury, and can satisfy the court that that injury will come if the acts are continued, he has a right to an injunction.

I do not dissent from the way in which the lords justices have put their judgments, and from the way in which FRY, J., has put it; but what I rely on is the second ground which has been put by JAMES, L.J. Theoretically, for the purpose of considering how the matter legally stands, all land must be considered as having been derived from the Crown, and the question arises, What were the obligations of the Crown as regards this land now vested in the defendant? This is material, because where land is vested in the Crown subject to public uses, the grantee of the Crown must take it subject to all obligations to which the land was subject when in the hands of the Crown. The Crown holds the bed of a navigable river

A or the shore of the sea between high and low water mark subject to the right of navigation, and the grantee of the Crown can never do anything to interfere with the navigation, and if a grant were made for the purpose of enabling the grantee to do that which would interfere with the navigation, that would be a void grant, because it would be a grant which the Crown could not make, having regard to the fact that it held the land for the benefit of the public, that is, subject to the right B of public navigation.

What then was the right and duty of the Crown as regards this land when it was in the hands of the Crown? The duty and obligation of the Crown was to protect the land from the incursions of the sea, and if there is land vested in the Crown which is a natural barrier against the sea, in my opinion the public have a right to say that the Crown shall not deal with that in such a way as to deprive the C realm of that natural barrier against the sea, and a grantee of the Crown can stand in no better position than the Crown itself would do. But against that it is said, how can you enforce that right as against the Crown? The subject cannot, for this reason, and for this reason only, that the Crown is not amenable to the jurisdiction of the court, and any default of duty on the part of the Crown, unless where a petition of right gives a remedy, cannot be made the ground of an action. The D subject must seek redress by petition to the Crown, and in that way only. But when once you get the land into the hands of a subject who is liable to the jurisdiction of the court, any other subject who suffers a special injury from the user of the land can by action insist on the land not being used in contravention to the public right.

In my opinion the land of the defendant, when vested in the Crown, was held E by the Crown for the public purpose of protecting the land from the sea; the land could not be granted free and discharged from that duty, and the defendant, or those through whom he claims, as they theoretically take from the Crown, must hold the land subject to that duty, and cannot be allowed to use the land in such a way as to destroy the natural barrier against the sea. I am of opinion, on these grounds, that the injunction is right, and the appeal must be dismissed.

F *Appeal dismissed.*

Solicitors: *W. F. Stokes*; *W. Tindal Perkins.*

[*Reported by* C. A. COOK, ESQ., *Barrister-at-Law.*]

AYNSLEY *v.* GLOVER

[COURT OF APPEAL (Mellish and James, L.JJ.), February 17, 22, 1875]

[Reported 10 Ch. App. 283; 44 L.J.Ch. 523; 32 L.T. 345; 39 J.P. 484; 23 W.R. 457]

Easement—Light—Ancient lights—Enjoyment from time immemorial—Alteration of windows—Interruption of light—Prescription Act, 1832 (2 *or* 3 *Will*, 4, *c.* 71).

The plaintiff filed a bill to restrain the defendant from building so as to interfere with the plaintiff's ancient lights. A right to the light from time immemorial was proved. Although there was evidence of unity of possession for a period of more than twenty years extending to within a short time of the bill being filed, there was no evidence of unity of title. It appeared that two of the windows concerned had been altered.

Held: (i) the plaintiff had established his title to the light by proof of enjoyment from time immemorial, and the Prescription Act, 1832, had not taken away any of the modes of claiming easements which existed before it was passed; (ii) the fact that two of the windows concerned had been altered did not affect the plaintiff's right.

Notes. Considered: *Stanley of Alderbury* v. *Shrewsbury* (1875), L.R. 19 Eq. 616; *Fowlers* v. *Walker* (1880), 49 L.J.Ch. 598; *Dalton* v. *Angus*, [1881–5] All E.R.Rep. 1; *Holland* v. *Worley* (1884), 26 Ch.D. 578; *A.-G.* v. *Queen Anne Garden and Mansions Co.* (1889), 60 L.T. 759; *Smith* v. *Baxter*, [1900] 2 Ch.D. 138; *Hyman* v. *Van den Bergh*, [1908] 1 Ch. 167; *Slack* v. *Leeds Industrial Co-operative Society*, [1924] 2 Ch. 475. Referred to: *Moore* v. *Hall* (1878), 3 Q.B.D. 178; *Greenwood* v. *Hornsey* (1886), 33 Ch.D. 471; *Martin* v. *Price*, [1894] 1 Ch. 276; *Warren* v. *Brown*, [1900] 2 Q.B. 722; *Cowper* v. *Laidler*, [1903] 2 Ch. 337; *Gardner* v. *Hodgson's Brewery Co.*, [1903] A.C. 229; *Colls* v. *Home and Colonial Stores*, [1904–7] All E.R.Rep. 5.

As to the acquisition of a right to light, see 12 HALSBURY'S LAWS (3rd Edn.) 588 et seq.; and for cases see 19 DIGEST (Repl.) 136 et seq. For the Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to:

(1) *Tapling* v. *Jones* (1865), 20 C.B.N.S. 166; 11 H.L.Cas. 290; 5 New Rep. 493; 34 L.J.C.P. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur.N.S. 309; 13 W.R. 617; 144 E.R. 1067, H.L.; 19 Digest (Repl.) 137, *886*.

(2) *Staight* v. *Burn* (1869), 5 Ch. App. 163; 39 L.J.Ch. 289; 22 L.T. 831; 34 J.P. 212; 18 W.R. 243, L.J.; 19 Digest (Repl.) 157, *1034*.

Also referred to in argument:

Heath v. *Bucknall* (1869), L.R. 8 Eq. 1; 38 L.J.Ch. 372; 20 L.T. 549; 33 J.P. 532; 17 W.R. 755; 19 Digest (Repl.) 204, *1459*.

Jackson v. *Duke of Newcastle* (1864), 3 De G.J. & Sm. 275; 4 New Rep. 448; 33 L.J.Ch. 698; 10 L.T. 635, 802; 28 J.P. 518; 10 Jur.N.S. 810; 12 W.R. 1066; 46 E.R. 642, L.C.; 19 Digest (Repl.) 148, *965*.

Yates v. *Jack* (1866), 1 Ch. App. 295; 35 L.J.Ch. 539; 14 L.T. 151; 30 J.P. 324; 12 Jur.N.S. 305; 14 W.R. 618, L.C.; 19 Digest (Repl.) 149, *968*.

Luttrel's Case (1601), 4 Co. Rep. 84 b; 76 E.R. 1063; 19 Digest (Repl.) 96, *557*.

Dent v. *Auction Mart Co.*, *Pilgrim* v. *Same*, *Mercer's Co.* v. *Same* (1866), L.R. 2 Eq. 238; 35 L.J.Ch. 555; 14 L.T. 827; 30 J.P. 661; 12 Jur.N.S. 447; 14 W.R. 709; 19 Digest (Repl.) 153, *1005*.

Martin v. *Goble* (1808), 1 Camp. 320, N.P.; 19 Digest (Repl.) 159, *1047*.

A.-G. v. *Nichol* (1809), 16 Ves. 338; 3 Mer. 687; 33 E.R. 1012, L.C.; 19 Digest (Repl.) 146, *954*.

Appeal by the defendant from a decision of SIR GEORGE JESSEL, M.R., dated Aug. 5, 1874, granting an injunction against interference with ancient lights.

The bill was filed by the owner and occupier of the Heathcote Arms Inn, Market Street, Longton, Staffordshire, alleging that the defendant intended to erect a building 36 feet high, within 5 feet of the plaintiff's messuage, whereby the access of light to eight of the plaintiff's windows would be obstructed. The injunction was granted in respect of four of the windows.

Roxburgh, Q.C., and *Cracknall* for the defendant.
Southgate, Q.C., and *Keary* for the plaintiff.

MELLISH, L.J.—This is an appeal from a decree of SIR GEORGE JESSEL, M.R., in a suit for the interruption of ancient lights. The suit appears to have been brought originally for the interruption of eight ancient lights, but the plaintiff has only succeeded in getting a decree as to four of them. The first question is whether the plaintiff has made out his right to the light in respect of those four windows. The objection that is made to them is that, although they have been erected more than twenty years, yet there has been a unity of possession at any rate from 1849, if not before, up to within a very short period of the time when the bill was filed. In my opinion it is not necessary to consider whether the plaintiff could have made out his right under the Prescription Act, 1832, because I am of opinion that under the circumstances of the case, the plaintiff has clearly made out a right from time immemorial. The Prescription Act, 1832, has not, as I apprehend, taken away any of the modes of acquiring easements which existed before that statute. Indeed, as the statute requires the proof of twenty years' or forty years' enjoyment (whichever is necessary to give the right) to be a proof of enjoyment for the twenty years or forty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements altogether destroyed if the plaintiff was not entitled to resort to those means of acquiring an easement which were in existence before the Act was passed.

In this case, there is an old man above eighty years of age, who says that he recollects these windows all his life; that before the cottages, in which the windows in question are, became part of the inn to which they now belong, they were occupied as separate cottages; and I think he says he was born in one of them, and that, as far as he knows, there always were lights, subject to this, that two of them had been considerably enlarged in 1846. It also appears that the cottages were in existence in 1808, because in that year, in a deed by which the cottages are conveyed, they are recited as being then in existence. I quite agree with the Master of the Rolls that it must of course be inferred that the windows also were then in existence. Beyond that we know nothing about them, and, therefore, the proof is that the cottages, with the lights in them, have existed as far back as living memory goes, and we have no evidence when they were not in existence. Although there is evidence of unity of possession in 1849—and there is a question, which I think it is unnecessary to consider, because it appears to me that it makes no difference in the result whether it did not begin still earlier—yet it is quite clear that before that unity of possession commenced, that is, before 1840 (or even if you carry it back to 1830 it would make no difference), there were a great number of years during which there was no unity of possession, and during which the windows existed, and there is no evidence that there ever was any unity of title at all. Under those circumstances, there is, I apprehend, clear evidence, independently of the statute, of a right to the light from time immemorial, which is not in any way taken away by the statute. I am, therefore, of opinion that the plaintiff has proved his right to these four lights.

The next question is whether he is bound to reduce the two lights out of the four which were enlarged by the roof being raised and the windows being raised with it; whether he is obliged to bring these old windows to their old size as a condition for obtaining the injunction. I am of opinion that he is not. That

appears to me to be clearly decided by *Tapling* v. *Jones* (1), which I think governs courts of equity quite as much as courts of law. The principle of that case is perfectly plain, that opening a new window, or the enlargement of an old window, in the wall of your house, is no injury or wrong at all to your neighbour. It is one of the natural rights of property which any man is entitled to exercise, and he cannot, by exercising that right, lose any other right which he may have acquired. Therefore, having got a right to the entry of light into a window of a certain size, he does not, by making that window larger, lose that right which he has acquired. I do not understand on what principle this court could say, "We will not give you relief in equity against what is a wrongful act, inasmuch as it deprives you of the light to which you are entitled, unless you do something which you are not bound to do, or block up windows which you are perfectly entitled to open if you please." That result appears to me to follow necessarily from *Tapling* v. *Jones* (1). I do not think there is any authority against it. The only case cited was *Staight* v. *Burn* (2) before GIFFARD, L.J., which appears, I think, to have depended on its own circumstances; at any rate, it is a case on an interlocutory injunction, which cannot bind this court in determining what is the final decree to be made. I am of opinion that the plaintiff cannot be put under terms to reduce his windows to their old size.

The next point that was raised was that this court ought not to grant an injunction, but ought merely to give damages. I am of opinion that this is a case for an injunction. I think that the plaintiff has proved his right to the ancient windows. Here are rooms in an inn which are used and enjoyed for the purposes of an inn, and the defendant proposes to erect a building within five feet of them. Of course that would altogether obstruct the light coming to them. The defendant proposes to build on a waste piece of ground, and the plaintiff has filed his bill before the building is even actually commenced. It is fortunate in this case that the building proposed to be erected is so near to the plaintiff's house that he is not in the difficulty in which ordinary plaintiffs are, namely, as to its being doubtful whether this building would block the lights or not. Here it is so near that it is absolutely certain that it would block the lights, and, therefore, very properly, the plaintiff filed his bill immediately. I cannot understand why the defendant is to be allowed to build on a mere bit of waste land so as altogether to block up the rooms which are necessary for the enjoyment of this public house. It appears to me that this is properly a case for the court to interfere by injunction.

The only other point which was raised was about costs. I do not see any reason to object to the decision of the Master of the Rolls about costs, because practically the whole case as to the four windows and as to the eight windows depended on the same evidence, and, in my opinion, the costs would not have been materially lessened if the bill had been filed respecting these four windows only. I do not think that there is any reason to suppose that the defendant would have yielded respecting the four windows, because he fought it all out respecting the four windows as well as the others.

I am of opinion that the decision of the Master of the Rolls is right, and that this appeal should be dismissed with costs.

JAMES, L.J., concurred.

Appeal dismissed.

Solicitors: *Wedlake & Letts*, for *Keary & Marshall*, Stoke-upon-Trent; *F. C. Greenfield.*

A

POLACK AND ANOTHER *v.* EVERETT

[Queen's Bench Division (Blackburn, Mellor and Quain, JJ.), February 10, 1876]

[Reported 1 Q.B.D. 669; 45 L.J.Q.B. 369; 34 L.T. 128; 24 W.R. 365]

B

[Court of Appeal (Sir George Jessel, M.R., Kelly, C.B., Mellish, L.J., and Denman, J.), May 2, 1876]

[Reported 1 Q.B.D. 678; 46 L.J.Q.B. 218; 35 L.T. 350; 24 W.R. 689]

C *Guarantee—Discharge of surety—Alteration of contract by subsequent transaction—Guarantee of agreement regarding management of company—Sale of book debts of company with knowledge, but without assent, of surety.*

A surety is discharged when the principal creditor deprives him of any right he would have against the original debtor, even though the surety is benefited thereby. The surety is not bound to express his dissent even though he knows that an alteration is being made in the original contract.

D

Notes. Distinguished: *Rainbow* v. *Juggins* (1880), 5 Q.B.D. 138. Considered: *Ward* v. *National Bank of New Zealand* (1883), 8 App. Cas. 755; *Taylor* v. *Bank of New South Wales* (1886), 11 App. Cas. 596. Applied: *Re Darwen and Pearce Associated Paper Mills* v. *Barnes* (1926), 95 L.J.Ch. 487; *Smith* v. *Wood*, [1928] All E.R.Rep. 229. Referred to: *Holme* v. *Brunskill* (1878), 38 L.T. 838; *Carter* v. *White*, [1881–5] All E.R.Rep. 921; *Lowes* v. *Maughan and Fearon* (1884), 1 T.L.R. 6; *Re Wolmershausen*, *Wolmershausen* v. *Wolmershausen* (1890), 38 W.R. 537; *Metropolitan Bank* v. *Coppee* (1895), 12 T.L.R. 129; *Greenwood* v. *Francis*, [1899] 1 Q.B. 312; *Egbert* v. *National Crown Bank*, [1918] A.C. 903; *Sassoon* v. *International Banking Corpn.*, [1927] A.C. 711; *Midland Motor Showrooms, Ltd.* v. *Newman*, [1929] All E.R.Rep. 521.

E

F As to discharge of surety by conduct of creditor, see 18 Halsbury's Laws (3rd Edn.) 502 et seq.; and for cases see 26 Digest (Repl.) 163 et seq.

Cases referred to:

(1) *Pickard* v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, *1103*.

G (2) *Freeman* v. *Cooke* (1848), 2 Exch. 654; 6 Dow. & L. 187; 18 L.J.Ex. 114; 12 L.T.O.S. 66; 12 Jur. 777; 154 E.R. 652; 21 Digest (Repl.) 366, *1090*.

(3) *Rees* v. *Berrington* (1795), 2 Ves. 540; 30 E.R. 765, L.C.; 26 Digest (Repl.) 184, *1369*.

(4) *Samuell* v. *Howarth* (1817), 3 Mer. 272; 36 E.R. 105; 26 Digest (Repl.) 183, *1356*.

H (5) *Mayhew* v. *Crickett* (1818), 2 Swan. 185; 1 Wils. Ch. 418; 36 E.R. 585, L.C.; 26 Digest (Repl.) 208, *1596*.

(6) *Wulff* v. *Jay* (1872), L.R. 7 Q.B. 756; 41 L.J.Q.B. 322; 27 L.T. 118; sub nom. *Woulff* v. *Jay*, 20 W.R. 1030; 26 Digest (Repl.) 193, *1461*.

Also referred to in argument:

I *Watts* v. *Shuttleworth* (1861), 7 H. & N. 353; 5 L.T. 58; 7 Jur.N.S. 945; 10 W.R. 132; 158 E.R. 510, Ex. Ch.; 26 Digest (Repl.) 192, *1459*.

Harrison v. *Seymour* (1866), L.R. 1 C.P. 518; Har. & Ruth. 567; 35 L.J.C.P. 264; 12 Jur.N.S. 924; 26 Digest (Repl.) 165, *1234*.

Davis v. *Stainbank* (1855), 6 De G.M. & G. 679; cited in 7 E. & B. at p. 437; 43 E.R. 1397, L.JJ.; 26 Digest (Repl.) 111, *774*.

Appeal by the plaintiffs from a decision of the Queen's Bench Division, in an action tried by Denman, J., on a guarantee by which the defendant guaranteed perfomance of an agreement made by one Nazarkiewich on Dec. 20, 1877, with the plaintiffs. Denman, J., directed a verdict for the plaintiffs for the amount

claimed with leave to move to enter judgment for the defendant on the pleas, the court to have power to draw inferences of fact. The defendant appealed to the Queen's Bench Division who held that the defendant was discharged by the fact that the plaintiffs had without consent released a partial security in their hands.

Nazarkiewich was a wine merchant, carrying on business in the City of London. On Dec. 20, 1873, he was indebted to the plaintiffs, Messrs. Polak Bros., in a sum of £5,000, and also for a further sum of £3,400. By an agreement entered into on Dec. 20, 1873, he undertook to pay to the plaintiffs £2,400 in cash, and also to transfer to them £6,000 in fully paid-up shares in a company which was to take over his business, such shares to be redeemed at par within twelve calendar months from Jan. 1, 1874. By another clause in the agreement, books debts which were due to Nazarkiewich, were to be collected by a Mr. Vispe, and a moiety of the proceeds was to be applied to the redemption of the shares at par. By an agreement of the same date, the defendant guaranteed the fulfilment by Nazarkiewich of the above so far as concerned the full redemption of the shares therein mentioned of the value of £1,000 on or before Jan. 1, 1875. Vispe was unable to collect more than £400 of the book debts, and, the company not considering that it was to their interest that their customers should be pressed, entered into agreements with Nazarkiewich and the plaintiffs for the transfer to the company of the book debts for a sum of £1,200. This agreement was confirmed at a meeting of the company on May 27, 1874, at which the defendant, the chairman of the company, was present, but he did not consent to the bargain, and on this point there was no cross-examination. The nominal value of the book debts was £8,000, to one-half of which the agreement of Dec. 20, 1873, applied. It was now sought to make the defendant liable for the £2,000, balance of the £6,000, after allowing the full nominal value of the moiety of the book debts. The court had power to draw inferences of fact.

Philbrick, *Q.C.*, and *Webster* for the plaintiffs.

M'Intyre, *Q.C.*, and *J. C. Mathew* for the defendant, were not called on to argue.

BLACKBURN, J.—In the first place, leave was reserved for us to draw inferences of fact. The defendant, being summoned as a witness, swore positively that though he was chairman of the company he protested against the sale of the book debts to the company. There was no cross-examination on the point, and it can never be intended that we are to infer that a fact so distinctly sworn to was false. Though the defendant was well aware of the transaction, still he was not an assenting party to it. Counsel for the plaintiffs argues that knowledge even without assent is sufficient to bind him. *Picard* v. *Sears* (1) would seem almost to go that length, but that case has since been corrected by *Freeman* v. *Cooke* (2), which clearly shows that it is only when a duty is cast on a man to speak that his silence is to be considered binding upon him. When a surety becomes aware that the principal creditor is going to do something, there is no authority for saying that he is bound to speak. Does the act of the plaintiffs in this case release the surety?

It has been established from *Rees* v. *Berrington* (3), down to the present time that a surety is discharged by the creditor giving time to the principal debtor, because he deprives the surety of part of his right which he would have had against the debtor—to use the creditor's name to sue, for instance—and though it actually benefits the surety, still by principles of equity it discharges the surety entirely. The reason is as stated by Lord Eldon, L.C., in *Samuell* v. *Howarth* (4) (3 Mer. at p. 278),

> "that the surety cannot have the same remedy as he would have had under the original contract."

It is because it is very undesirable that there should arise any dispute whether the surety benefits or not that the line is thus clearly drawn, and this is now so thoroughly established that nothing but the legislature can alter it. Here it is true that time is not given, but there has been an equal interference with the equitable

A rights of the surety, the right to have these shares paid off in a certain way, and of that right he has been deprived by the release of the book debts, and this was a wilful act, and that clearly comes under the decision in *Mayhew* v. *Crickett* (5). It has been argued by consent that if the whole amount of the book debts in question had been paid off, there was still a balance, and that balance could not be affected by such payment, but once concede the rule that where the creditor B interferes with the rights of the surety, and alters those rights even for his benefit, that that discharges the surety, it must apply equally to the whole security and to any part of it. *Wulff* v. *Jay* (6), is distinguishable, for in that case the creditor was, in equity, in the position of a mortgagee, bound to account for moneys that should have been in pledge. Laches does not discharge the surety, for in that case the rights of the surety remain as before, just as where a creditor does not choose C to sue, that will not discharge the surety. Here there is no case of laches, but an absolute destruction of a right. Judgment must be for defendant.

MELLOR, J.—I am of the same opinion. I do not think there is any question of expediency involved. I think it rests on very high grounds that the creditor has no right to consider whether what he does is for surety's benefit or not. It is D simply a question of contract, and the parties must be bound by the terms of the contract.

QUAIN, J.—To alter a contract of suretyship without the consent of the surety would be a most unsafe proceeding, and quite contrary to the decision in *Rees* v. *Berrington* (3), in which the principles that govern this case appear most clearly laid down.

E From this decision the plaintiffs appealed to the Court of Appeal.

May 2, 1876. *Philbrick*, *Q.C.*, and *R. E. Webster* for the plaintiffs.
McIntyre, *Q.C.*, and *J. C. Mathew* for the defendant, were not called on to argue.

SIR GEORGE JESSEL, M.R., KELLY, C.B., MELLISH, L.J., and **DENMAN, J.,** had no doubt that the view taken by the Queen's Bench Division was F correct, and affirmed the judgment for the same reasons.

Appeal dismissed.

Solicitors: *Lumley & Lumley*; *Parker & Clarke.*

DAWKINS *v.* LORD ROKEBY

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley, Lord O'Hagan, Lord Penzance and Lord Selborne), June 28, 1875]

[Reported L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 40 J.P. 20; 23 W.R. 931]

Libel—Slander—Privilege—Absolute privilege—Witness at military court of inquiry.

The ordinary rule of law that no action will lie against a witness for what he says or writes in giving evidence before a court of justice extends to a witness called before a military court of inquiry to testify on a matter of military discipline.

Notes. Applied: *Dawkins* v. *Prince Edward of Saxe-Weimar* (1876), 1 Q.B.D. 499. Followed: *Seaman* v. *Netherclift* (1876), 2 C.P.D. 53. Applied: *Goffin* v. *Donnelly* (1881), 6 Q.B.D. 307; *Munster* v. *Lamb*, [1881–5] All E.R.Rep. 791. Considered: *Hennessy* v. *Wright* (1888), 21 Q.B.D. 509; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1891–4] All E.R.Rep. 429. Applied: *Chatterton* v. *Secretary of State for India in Council*, [1895–9] All E.R.Rep. 1035; *Barratt* v. *Kearns*, [1905] 1 K.B. 504; *Attwood* v. *Chapman* [1914–15] All E.R.Rep. 1034. Followed: *Co-partnership Farms* v. *Harvey-Smith*, [1918] 2 K.B. 405. Considered: *Everett* v. *Griffiths*, [1920] 3 K.B. 163; *Addis* v. *Crocker*, [1960] 2 All E.R. 629; *Lincoln* v. *Daniels*, [1961] 3 All E.R. 740. Referred to: *Re Tufnell* (1876), 3 Ch.D. 164; *R.* v. *Army Council, Ex parte Ravenscroft* (1917), 33 T.L.R. 387; *Frazer* v. *Balfour* (1918), 87 L.J.K.B. 1116; *Heddon* v. *Evans* (1919), 35 T.L.R. 642; *Collins* v. *Whiteway*, [1927] 2 K.B. 378; *Hearts of Oak Assurance Co.* v. *A.-G.* (1931), 47 T.L.R. 579; *O'Connor* v. *Waldron*, [1934] All E.R.Rep. 281; *Smith* v. *National Meter Co.*, [1945] 2 All E.R. 35; *Marrinan* v. *Vibart*, [1962] 3 All E.R. 380.

As to absolute privilege, see 24 Halsbury's Statutes (2nd Edn.) 48 et seq.; and for cases see 32 Digest (Repl.) 118 et seq.

Appeal from a decision of the Exchequer Chamber (Kelly, C.B., Martin, Bramwell, Channell, Pigott, and Cleasby, BB., Byles, Keating, Brett and Grove, JJ.), reported L.R. 8 Q.B. 255, on a bill of exceptions to the ruling of Blackburn, J., in a case tried before him at Westminster, in February, 1871.

The appellant and the respondent were both officers in the army, and the action was brought by the appellant for an alleged libel and slander of him by the respondent in evidence given by him before a military court of inquiry, assembled to investigate the conduct of the appellant as an officer. The learned judge ruled that, as a matter of law the action would not lie even though the appellant should be able to prove that the respondent in giving such evidence had acted mala fide, with actual malice, without any reasonable and probable cause, and with a knowledge that the statements made by him were false. The judge directed a verdict for the respondent. A bill of exception was tendered and the judgment of the court below was affirmed. The appellant appealed by the Exchequer Chamber. This proceeding in error was then brought, the judges were summoned to the House of Lords, and Kelly, C.B., Blackburn, Mellor, Brett and Grove, JJ., and Pollock, B., attended.

H. Matthews, *Q.C.*, and *Holl* for the appellant.

Bulwer, *Q.C.*, *Bowen* and *Fitzmaurice* for the respondent.

At the conclusion of the arguments the following question was left by their Lordships to the learned judges: "Whether the opinion and ruling of the learned judge, as stated in the bill of exceptions, were right in point of law?"

KELLY, C.B., delivered the following opinion of the judges.—We answer your Lordships' question in the affirmative. A long series of decisions has settled that no

action will lie against a witness for what he says or writes in giving evidence before a court of justice. This does not proceed on the ground that the occasion rebuts the prima facie presumption that words disparaging to another are maliciously spoken or written. If this were all, evidence of express malice would remove this ground; but the principle, we apprehend, is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities, as regards witnesses in the ordinary courts of justice, are numerous and uniform. In the present case, it appears in the bill of exceptions that the words and writings complained of were published by the respondent, a military man, bound to appear and give testimony before a court of inquiry. All he said and wrote had reference to that inquiry, and we can see no reason why public policy should not equally prevent an action being brought against such a witness as against one giving evidence in an ordinary court of justice.

LORD CAIRNS, L.C.—I am sure your Lordships all feel greatly indebted to the learned judges for the attention which they have paid to this case, and for the very clear and satisfactory opinion which they have given in answer to your Lordships' question. It is of importance that the House should bear in mind the precise expressions of the learned judge who tried the case, because I am sure that your Lordships would not desire your decision to go further than the circumstances of this particular case would warrant.

The leading facts which are put in prominence by the learned judge are these: that the statements were made by the respondent, who was a military man, and that the inquiry was a military inquiry; that the statements were made in relation to the conduct of the appellant as a military man, and were made with reference to the subject of that inquiry. I say this the more particularly, because an argument was addressed to your Lordships to show that the inquiry in question was not to be considered in the light of a judicial inquiry, and that the evidence was not given by a witness on oath. That is quite true, but it is at the same time stated in the bill of exceptions that it was an inquiry connected with the discipline of the army, that it was an inquiry warranted by the Queen's orders and regulations for the army, that it was called by the Field-Marshal Commanding-in-Chief in pursuance of those regulations, and that the respondent was called before the court of inquiry as a witness, as a person who was required to give evidence relevant to the inquiry which was then being conducted, and that it was in the course of that inquiry that the statements were made.

Adopting the expressions of the learned judges with regard to what I take to be the settled law as to witnesses, and as to the protection of witnesses in judicial proceedings, I certainly am of opinion that, on all principles, and certainly on all considerations of conscience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath should be extended, and must be extended, to a military man who is called before a court of inquiry of this kind, for the purpose of testifying there on a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made viva voce, and those which were made in writing, were relevant to that inquiry.

Under these circumstances, I submit that the conclusion of the learned judges is in all respects one which we ought to adopt, and that your Lordships will hold that statements made under these particular circumstances are statements which cannot become the foundation of an action at law. I, therefore, beg leave to move that the appeal be dismissed with costs.

LORD CHELMSFORD, LORD HATHERLEY, LORD O'HAGAN and **LORD SELBORNE** concurred.

LORD PENZANCE.—I also agree in the view which has been stated, but I wish to say one word on the supposed hardship of the law which is brought into

question by this appeal. It is said that a statement of fact of a libellous nature which is palpably untrue—known to be untrue by him who made it, and dictated by malice—ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth, and assumes the malice. If by any process of demonstration free from the defects of human judgment the untruth and malice could be set above and beyond all question and doubt, there might be ground for contending that the law should give damages to the injured man. But this is not the state of things under which this question has to be determined. Whether the statements were in fact untrue, and whether they were dictated by malice, are, and always will be, open questions on which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and yet in the eyes of a jury may be open to that imputation; or again, the witness may be cleared by the jury of the imputation, and yet may have had to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands. These considerations have long since led to the legal doctrine that a witness in the courts of law is free from any action; and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present, and with the same result.

Appeal dismissed.

Solicitors: *Guscotte, Wadham & Daw*; *W. C. Hall.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

DAVIS *v.* GOODMAN AND ANOTHER

[Court of Appeal (Bramwell, Baggallay and Thesiger, L.JJ.), March 19, 1880]

[Reported 5 C.P.D. 128; 49 L.J.Q.B. 344; 42 L.T. 288; 28 W.R. 559]

Bill of Sale—Registration—Attestation—Failure to comply with Bills of Sale Act, 1878—Validity of bill as between grantor and grantee.

A bill of sale to which the Bills of Sale Act, 1878, applies, but is not attested by a solicitor and explained by him to the grantor, nor registered as required by the Act, is, nevertheless, valid as between the grantor and grantee.

Notes. Section 8 of the Bills of Sale Act, 1878, is in terms repealed by s. 15 of the Bills of Sale Act (1878) Amendment Act, 1882, but the effect of s. 3 of the latter Act is that the repeal applies only to bills of sale given as security for money. Section 10 of the Bills of Sale Act, 1878, remains in force so far as absolute bills are concerned by virtue of s. 3 of the 1882 Act.

Distinguished: *Seal* v. *Claridge* (1881), 7 Q.B.D. 516. Referred to: *Re Haynes, Ex parte National Mercantile Bank* (1880) 15 Ch.D. 42.

As to attestation and registration of bills of sale, see 3 Halsbury's Laws (3rd Edn.) 298 et seq.; and for cases see 7 Digest (Repl.) 85 et seq. For the Bills of Sale Acts, 1878 and 1882, see 2 Halsbury's Statutes (2nd Edn.) 557 and 574.

A Case referred to in argument:

Hill v. *Kirkwood* (1880), 42 L.T. 105; 28 W.R. 358, C.A.; 7 Digest (Repl.) 85, *484.*

Appeal from a decision of the Common Pleas Division (LORD COLERIDGE, C.J., and LINDLEY, J.), reported 5 C.P.D. 20, affirming the decision of the judge of Worcestershire County Court.

B On Feb. 13, 1879, the plaintiff executed a bill of sale on his household goods to secure a loan made by the defendants. The bill of sale was neither registered nor attested. On July 25, 1879, the defendants seized the plaintiff's goods by virtue of the powers of the bill of sale, and sold them. The plaintiff brought an action in the county court for conversion of the goods, contending that the bill of sale was subject to the Bills of Sale Act, 1878, and that it had not been attested C and registered as required by sections 8 and 10 of that Act and was, therefore, void, even between the immediate parties thereto. The county court judge gave judgment for the plaintiff, holding that the bill of sale was void. The Divisional Court of the Common Pleas Division affirmed the decision. The defendants appealed.

D By s. 8 of the Bills of Sale Act, 1878:

"Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assign- E ment for the benefit of the creditors of such person, and also against all sheriffs officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property F in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be) and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such G bill has been made or given, as the case may be)."

By s. 10 of the Act:

"A bill of sale shall be attested and registered under this Act in the following manner: (i) the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution H of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor."

Bompas, Q.C., for the defendants.
Gore for the plaintiff.

BRAMWELL, L.J.—I am of opinion that this appeal ought to be allowed, and I but for the decision of the court below I should not have thought it at all a doubtful case. I am of opinion that the Bills of Sale Act, 1878, must be read as though the first subsection of s. 10 were included in and incorporated with s. 8. The only consequences attributable to and following upon a failure properly to attest and duly to register a bill of sale are the consequences set forth in s. 8. That the bill of sale should be void as against the grantor is not one of the consequences specified in that section. I think the provision as to the explanation of the bill of sale by the attesting solicitor was inserted not only for the benefit of the grantor but also for the benefit of the creditor, for it helps to enable an intending grantor to

tell whether he is likely to be giving undue preference to one of the creditors, and thereby to defraud the other creditors. Besides this the creditors have a guarantee in the attestation of the document by a solicitor that the bill of sale set up is prima facie a genuine and valid document, and so they get an additional security against fraud. The legislature has not said that such a bill of sale as this is to be void as between grantor and grantee because of the failure to follow the directions given in the Act, and I cannot think that it is void.

BAGGALLAY, L.J.—The Bills of Sale Act, 1854, required bills of sale to be filed together with certain affidavits, and there enacted, in almost the same words as those of s. 8 of the Act of 1878, that if those provisions were not complied with the bills of sale should be void as against certain specified classes of persons. The Act of 1878 requires attestation, and also provides that in default of attestation bills of sale shall be void as against certain specified persons. Section 10 explains the way in which the attestation and registration are to be effected, and so interprets s. 8. Under the earlier Act a bill of sale was not void between grantor and grantee for want of the formalities being observed, and I think that a similar rule must be applied to the non-observance of the formalities required under the Act of 1878. No doubt the provision as to explanation and attestation may be said to be inserted in one sense for the benefit of the grantor, but I think it is not possible to draw the conclusion that the bill of sale is to be void as between grantor and grantee if the directions as to these matters are not observed. I, therefore, agree that this appeal must be allowed.

THESIGER, L.J.—The object of the Bills of Sale Acts, 1854 and 1866, was the protection of the creditors, and the object of the Act of 1878 is the same. Section 8 of the Act of 1878 provides that every bill of sale shall be attested, that it shall be registered, and that the consideration shall be set forth, and it provides that if those conditions are not complied with certain results are to follow in favour of certain specified persons. The Act stays "otherwise such bill of sale . . . shall be deemed fraudulent and void." I am of opinion that the word "otherwise" governs all the preceding part of the section. The repetition of the word "shall," upon which Lord Coleridge, C.J., appears to have placed reliance, does not, I think, support the argument sought to be based upon it; for it is to be observed that this word "shall" is again repeated in the clause which deals with the setting forth of the consideration, so that if the clause as to attestation is to be taken alone each of the other clauses must also be taken alone. I am of opinion that the sense, the object, and the grammatical construction of the several sections all point to one conclusion, which is that the only result of not performing the directions and not complying with the provisions of the statute is that the bill of sale is void only as against the classes of persons specified in s. 8. I do not think that the provisions of s. 10 (1) carry the case any farther. Section 8 enacts that certain things must be done sub modo, and s. 10 gives the modus. I think s. 10 should be read into and together with s. 8, and that both bear the same construction. I do not think there is any ground for saying that these sections do not exist for the benefit of creditors. The creditors of the grantor of a bill of sale are interested in having the purport of that bill of sale properly explained to the grantor; such explanation is a protection to the grantor as well as to the grantee. I am, therefore, of opinion that the judgment of the court below cannot be supported, and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Harper, Broad & Battock*; *Milne, Riddell & Mellor*, for *Tinsley*, Dudley.

[*Reported by* P. B. Hutchins, Esq., *Barrister-at-Law.*]

BALLARD *v.* MARSDEN

[Chancery Division (Fry, J.), April 14, 1880]

[Reported 14 Ch.D. 374; 49 L.J.Ch. 614; 42 L.T. 763; 28 W.R. 914]

Administration of Estates—Legacy—Appropriation of assets to satisfy—Debt due to estate from legatee—Right of executors to retain amount of debt.

Where executors have set apart and appropriated assets to meet a legacy, they cannot retain any part of the appropriated assets to meet a debt due from the legatee to the estate of the testator.

Notes. Considered: *Re Milnes, Milnes* v. *Sherwin* (1885), 53 L.T. 534. Referred to: *Re Moore, Moore* v. *Moore* (1881), 45 L.T. 466.

As to legacies to debtors, see 16 Halsbury's Laws (3rd Edn.) 321, 322; and for cases see 23 Digest (Repl.) 444 et seq.

Cases referred to:

(1) *Priddy* v. *Rose* (1817), 3 Mer. 86; 36 E.R. 33; 8 Digest (Repl.) 565, *171.*

Also referred to in argument:

Phillipo v. *Munnings* (1837), 2 My. & Cr. 309; 40 E.R. 658, L.C.; 32 Digest (Repl.) 473, *879.*

Stephens v. *Venables* (*No. 1*) (1862), 30 Beav. 625; 54 E.R. 1032; 23 Digest, (Repl.) 410, *4802.*

Willes v. *Greenhill* (1860), 29 Beav. 376; 30 L.J.Ch. 808; 9 W.R. 217; 54 E.R. 673; 23 Digest (Repl.) 447, *5152.*

Re Batchelor, Sloper v. *Oliver* (1873), L.R. 16 Eq. 481; 43 L.J.Ch. 101; 21 W.R. 901, L.C.; 23 Digest (Repl.) 449, *5173.*

Brandon v. *Brandon* (1859), 3 De G. & J. 524; 28 L.J.Ch. 147; 32 L.T.O.S. 363; 5 Jur.N.S. 256; 7 W.R. 250; 44 E.R. 1371, L.JJ.; 39 Digest 90, *1068.*

Re Cousen, Ex parte Barff (1848), De G. 613; 17 L.J.Bcy. 22; 11 L.T.O.S. 474; 160 E.R. 967; 32 Digest (Repl.) 299, *425.*

Fox v. *Buckley* (1876), 3 Ch.D. 508; 25 W.R. 170, C.A.; 23 Digest (Repl.) 524, *5885.*

Re Hodgson, Hodgson v. *Fox* (1878), 9 Ch.D. 673; 48 L.J.Ch. 52; 27 W.R. 38; 4 Digest (Repl.) 453, *3970.*

Action by the plaintiff as mortgagee of a life interest in a legacy to recover sums due to her under the mortgage.

The testatrix, Mary Anne Cross died on Oct. 24, 1876, and by her will of Nov. 27, 1873, gave to the defendants Marsden and Thompson, whom she appointed executors, the sum of £1,000 on trusts to invest the same and pay the income thereof to the defendant Miss Mary Harvey for life. In May, 1877, the defendants Marsden and Thompson set apart the sum of £1,000 to meet the legacy and purchased £750 East India Railway Stock. In a letter from the executors' solicitors on May 28, 1877, Miss Harvey was informed that the realised stock had been purchased from the moneys set aside to meet the legacy, less expenses and legacy duty.

Thereafter, by an indenture of Oct. 17, 1877, Miss Harvey mortgaged her life interest in the legacy to the plaintiff Amelia Ballard and notice of the assignment was given to the executors' solicitors. However, some twenty years before, in 1857, the testatrix had taken a lease of 21 years of a house in Blackheath from Lord Ashburnham, with the usual covenants to repair. The lease was assigned to Miss Harvey, and a Miss Grainger jointly; the assignees covenanting to perform the covenants and to keep indemnified the testatrix and her executors from liability for breach of such covenants. Subsequently Miss Grainger assigned her

interest to Miss Harvey who remained in occupation of the premises until the expiration of the lease on Dec. 25, 1877. In September, 1877, Lord Ashburnham made a claim for dilapidations, later assessed at £324, on the executors which they paid out of the estate. The plaintiff as mortgagee of Miss Harvey's life interest in the legacy claimed the interest on the legacy. This the executors declined to pay, contending they should retain it, and apply it in repayment of the amount paid by them for dilapidations, since Miss Harvey was bound to keep them indemnified under her covenants in the assignment of the house.

Cookson, Q.C., and *Parkin* for the plaintiff.
North, Q.C., and *J. G. Wood* for the defendants.

FRY, J.—The plaintiff in this case seeks to recover the money due to her as mortgagee of the life interest of Mary Harvey in £1,000, bequeathed by Mary Ann Cross, and in the securities representing that sum. A sum of East India Railway stock has been set apart by the executors of Mrs. Cross's will to meet this legacy. It is material to observe that, before such setting apart Miss Harvey could not have recovered her legacy without administration of the estate of the testatrix, but since such setting apart she could have gone against the Indian Railway stock as a trust fund without interfering with the general estate. Similarly, had the investment in the Indian stock depreciated in value, she could not after such appropriation have gone against the general estate to make good her loss, while, had the stock improved, she and not the estate would have had the benefit of the rise.

The stock was a trust fund held by two executors for the purpose of meeting Miss Harvey's legacy. The executors, however, claim a right in priority to the plaintiff's mortgage to retain a sum of money due from Miss Harvey to the general estate of the testatrix. Lord Ashburnham's claim was first made on Sept. 28, 1877, and the amount due for dilapidations was assessed by three surveyors at £324 6s. 7d. on Feb. 18, 1878, which sum was paid by the executors out of the estate of the testatrix on Sept. 13, 1878, and the executors have since retained £131 8s. 1d. out of the dividends of the Indian Railway Stock, and claim to be entitled to retain or set off against the plaintiff's mortgage the whole of the £324 6s. 7d. The plaintiff had notice when she advanced the money of the claim made by Lord Ashburnham, so that she does not plead that she was a purchaser for value without notice, but merely puts in issue the question whether the executors have or have not the right to retain the amount necessary to satisfy the sum due to Lord Ashburnham out of the legacy of Miss Harvey.

I will consider the question first on principle. I can see no ground for such contention. When the executors set apart the legacy it ought to be considered as set apart so as to facilitate the dealing with it by the legatee for every purpose. Why, then, should Lord Ashburnham or any other creditor have a right to call upon the specific legatee to give this benefit to the general estate of the testatrix, after the executors, who were aware of the claims of Lord Ashburnham, thought fit to set the legacy apart? Secondly, are there any authorities in favour of the contention of the executors? There are two classes of cases on the subject which have been cited. The first class is where a testator has given a share of his residuary personal property to a person who has come under a liability to the testator; here the residuary legatee cannot take the legacy until he has satisfied the liability, for his share of the residue is only what remains after satisfying his liability to the testator. The second class of cases is those which are represented by *Priddy* v. *Rose* (1), where the benefit and liability arise under one and the same instrument. Here, to use the language of Sir William Grant in *Priddy* v. *Rose* (1), a man "cannot claim a benefit under a settlement without making good his part of it." That principle does not apply to this case in which Miss Harvey's liability is to the defendants Marsden and Thompson, as executors, but her right to the legacy

A is sustainable against them as trustees for her. I should be frustrating the intentions of all the parties if I were to direct this legacy, which has been set aside for her, to be applied according to the contention of the executors. The costs of the action must be paid by the executors, who have set up an unfounded claim.

Solicitors: *Sutton & Ommanney*; *T. N. Crosse.*

B [*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

C

WATSON *v.* GRAY

[CHANCERY DIVISION (Fry, J.), February 23, March 11, 1880]

D [Reported 14 Ch.D. 192; 49 L.J.Ch. 243; 42 L.T. 294; 44 J.P. 537; 28 W.R. 438]

Boundary—Party-wall—Adjoining owners tenants in common—Interference with wall by one owner—Building on wall—Right of other co-owner to remove.

Boundary—Party-wall—Meaning of and variations of the term.

E Where a wall between adjoining owners of premises is held by the two owners as tenants in common neither has a right to build on the wall or to do any other act interfering with the user of the wall or the top of it by the other. If one owner builds on the wall, the other owner may forcibly remove the building.

F A party-wall may mean a wall built on land belonging to the owners of adjoining lands in equal moieties as tenants in common; a wall divided into longitudinal halves, one half standing on the land of each of two adjoining owners; a wall belonging entirely to one of the adjoining owners subject to an easement of user enjoyed by the other adjoining owner; a wall longitudinally divided, each moiety being subject to an easement of user by the owner of the other moiety.

G **Notes.** Future dispositions to tenants in common are dealt with by s. 34 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 489).

Referred to: *Newton* v. *Huggins* (1906), 50 Sol. Jo. 617; *Mason* v. *Fulham Corpn.*, [1910] 1 K.B. 631.

As to party-walls, see 3 HALSBURY'S LAWS (3rd Edn.) 376 et seq.; and for cases see 7 DIGEST (Repl.) 303 et seq.

H Cases referred to:

(1) *Wiltshire* v. *Sidford* (1827), 8 B. & C. 259, n.; 1 Man. & Ry.K.B. 404; 6 L.J.O.S.K.B. 151; 108 E.R. 1040; 7 Digest (Repl.) 304, *233*.

(2) *Cubitt* v. *Porter* (1828), 8 B. & C. 257; 2 Man. & Ry.K.B. 267; 6 L.J.O.S.K.B. 306; 108 E.R. 1039; 7 Digest (Repl.) 303, *224*.

(3) *Matts* v. *Hawkins* (1813), 5 Taunt. 20; 128 E.R. 593; 7 Digest (Repl.) 303, *223*.

I (4) *Stedman* v. *Smith* (1857), 8 E. & B. 1; 26 L.J.Q.B. 314; 3 Jur.N.S. 1248; 120 E.R. 1; 7 Digest (Repl.) 305, *235*.

(5) *Wigford* v. *Gill* (1591), Cro. Eliz. 269; 78 E.R. 524; 7 Digest (Repl.) 310, *264*.

Also referred to in argument:

Weston v. *Arnold* (1873), 8 Ch. App. 1084; 43 L.J.Ch. 123; 22 W.R. 284, L.JJ.; 7 Digest (Repl.) 303, *227*.

Sheffield Improved Industrial and Provident Society v. *Jarvis*, [1871] W.N. 208; affirmed, [1872] W.N. 47, L.JJ.; 7 Digest (Repl.) 305, *240*.

Standard Bank of British South America (Africa) v. *Stokes* (1878), 9 Ch.D. 68; 47 L.J.Ch. 554; 38 L.T. 672; 43 J.P. 91; 26 W.R. 492; 7 Digest (Repl.) 304, *231.*

Wheeldon v. *Burrows* (1879), ante p. 669; 12 Ch.D. 31; 48 L.J.Ch. 853; 41 L.T. 327; 28 W.R. 196, C.A.; 19 Digest (Repl.) 48, *269.*

Suffield v. *Brown* (1864), 4 De G.J. & Sm. 185; 3 New Rep. 340; 33 L.J.Ch. 249; 9 L.T. 627; 10 Jur.N.S. 111; 12 W.R. 356; 46 E.R. 888, L.C.; 19 Digest (Repl.) 45, *238.*

Pyer v. *Carter* (1857), 1 H. & N. 916; 26 L.J.Ex. 258; 28 L.T.O.S. 371; 21 J.P. 247; 5 W.R. 371; 156 E.R. 1472; 19 Digest (Repl.) 43, *228.*

Action for damages for the removal of a piece of wall and an injunction to restrain the defendant from interfering with rebuilding it.

The plaintiff and defendant were neighbours. The plaintiff owned the freehold of No. 9, Queen's Terrace, Middlesborough. The defendant owned the freehold of No. 7, Queen's Terrace, which adjoined the plaintiff's premises. Between the plaintiff's and defendant's back yards there was a wall. The plaintiff's premises were conveyed to his predecessor in title by a deed of conveyance dated Sept. 15, 1855, from Joseph Pease, who was also the predecessor in title of the defendant. The conveyance contained the following declaration:

> "It is hereby agreed and declared by and between the said parties hereto that the north and south gables and walls of the said messuage or dwelling-house and hereditaments hereby conveyed shall be and remain party-walls."

A similar declaration was contained in the conveyance by Pease to the defendant of the latter's premises. The plaintiff having in January, 1879, erected a triangular wall on the wall between the plaintiff's and defendant's premises, which triangular wall was intended to form part of a shed to be built on the plaintiff's land, the defendant knocked it down with a hammer.

North, Q.C., and *Everitt* for the plaintiff.

J. E. Palmer for the defendant.

Cur. adv. vult.

Mar. 11, 1880. **FRY, J.,** described the premises and stated the circumstances, and continued: What were the rights of the plaintiff and defendant in the wall on which the triangular wall was erected? It is necessary to refer to the terms of the deed of Sept. 15, 1855. That conveyance, no doubt, would include the walls of the house. But there is an express agreement as to the wall dividing the plaintiff's premises from those of the defendant. [His Lordship read the declaration in the deed, and continued:] The question then arises, what is the meaning of "party-walls"? The term is rather a popular than a legal one. It appears to be used in four different senses. (i) As describing a wall erected on land belonging to the owners of adjoining lands in equal moieties as tenants in common, as the term was applied in *Wiltshire* v. *Sidford* (1), and in *Cubitt* v. *Porter* (2). (ii) Where the wall is divided into longitudinal halves, one half standing on the land of each of two adjoining owners, as in *Matts* v. *Hawkins* (3). (iii) As applied to a wall which belongs entirely to one of two owners of adjoining lands, but which is subject to an easement of user belonging to the other owner, as it is used in many Building Acts. (iv) As applied to a wall longitudinally divided, each moiety being subject to an easement of user by the owner of the other moiety. In the case of walls divided longitudinally, it has been held in *Cubitt* v. *Porter* (2) that there is a right in each owner to pare away the portion standing on his own land. So if one erects a wall upon his own land, and the land of his neighbour, and the neighbour pulls down the wall upon his land, and thereupon all the wall falleth down, this is lawful: *Wigford* v. *Gill* (5), Clrs. In the case of a wall held in common, there is the right of partition, as mentioned in the note to *Wiltshire* v. *Sidford* (1).

I am of opinion that the wall in this case belongs to the plaintiff and defendant as tenants in common. This seems to be the way in which party-walls are most

commonly held, and this view is supported by the declaration in the deed which I have read. The question then is whether the erection of the triangular wall on the party wall was within the plaintiff's rights. It must be remembered that this question is not the same as the question whether trespass can be brought. In *Cubitt* v. *Porter* (2), BAYLEY, J., says (8 B. & C. at p. 265):

> "One tenant in common has, upon that which is the subject-matter of the tenancy in common, laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have."

That is the precise remedy to which the defendant had recourse here. In *Stedman* v. *Smith* (4), the plaintiff and defendant occupied adjacent plots of ground divided by a wall, of which they were tenants in common. There was a shed in the defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. The defendant took the coping stones off the top of the wall, heightened the wall, replaced the coping stones on the wall, and built a wash-house contiguous to the walls, where the shed had stood, the roof of the wash-house occupying the whole width of the top of the wall, and he let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him. These facts were held to constitute an actual ouster of the plaintiff, and an actionable trespass. CROMPTON, J., says (8 E. & B. at p. 6):

> "You certainly had no longer the use of the same wall; you could not put flower pots on it, for instance. Suppose he had covered it with broken glass, so as to prevent your passing along it, as you were entitled to do."

And in his judgment the same judge says (ibid. at p. 7):

> "The plaintiff is excluded from the top of the wall; he might have wished to train fruit trees there, or to amuse himself by running along the top of the wall."

Here the defendant has been prevented in a similar manner from using the wall. It is clear that his rights have been interfered with, and I hold that the plaintiff is not entitled to any damages in respect of what he has done, and that no injunction to restrain him from doing so in future will be granted.

Judgment for the defendant.

Solicitors: *Edmund Peacopp*; *Hope & Co.*

Reported by FRANK EVANS, ESQ., *Barrister-at-Law.*]

Re HENLEY. Ex parte DIXON

[COURT OF APPEAL (James, L.J., Brett, J.A., and Baggallay, J.A.), November 30, 1876]

[Reported 4 Ch.D. 133; 46 L.J.Bcy. 20; 35 L.T. 644; 25 W.R. 105]

Agent—Mercantile agent—Limited authority—No sale in agent's name—No disclosure to buyer—Buyer dealing with agent as principal—Debt due from agent to buyer—Set-off against claim by principal for purchase price.

Although a mercantile agent is directed not to sell goods in his own name, but to disclose the agency, in the absence of disclosure to a buyer of the agent's limitation of authority, a buyer who deals with the agent as principal is not deprived of his right to set off a debt due from the agent to the buyer against a claim by the principal for goods purchased.

Notes. Applied: *Thackrah* v. *Ferguson* (1877), 25 W.R. 307. Considered: *Stevens* v. *Biller* (1883), 25 Ch.D. 31. Referred to: *Maspons y Hermano* v. *Mildred Goyeneche & Co.* (1882), 9 Q.B.D. 530.

As to the implied authority of a factor to sell goods in his own name, see 1 HALSBURY'S LAWS (3rd Edn.) 167; and for cases see 1 DIGEST (Repl.) 663 et seq.

Case referred to:

(1) *Semenza* v. *Brinsley* (1865), 18 C.B.N.S. 467; 34 L.J.C.P. 161; 12 L.T. 265; 11 Jur.N.S. 409; 13 W.R. 634; 144 E.R. 526; 1 Digest (Repl.) 664, *2323*.

Also referred to in argument:

George v. *Clagett* (1797), 7 Term Rep. 359; Peake, Add. Cas. 131; 2 Esp. 557; 101 E.R. 1019; 1 Digest (Repl.) 663, *2318*.

Baring v. *Corrie* (1818), 2 B. & Ald. 137; 106 E.R. 317; 1 Digest (Repl.) 665, *2331*.

Borries v. *Imperial Ottoman Bank* (1873), L.R. 9 C.P. 38; 43 L.J.C.P. 3; 29 L.T. 689; 22 W.R. 92; 1 Digest (Repl.) 664, *2324*.

Appeal by the principal, William Dixon, from a decision of Mr. Registrar SPRING RICE, sitting as Chief Judge in Bankruptcy, rejecting the principal's proof against the estate of Henley for the purchase price of iron, on the ground that there was a set-off against a larger sum due on a private account from the agent, M'Arthur, to the respondent, the trustee of the Henley estate.

In 1872, William M'Arthur, who carried on business as an iron merchant in London under the firm of M'Arthur & Co., was appointed sole agent in London for the sale of Calder and Govan pig iron, manufactured by Messrs. William Dixon Ltd., of Glasgow, who forwarded large quantities of iron to him for sale. One of the terms of his appointment was that in case of payment by bills, the agency for Messrs. William Dixon should be disclosed on the bills. During 1874, M'Arthur made several sales of their iron to W. T. Henley, who carried on business as a telegraph engineer and contractor at Woolwich. Henley's orders were sent to M'Arthur as if he had been principal, and the invoices for the goods were made out in M'Arthur's own name (in the name of M'Arthur & Co.), as if he had been principal. But in the bills of exchange which he drew upon Henley for the price, M'Arthur & Co.'s signature was accompanied by the words "Agents for W. Dixon Ltd., Calder and Govan Iron Works, Glasgow," which words were stamped upon the bills in pale blue printed letters by means of a stamping machine, but so faintly as to be hardly legible, the more so as the signature of M'Arthur & Co. was written over the words. On Jan. 25, 1875, Henley sent an order to M'Arthur for thirty tons of No. 1 Calder pig iron at £5 per ton, and thirty tons No. 3 Calder pig iron at £4 9s. 6d. per ton. On Jan. 28, 1875, M'Arthur forwarded the goods and sent an invoice of them headed "W. T. Henley, Esq., in account with Wm. M'Arthur & Co." The price amounted to £286 5s. 6d., and at the foot of

A the invoice were the words "Payment by cash on Feb. 10, 1875, less 2½ per cent." On Feb. 10, 1875, M'Arthur sent to Henley for his acceptance a four months' bill for £286 5s. 6d., with the words "Agents for W. Dixon, Ltd., Calder and Govan Iron Works, Glasgow," very faintly stamped upon it, and the signature "Wm. M'Arthur & Co., per J. Mackenzie," written over the stamped words. Henley refused to accept this bill, claiming to set-off against the price a larger debt which was due B to him from M'Arthur on a private account.

In March, 1875, Henley filed a petition for liquidation of his affairs by arrangement, and in the following month M'Arthur filed a similar petition. Messrs. W. Dixon claimed to prove against Henley's estate for £286 5s. 6d., the price of the iron purchased by him in January, 1875. The trustee rejected the proof on the ground that Henley had dealt with M'Arthur as principal, and that there was a C right of set-off against the larger debt due from M'Arthur to Henley. In support of the claim of Messrs. W. Dixon, M'Arthur and his cashier deposed that Henley had no authority from M'Arthur to place the purchase money for the iron to M'Arthur's credit in the private account between him and Henley, that he must have known from the words stamped on the bills sent him for acceptance, that M'Arthur acted in the sale as agent for Messrs. W. Dixon, whose property the iron D was, and that it was well known in the trade that M'Arthur was the sole agent for Messrs. W. Dixon's Calder and Govan iron. And Messrs. W. Dixon's manager deposed that M'Arthur never had any authority from Messrs. W. Dixon to sell the Calder iron as a principal, and that every pig was branded with the word "Calder," and that it was well known in the trade that iron so branded was made solely by Messrs. W. Dixon. Henley deposed that he always believed he was dealing E with M'Arthur as a principal, and that he never heard anything to the contrary till Feb. 22, 1875, and he was not cross-examined on this statement. Henley's manager deposed that certain Calder pig iron which was ordered in February, 1875, and supplied, but afterwards returned, was only ordered with a view of reducing the unsecured balance owing from M'Arthur to Henley on their general account.

F The registrar held that the trustee of Henley's estate was entitled to the set-off, and rejected Messrs. W. Dixon's proof. The principal, Messrs. W. Dixon, appealed.

De Gex, Q.C., and *Bagley* for the principal.

Hemming, Q.C., and *Jeune* for the trustee in Henley's liquidation, were not called on to argue.

G **JAMES, L.J.**—I am of opinion that the Registrar's order in this case ought to be affirmed. It seems to me that every one of the requisites mentioned by WILLES, J., in *Semenza* v. *Brinsley* (1) has been proved. That is to say, according to the ordinary mode of dealing of factors, M'Arthur sold the goods in his own name and as his own goods. Henley swears and Henley's agent swears (and they have never been cross-examined) that he dealt with M'Arthur as principal, and in the H belief that he was the principal, and never had any doubt upon the subject until Feb. 22, 1875. The only evidence adduced against that is—first, a private communication between the principals and the agent. That, of course, cannot limit the authority of the agent, who is authorised to hold himself out to the world as principal. Secondly, the forms of certain bills of exchange are relied upon. But when I come to look at them they amount to nothing whatever, because although I there is something printed on them as to agency, that printed matter is so carefully written over with ink as to prevent anybody from seeing it at first sight—so carefully written over that I had some difficulty myself in seeing what the meaning of the printed words was. Then the bills themselves are endorsed by M'Arthur as principal, he thereby making himself liable upon them to anyone into whose hands they might come as endorsees. Upon that first point I am satisfied that the requisites mentioned in that judgment of WILLES, J., in *Semenza* v. *Brinsley* (1), have been fully complied with. Then as to the set-off, the registrar has found as a fact upon the evidence before him, which he believed, that there was nothing sufficient

to displace the positive affidavit that there was an actual debt due from M'Arthur and Henley before Feb. 22, 1875, when the notice reached him that the goods really belonged to some one else. In my opinion the appeal ought to be dismissed with costs.

BAGGALLAY, J.A.—I am of the same opinion.

BRETT, J.A.—I am of the same opinion. The first point in this case arises upon the assumption that there is a debt due from Henley, the agent, to the principal, Dixon & Co., the alleged creditors. It is contended that even assuming that to be so, the rule laid down by WILLES, J., in *Semenza* v. *Brinsley* (1) is not fulfilled, on two grounds. First of all, it was said that the agent was not a factor and a limitation of the definition of a factor was suggested which, I confess, I have never before heard of. The true definition of a factor was, as I have always thought, that which is laid down in SMITH'S MERCANTILE LAW (8th Edn. at p. 106), where it is said:

> "There are two extensive classes of mercantile agents, viz., factors who are entrusted with the possession as well as the disposal of property, and brokers who are employed to contract about it without being put into possession."

As for limiting that definition by a supposition that factors are only entrusted with goods sent from abroad, that is a limitation which I never before heard of, and which I think must be rejected.

M'Arthur, then, was a factor, that is to say, he was a person entrusted with the possession as well as the disposal of the property. WILLES, J., who had the greatest experience in mercantile law that any man could have, says in *Semenza* v. *Brinsley* (1), that it is usual for factors (that is to say persons who are so entrusted with goods) to sell the goods in their own name. Another rule of law is this, that the question of the extent of an agent's authority as between himself and third parties is to be measured by the extent of his usual employment. That being so, the very fact of entrusting your goods to a man as a factor with a right to sell them, is prima facie an authority from you to him to sell them in his own name. Therefore, there being no limitation of that authority as shown here to the person who was dealing with the agent, that is sufficient evidence of an authority to the agent to sell the goods in his own name as principal with the consent of the person who had entrusted him with the goods. That point, therefore, is made out. It is true that WILLES, J., in *Semenza* v. *Brinsley* (1) mentioned as one of the necessary things to enable the debtor to set off the agent's debt against the principal, that the sale of goods by the agent as his own must have been with the authority of the principal, but that was because he was dealing with a demurrer, and at the end of the judgment he himself said it was a great pity that the parties did not go on and try the facts. And if the facts had been tried, the moment WILLES, J., had found that the agent was entrusted with the goods as a factor he would have held that that was of itself an authority given to him by the principal to sell in his own name, so far as concerned anybody to whom no limitation of that authority was disclosed. Therefore, that point is made out that the sale in the agent's own name was with the authority of the principal.

Then it is said that the person dealing with the agent must be shown to have believed that he was the principal in the transaction. In the present case he swears that he did believe that. But it is suggested, to the contrary, that the bills of exchange in the former transactions must, upon their face, have shown him that the agent was dealing merely as an agent. If the bills had in fact shown that he was dealing as an agent, I should have thought then that the point was a good one. But fortunately we have looked at the original documents, and the moment the original documents are shown we see that the decision of the Registrar ought to be supported, because, although it is alleged that the bills on their face do show that the drawer was an agent, yet when you look at them you see that the words which are relied upon are in such a form, they are printed so faintly, and are so

written over, that to say the purchaser must have had knowledge of the fact of agency from seeing the bills, would be wrong. At all events we cannot say the Registrar was wrong in finding that Henley's oath is true; there is nothing on the face of the bills, to show us that his oath is untrue. Therefore, so far as the law is concerned, the case is brought within the rule laid down by WILLES, J., in *Semenza* v. *Brinsley* (1). That, however, would be nothing, if there was practically no set-off. But there, again, the Registrar has found on the evidence that there was a set-off, and there is nothing now brought before the court to show that the decision of the Registrar was wrong in that respect.

Appeal dismissed.

Solicitors: *Cobbold & Woolley*; *Gedge, Kirby & Millett.*

[*Reported by* H. PEAT, ESQ., *Barrister-at-Law.*]

IRVINE & CO. *v.* WATSON & SONS

[COURT OF APPEAL (Bramwell, Baggallay and Brett, L.JJ.), June 11, 1880]

[Reported 5 Q.B.D. 414; 49 L.J.Q.B. 531; 42 L.T. 800]

Agent—Principal—Discharge of principal—Purchase by agent of goods for unnamed principal—Payment of agent by principal—Non-payment of seller by agent—Liability of principal to seller.

Where a principal has bona fide paid an agent whom he has employed to buy goods for him at a time when the seller was giving credit to the agent believing him to be a principal, the seller cannot recover the price of the goods from the undisclosed principal. If, however, at the time of dealing, the seller was informed that goods were being bought for an unnamed principal, then, even after the principal has paid the agent, the seller may recover from the undisclosed principal unless the principal has been reasonably led to infer that the agent has paid the purchase price or that the seller elects to look to the agent alone for payment.

On Mar. 10, 1879, the defendants gave C. an order to buy palm oil, and on Mar. 12, C. purchased the oil from the plaintiffs, stating that it was for a principal in the country without naming him. Part of the oil was delivered on Mar. 13 and the remainder on Mar. 15, 1879, when the defendants paid C. for the oil by their acceptances. On Mar. 18, and again on Mar. 25, the plaintiffs applied, without effect, to C. for payment. On Mar. 27, 1879, C. stopped payment and on Mar. 28, 1879, the plaintiffs applied to the defendants for payment of the price of the oil. The defendants repudiated liability on the ground that before the plaintiffs' claim they had paid C.

Held: no such delay had intervened since the purchase of the oil to lead the defendants reasonably to infer that the plaintiffs had settled with C. or that they looked to C. alone, and, therefore, the defendants were not discharged by their payment to C., and the plaintiffs were entitled to recover.

Notes. Applied: *Davison* v. *Donaldson* (1882), 9 Q.B.D. 623. Referred to: *Maspons y Hermano* v. *Mildred Goyeneche & Co.* (1882), 9 Q.B.D. 530.

As to contracts made by the agent and when the principal is discharged, see 1 HALSBURY'S LAWS (3rd Edn.) 219 et seq., and for cases see 1 DIGEST (Repl.) 677 et seq.

Cases referred to:

(1) *Thomson* v. *Davenport*, *Fynney* v. *Pontigny*, *Davenport* v. *Thomson* (1829), 9 B. & C. 78; Dan. & Ll. 278; 4 Man. & Ry.K.B. 110; 7 L.J.O.S.K.B. 134; 109 E.R. 30; 1 Digest (Repl.) 669, *2352*.

(2) *Heald* v. *Kenworthy* (1855), 10 Exch. 739; 24 L.J.Ex. 76; 3 C.L.R. 612; 156 E.R. 638; 1 Digest (Repl.) 677, *2397*.

(3) *Armstrong* v. *Stokes* (1872), L.R. 7 Q.B. 598; 41 L.J.Q.B. 253; 26 L.T. 872; 21 W.R. 52; 1 Digest (Repl.) 677, *2399*.

(4) *Smyth* (*Smith*) v. *Anderson* (1849), 7 C.B. 21; 18 L.J.C.P. 109; 12 L.T.O.S. 450; 13 Jur. 211; 137 E.R. 9; 1 Digest (Repl.) 678, *2404*.

Also referred to in argument:

Smethurst v. *Mitchell* (1859), 1 E. & E. 622; 28 L.J.Q.B. 241; 33 L.T.O.S. 9; 5 Jur.N.S. 978; 7 W.R. 226; 120 E.R. 1043; 1 Digest (Repl.) 671, *2365*.

Appeal by the defendants from a decision of BOWEN, J., on further consideration, giving judgment for the plaintiffs in an action to recover from the defendants the price of eleven casks of palm oil bought for the defendants by Conning & Co., as brokers, who told the plaintiffs they wanted the oil for a principal.

The plaintiffs were merchants in business at Liverpool and the defendants were merchants in business at Leeds. On Mar. 10, 1879, the defendants gave Conning & Co. an order for eleven casks of palm oil. The contract note was as follows:

"Mar. 12, 1879. Messrs. Conning & Co. We have this day sold you the following [specified] goods. Customary allowances and public sale conditions; payment cash, or before delivery if required, allowing 2½ per cent. discount. Per pro [the plaintiffs]. W. Geikie".

The public sale conditions provided that "brokers purchasing shall be responsible as principals" and "payments to be made as at present customary and if required before delivery."

Delivery of eight casks was given by the plaintiffs to Conning & Co. on Mar. 13, 1879, and the remainder on Mar. 15, and the defendants paid Conning & Co. for the oil by their acceptances received on Mar. 17, 1879, and discounted on the same day. About Mar. 18, and again about Mar. 25, 1879, the plaintiffs applied, without effect, to Conning & Co. On Mar. 27, 1879, Conning & Co. stopped payment and on Mar. 28, 1879, the plaintiffs, for the first time, applied to the defendants for payment. The defendants replied that they had paid Conning & Co. and repudiated all liability and maintained that even if Conning & Co. were agents and brokers of the defendants and effected the purchase as brokers and agents, the plaintiffs were precluded from suing the defendants, as undisclosed principals, for the price, as the defendants had in the meantime and before any claim was made paid Conning & Co. for the goods in acceptances discounted by Conning & Co.

Gully, *Q.C.*, and *Crompton* for the defendants.

W. R. Kennedy (*Sir Farrer Herschell* with him) for the plaintiffs.

BRAMWELL, L.J.—I think this judgment ought to be affirmed. The defendants gave Conning & Co. an order to buy certain goods for them, and Conning & Co., in pursuance of this order, bought from the plaintiffs. The plaintiffs sold the goods by a written contract, on the face of which Conning & Co. were the purchasers; but the plaintiffs knew that Conning & Co. were agents. The plaintiffs, therefore, knew that they had a remedy against two distinct persons, that is, against Conning & Co. and against some other person, the principal, who was then unknown to them. The defendants knew that Conning & Co. bought as brokers; therefore, they knew that the seller had a remedy against themselves alone, if their names had been given by the brokers, or that, as the fact was, the seller had a remedy against them and against the brokers also. Then acceptances were given by the defendants to the brokers in anticipation of a debt which the brokers would have to discharge when the goods were delivered. In my opinion it is impossible to say that the defendants were discharged. The only way in which they could be

A said to be discharged would be by the plaintiffs misleading the defendants. But the plaintiffs did not mislead the defendants. The stipulation as to payment was for the benefit of the plaintiffs, and they could waive it. If there were a practice always to enforce such a stipulation, perhaps the defendants might be fairly entitled to complain of the plaintiffs not having done so. But this is not so in this case, for there is no such practice. It is enough to state this to show that the defen-
B dants' contention cannot be maintained.

Then as to the authorities. I cannot take the language used by LORD TENTERDEN, C.J., and BAYLEY, J., in *Thomson* v. *Davenport* (1) literally; but I think it must be taken, not as having been overruled or qualified, but as having been uttered with an intention the same as that of PARKE, B., in delivering judgment in *Heald* v. *Kenworthy* (2). Taking the words literally, I think the view of PARKE, B., is
C preferable, where he says (10 Exch. at p. 746):

> "If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that
D effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so. But I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position."

E One word as to *Armstrong* v. *Stokes* (3). That was a very remarkable case. It seems as if the court there were not obliged to hold that J. and O. Ryder had authority to bind the defendants, and on the facts it must be taken that J. and O. Ryder there were not mere agents of the defendants, but a sort of intermediate parties, and in that way there is a difference between that case and the present. BLACKBURN, J., in delivering judgment in that case says (L.R. 7 Q.B. at pp. 610,
F 611):

> "We find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker who avowedly acts for a principal (though not necessarily named), and confining ourselves to the present case, which is one in which, to borrow LORD TENTERDEN's phrase in *Thomson* v. *Davenport* (1), the plaintiff
G sold the goods to J. and O. Ryder & Co., 'supposing at the time of the contract he was dealing with a principal,' we think such an exception is established. . . . We confine our decision to the case before us, where the defendants, after the contract was made, and in consequence of it, bona fide and without moral blame, paid J. and O. Ryder at a time when the plaintiff still gave sole credit to J. and O. Ryder, and knew of no one else. We think that after that it was
H too late for the plaintiff to come upon the defendants."

That is not the case here, for when payment was made, although the plaintiffs did not know of these particular defendants, they knew that there was some one else on whose behalf Conning & Co. had bought. From reading the above passage from the judgment in *Armstrong* v. *Stokes* (3) one would think that the rights
I and duties of a buyer depended upon what the vendor knew; but how can the buyer have different rights according to whether the seller knew that there was a principal or not? Here the defendants employed brokers to buy, and they knew that those brokers had pledged their credit to the sellers, whoever they might be, and that there would be a claim on them, the defendants, unless the brokers paid for the goods, and, knowing this, they gave the acceptances to the brokers at their own peril.

BAGGALLAY, L.J.—I am of the same opinion. Before BOWEN, J., in the court below, there were two questions for consideration, first, whether Conning &

Co. had authority to bind the defendants; and, secondly, whether the defendants have since been exonerated from their liability. No question now arises on the first point. On Mar. 15, 1879, a transaction took place, which is relied upon on behalf of the defendants, the delivery of bills of exchange by the defendants to the brokers. I very much doubt whether that was a payment, but I will treat it as a payment for the purpose of dealing with the arguments.

If the law were literally as it is laid down in *Thomson* v. *Davenport* (1), the defendants might be entitled to succeed, for there LORD TENTERDEN, C.J., says (9 B. & C. at p. 86) that the rule of law enabling a person who sells to an agent to recover from an undisclosed principal is

> "subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal";

and BAYLEY, J., imposes a similar qualification. But in these judgments the case of a payment to the agent, or an alteration of the account, is rather indicated as an exception, and the case then before the court did not come within the exception so indicated; therefore, what was said on this point amounted merely to dicta, and was not the ground of the decision. In other cases these general terms have been dissented from, and if it were necessary to give an opinion I should dissent from them, for it seems to me that they want qualification. In *Heald* v. *Kenworthy* (2) PARKE, B., qualifies them; I think his statement includes acts of omission as well as of commission. This qualification is stated by BOWEN, J., in his judgment in the court below, where he says:

> "The principal, such is the reasoning of the Court of Exchequer, has originally authorised his agent to create a debt, and the principal cannot be discharged from the debt unless the seller has estopped himself by his conduct from enforcing it against him."

A very long delay in applying for payment may lead to the inference that the broker has discharged the debt, but that is not so here, for the payment, if it was a payment, took place on Mar. 15, and the plaintiffs applied to the defendants for payment on Mar. 28, 1879. If the limit imposed by PARKE, B., on the dicta of LORD TENTERDEN, C.J., and BAYLEY, J., is right, there was no payment here which could relieve the defendants from their liability to pay the plaintiffs.

Reliance has been placed on *Armstrong* v. *Stokes* (3) as limiting the rights of an undisclosed principal. I think the effect of the language used in the judgment in that case goes beyond what was decided, and if that is not so I should dissent from that decision; but that is not the effect of the decision, for it depended on the special circumstances of the case, as BOWEN, J., in the court below, shows in his judgment, where he says

> "It is obvious that when, as in *Armstrong* v. *Stokes* (3), the seller deals exclusively with the agent as principal, the seller sells knowing that if his buyer turns out to have a principal behind him, the principal will have at all events been justified in assuming that the seller deals simply with the agent"

That, no doubt, is the view there adopted. Therefore, having come to this conclusion on the facts, I think I am not saying anything contrary to decided cases, unless it is to the rule stated in the passages which have been referred to in the judgments in *Thomson* v. *Davenport* (1) which is not necessary to the decision; I do not agree with it, and I, therefore, agree that in this case the plaintiffs are entitled to recover, and the judgment ought to be affirmed.

BRETT, L.J.—In this case the circumstances were such that Conning & Co. never were the agents of the plaintiffs, but were the agents only of the defendants. It is contended, on behalf of the defendants, that on Mar. 15, 1879, by delivering bills of exchange to Conning & Co., they paid Conning & Co. for the goods in question, and by so doing exonerated themselves from liability to the plaintiffs. It cannot be doubted that, unless this case comes within some exception to the

A general rule, payment by the defendants to Conning & Co., who were solely their own agents, cannot be a good payment to the plaintiffs.

The case, however, is said to be within the doctrine laid down in *Thomson* v. *Davenport* (1); but there the question raised was not a question whether there was a good payment, but whether the plaintiff could sue the defendant at all. LORD TENTERDEN, C.J., in delivering judgment in that case, said (9 B. & C. at B p. 86):

> "I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real C principal."

That was all that it was necessary to say, but he went on dealing with a matter which it was not necessary to deal with,

> "subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal."

D And in the same case BAYLEY, J., said (ibid. at p. 88):

> "Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he may do so. If he does make himself personally liable it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be E prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable."

If he had stopped here, he would have said all that was necessary for the purpose of laying down the rule which was applicable to the case then before the court; but he went on:

> "If the principal has paid the agent, or if the state of accounts between the F agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

But is it fair to read judgments, when the judges' attention was fixed on the former part of the proposition which they were stating, in such a manner as to tie G the judges down to the very words they used? BAYLEY, J., was there dealing with an equity.

In the case in which MAULE, J., delivered judgment, *Smyth* v. *Anderson* (4), the same question arose as in *Thomson* v. *Davenport* (1), and not whether there was a good payment. But in *Heald* v. *Kenworthy* (2) it became necessary to state the qualification accurately, and PARKE, B., said in effect that it was an equity in H the passage from his judgment which had been read by BRAMWELL, L.J., and also where he uses these expressions (10 Exch. at p. 747):

> "I think that there is no authority for saying that a payment made to the agent, as in this case, precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement I has been made with the agent."

If the seller has done that it raises an equity against him. PARKE, B., in that judgment, goes to the foundation of the doctrine stated by LORD TENTERDEN, C.J., and BAYLEY, J., and puts the true limitation on it. If the matter stood thus on those authorities I should have no doubt that the limitation of PARKE, B. (who was supported by POLLOCK, C.B., and ALDERSON, B.), was a true proposition of law; but it is said to have been questioned or overruled in *Armstrong* v. *Stokes* (3). I doubt very much whether BLACKBURN, J., and the other judges who were parties to the judgment in that case, intended to overrule the doctrine put forward by

PARKE, B.; I think they intended to deal with *Armstrong* v. *Stokes* (3) as a separate case, and not within the limitation; they noticed the business position of Manchester commission merchants.

It comes to this, that where an agent deals with any person believing him to be a sole principal, and the nature of the business is such that the seller would so deal in the ordinary course, payment to the seller will discharge the buyer, although it may afterwards turn out that the seller was only an agent. That is the utmost to which the doctrine can be carried. It may be that the meaning of BLACKBURN, J., was this, that, having to apply the doctrine, he found that in the very authority that established it there was a qualification in large terms, and, sitting in the Court of Queen's Bench, he thought that he had no right to overrule that qualification, and must give some application to it, and wished to confine it to the case before him, and not to apply it to the case of a broker. If he meant that, we reserve to ourselves the right to reconsider what was assumed in *Armstrong* v. *Stokes* (3), if at any time the point should arise. Adopting the qualification of the general rule as to the rights of a seller stated by PARKE, B., which I think is right, this case is not within that qualification. If there were any conduct on the part of the plaintiffs misleading the defendants it would be open to the defendants to raise it; but the only thing the plaintiffs did was not to insist on their strict right, which would be an unusual thing to do; I think, therefore, that there was no laches on the part of the plaintiffs. For these reasons I am of opinion that the judgment ought to be affirmed.

BAGGALLAY, L.J.—With regard to *Thomson* v. *Davenport* (1), I wish to add that LITTLEDALE, J., confined his judgment in that case to the general principle of law, and did not refer to the qualification suggested by LORD TENTERDEN, C.J., and BAYLEY, J., while PARKE, J., took no part in the decision, having been concerned as counsel in the case.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, for *Bateson*, Liverpool; *Clarke & Son*, for *Dunning & Kay*, Leeds.

[*Reported by* P. B. HUTCHINS, ESQ., *Barrister-at-Law.*]

A

K——. *v.* RASCHEN AND ANOTHER

[Exchequer Division (Cleasby B., and Hawkins, J.), January 22, 1878]

[Reported 38 L.T. 38; 42 J.P. 264]

B *Master and Servant—Contract of service—Termination—Illness of servant—Illness due to misconduct before date of contract—Possibility of illness not then known.*

By an agreement, dated June 27, 1877, the plaintiff was employed as a clerk by the defendants at a salary of £120 a year, the employment to be determinable on either side by one month's notice. The plaintiff commenced working on July 2, 1877, and continued until Aug. 1, when, owing to an illness which was C due to misconduct on his part before he entered the defendants' employment, he was absent till Sept. 2, 1877, when he presented himself for work. The defendants refused to employ him, having in the meantime given him notice terminating his employment by letter dated Aug. 20, 1877. The plaintiff claimed £16 13s. 4d. as wages from Aug. 1 to Sept. 20, 1877.

D **Held:** although the plaintiff's illness originated by his own misconduct, when he became the defendants' servant he did not know that he would become ill and incapacitated for work, and, therefore, he was entitled to the sum claimed.

Notes. Referred to: *Loat* v. *Maple* (1903), 88 L.T. 288; *Niblett* v. *Midland Rail. Co.*, [1904–7] All E.R.Rep. 248.

As to temporary incapacity of servant through illness, see 25 Halsbury's Laws E (3rd Edn.) 477; and for cases see 34 Digest (Repl.) 99 et seq.

Case referred to:

(1) *Cuckson* v. *Stones* (1858), 1 E. & E. 248; 28 L.J.Q.B. 25; 32 L.T.O.S. 242; 5 Jur.N.S. 337; 7 W.R. 134; 120 E.R. 902; 34 Digest (Repl.) 81, *530.*

Also referred to in argument:

F *Spotswood* v. *Barrow* (1850), 5 Exch. 110; 19 L.J.Ex. 226; 14 L.T.O.S. 446; 155 E.R. 48; 34 Digest (Repl.) 87, *580.*

Boast v. *Firth* (1868), L.R. 4 C.P. 1; 38 L.J.C.P. 1; 19 L.T. 264; 17 W.R. 29; 34 Digest (Repl.) 325, *2453.*

De Bernardy v. *Harding* (1853), 8 Exch. 822; 22 L.J.Ex. 340; 21 L.T.O.S. 158; 1 W.R. 415; 1 C.L.R. 884; 155 E.R. 1586; 12 Digest (Repl.) 371, *2933.*

Chandler v. *Grieves* (1792), 2 Hy. Bl. 606, n.; 126 E.R. 730; 41 Digest 236, *763.*

G *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242.*

Cort v. *Ambergate, Etc., Rail. Co.* (1851), 17 Q.B. 127; 20 L.J.Q.B. 460; 17 L.T.O.S. 179; 15 Jur. 877; 117 E.R. 1229; 12 Digest (Repl.) 490, *3682.*

H **Appeal** by the plaintiff from a decision of the Common Serjeant of London, sitting in the Lord Mayor's Court, in an action to recover £16 13s. 4d. from the defendants for wages due from Aug. 1 to Sept. 20, 1877, under a contract of service, dated June 27, 1877, at a salary of £120 a year, terminable on either side by one month's notice. The plaintiff was non-suited, but he subsequently obtained a rule calling on the defendants to show cause why judgment should not be entered I for him.

The plaintiff had been employed under an agreement dated June 27, 1877, at a salary of £120, subject to increase in events which did not occur, and employment was to be determinable on either side by one month's notice. The plaintiff served under the contract from July 2 to July 30, 1877, when he was unwell. He obtained the permission of his employers to absent himself from work until Aug. 6, 1877. He remained away, however, and was under medical treatment, and was unable to return to his employment until Sept. 2, 1877, when he returned and tendered his services, which the defendants refused; and they had in the meantime, on

Aug. 20, 1877, given him notice, by letter of that date, terminating the employment, and stating that, as they could not do without a clerk to fill his place, they had engaged another person. They refused to pay him the amount claimed by him for wages during his absence, on the ground that he had, by his own misconduct, rendered himself incapable of performing his duties, and, therefore, was not entitled to any remuneration. The illness under which the plaintiff was suffering arose from venereal disease.

Reed showed cause against the rule.
Glyn in support.

CLEASBY, B.—Some little difficulty has arisen here owing to the form of the pleading. The plaintiff in this case entered into the service of the defendants and was employed by them under an agreement dated June 27, 1877, by which he was to be paid a salary of £120 per annum, and by the agreement he was to have one month's notice in case of dismissal. The plaintiff entered upon his duties on July 2, 1877, and there is nothing to show that, at the time he entered into the agreement and subsequently thereto upon his duties under it, he concealed from his employers anything which he ought to have disclosed, or that he knew that he would not be able to perform his duties in the defendants' service. Therefore, the contract is not tainted by a knowledge on his part of any circumstances which would render him unable to perform it. After a month's service illness supervened, and the plaintiff was unable to continue his attendance at the defendants' office. The question is whether or not illness is such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it.

I think, prima facie, illness is to be attributed to the act of God, and we are not justified in going back for any length of time, and entering into an investigation as to what may have been the cause of it. We ought not, I think, to extend the effect of disability arising from illness. The illness which rendered him unable to perform his duties for a time came upon him unexpectedly, and we cannot go back to first causes and into the question of how it arose. The maxim causa proxima non remota spectatur is applicable here. As to how precisely the disease arose, there may be various different opinions, and there might be the greatest uncertainty as to the cause or matter which originally brought it about. It was a misfortune which could not have been foreseen at the time the contract was made, and the plaintiff is entitled to say that it is a reasonable excuse for his absence from his duties, and that our judgment should be given for the plaintiff, setting aside the nonsuit, and entering the verdict for him for the £16 13s. 4d., the amount of damages claimed by him in this action.

HAWKINS, J.—I am of the same opinion. If the plaintiff had been aware, at the time of the making of the contract, that he would be incapacitated by illness from performing his duties, I am not prepared to say that he could recover in this action. But there is nothing to show that he knew anything of the illness which he subsequently suffered from until after the agreement had been entered into. There was no cross-examination on that point, and no question was put to him, and there was no evidence to show that he had any suspicion of the misfortune which subsequently overtook him, or that he was aware that the seeds of the disease existed in him at that time. I base my opinion upon that fact, and I think, under these circumstances, that he is entitled to the amount claimed.

The misconduct alleged in the pleadings is his staying away without a reasonable excuse. How can it be called misconduct if a man stays away, on the advice of a doctor, in order to get himself cured? The third plea is similar to the one set up in *Cuckson* v. *Stones* (1); and as to that Lord Campbell, C.J., says (1 E. & E. at p. 255):

"We think that the gist of the plea is that the plaintiff, during the time in question, was not ready and willing to render, and did not render, any service, in the sense that he voluntarily and wilfully refused or omitted to serve. If so,

A we think he could not claim the wages to be paid to him in consideration of his service."

In the present case, the plaintiff did not voluntarily and wilfully refuse to serve, but was compelled to absent himself by an illness which came upon him during the time of service, and which was not the result of any misconduct that occurred after the agreement was made. As a matter of fact, I conclude that the malady was B contracted before he entered into the defendants' service; and he did not improperly obtain admission there. At the time that he entered into the contract, which he did honestly, he neither believed nor knew that he would not be able to fulfil it. In my opinion, therefore, the plaintiff is entitled to have the verdict for the amount claimed entered for him.

Appeal allowed.

C Solicitors: *Anthony Carr & Son*; *Reed & Lovell.*

[*Reported by* H. LEIGH, ESQ., and R. RINGWOOD, ESQ., *Barristers-at-Law.*]

D

Re RAGGETT. Ex parte WILLIAMS

E [COURT OF APPEAL (James, Cotton and Lush, L.JJ.), November 25, 1880]

[Reported 16 Ch.D. 117; 50 L.J.Ch. 187; 44 L.T. 4; 29 W.R. 314]

Mortgage—Consolidation—Mortgagee of two mortgage debts—Security for one debt ceasing to exist—Mortgage by three persons—Consolidation with mortgage by two of them in trust for the three.

Two partners of a firm made an equitable mortgage of a leasehold house to F W. to secure a loan, and later took in a third partner who thereupon acquired a share in the equity of redemption. Subsequently, the firm mortgaged a second leasehold house to W. to secure another loan. The firm failed, the partners became bankrupt, and the landlord took possession of the first house under a forfeiture clause in the lease. W. claimed in the bankruptcy of the partners to consolidate his two mortgage debts, so that the second mortgage should G not be redeemed until payment of both debts.

Held: a mortgagee could not consolidate two mortgage debts where the security for one had ceased to exist, and, therefore, W. had no right to consolidate the debts.

Per Curiam: There is no authority or principle which enables a mortgagee to consolidate a mortgage by three persons with one by two of them in trust H for the three of them, there being no reference in the documents and no privity between mortgagor and the cestuis que trust.

Notes. The mortgagee's right to consolidate is, in certain cases, restricted by s. 93 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 631, 632).

I Referred to: *Banner* v. *Berridge* (1881), 18 Ch.D. 254; *Re Gregson, Christison* v. *Bolam* (1887), 36 Ch.D. 223; *Sharp* v. *Rickards*, [1908–10] All E.R.Rep. 480.

As to the right to consolidate mortgages, see 27 HALSBURY'S LAWS (3rd Edn.) 320 et seq., and for cases see 35 DIGEST (Repl.) 482 et seq.

Cases referred to:

(1) *Barrow* v. *Manning*, [1880] W.N. 108; 35 Digest (Repl.) 490, *1771.*

(2) *Selby* v. *Pomfret* (1861), 1 John. & H. 336; affirmed, 3 De G.F. & J. 595; 30 L.J.Ch. 770; 4 L.T. 314; 7 Jur.N.S. 835; 9 W.R. 583; 45 E.R. 1009, L.C.; 35 Digest (Repl.) 486, *1709.*

Also referred to in argument:

Beevor v. *Luck*, *Beevor* v. *Lawson* (1867), L.R. 4 Eq. 537; 36 L.J.Ch. 865; 75 W.R. 1221; 35 Digest (Repl.) 483, *1686*.

Tassell v. *Smith* (1858), 2 De G. & J. 713; 27 L.J.Ch. 694; 32 L.T.O.S. 4; 4 Jur.N.S. 1090; 6 W.R. 803; 44 E.R. 1166, L.JJ.; 35 Digest (Repl.) 485, *1700*.

Appeal by the mortgagee from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy, refusing the mortgagee's proof in bankruptcy on his claim to consolidate two mortgages on the ground that the security for one of the mortgages had ceased to exist.

By a deed dated April 7, 1877, F. G. Raggett and W. F. Williams, two partners in a mercantile firm, covenanted with the appellant, W. J. Williams, to assign to him a leasehold house in the city of London for securing the repayment of £500 and interest. On June 13, 1877, the two partners took E. Beadon into the firm, and the leasehold house, subject to the equitable mortgage, became part of the partnership property. By a deed, dated Nov. 22, 1877, Count Alvo assigned a leasehold house in Mansfield Street to E. Beadon, as trustee for himself and his partners, by way of mortgage for securing the repayment of a sum of money. On Mar. 21, 1879, the firm mortgaged the house in Mansfield Street to the mortgagee for securing £200 and interest. The first house was held on a lease, which contained a proviso for forfeiture and re-entry on the bankruptcy of the lessees. The three partners, Raggett, W. F. Williams, and Beadon, became bankrupt on July 23, 1879, and the landlord entered and put an end to the lease. Under these circumstances, the mortgagee claimed in the bankruptcy to consolidate his two mortgage debts of £500 and £200, so that the house in Mansfield Street should not be redeemed until payment of both debts.

The mortgagee appealed.

Romer for the mortgagee.

Winslow, *Q.C.*, and *G. W. Lawrance* for the trustee.

JAMES, L.J.—We are all of opinion that the decision of the Registrar in this case must be affirmed. Speaking for myself I am bound to say that, having had frequent occasion to consider cases of consolidation of mortgages, and observing that sometimes injustice is done to the parties, I am not disposed to extend the doctrine to any case which I do not find already covered by some authority, or logically deducible from what has been laid down by some authority. And I do not find any authority at all for deciding that there can be any consolidation between two mortgage debts where one of the estates mortgaged has ceased to exist. It is not correct to call it consolidation in such a case; it is an attempt to tack one debt which has once been a mortgage debt to another security. It is not suggested that this debt could have been tacked independently of the question of consolidation. That really disposes of the question, and it is the view which was taken of it by the Registrar. With respect to *Barrow* v. *Manning* (1), before Hall, V.-C., we have not the full facts of the case before us; but, if that decision is inconsistent with our present decision, I do not see how it can be supported.

As to the second point, I know no authority or principle upon which a mortgagee can consolidate a mortgage by three persons with one by two in trust for the three, there being no reference to the first transaction in the second, and no privity between the mortgagor and the cestuis que trust. Counsel for the mortgagee suggested that the cestuis que trust in the mortgage of property held upon trust could have called on the trustees to convey the estate to them; but it appears to me that a mortgagee has no right to look into any transactions between the mortgagor and third parties. But the first ground is sufficient for the dismissal of the appeal.

COTTON, L.J.—I am also of opinion that, on the ground taken by the Registrar, this appeal ought to be dismissed. What is consolidation? It is when a mortgagor comes into a court of equity to redeem his property, and the court says, "You

A shall not do this if the mortgagee has another debt due from you which is secured upon an insufficient security. You must pay both debts; if not, you cannot redeem either property." But this assumes the right of the mortgagee to hold both properties, and the power of the mortgagor to redeem both when both the debts are paid. It does not apply to cases where there is only one property in the hands of the mortgagee. This is an attempt to make one property liable to two debts. B The mortgagee's right is only to retain both properties so long as he is able to reconvey both to the mortgagor, and if he voluntarily parts with one his right ceases. As this is so, we cannot deal with the case as if, to use the expression of PAGE-WOOD, V.-C. (1 John. & H. at p. 339) in *Selby* v. *Pomfret* (2), "both estates were pledged for the whole amount." That can only be when both properties remain in specie in the same mortgagee. Counsel for the mortgagee said that the C court never considers the relative value of the properties; but there is a broad distinction between a property of very small value and one which has ceased to exist at all. One can be handed over to the mortgagor and the other cannot. I think, therefore, that on the first ground the decision must be affirmed. As to the second point, if it had been necessary to decide it, I should have required time to consider it.

D **LUSH, L.J.**—I am also of opinion that the Registrar was right in holding that, when one security has ceased to exist, the right to consolidation is gone.

Appeal dismissed.

Solicitors: *Lawrence, Plews & Baker*; *Aldridge.*

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

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MUIR AND OTHERS *v.* CITY OF GLASGOW BANK AND LIQUIDATORS

[HOUSE OF LORDS (Earl Cairns, L.C., Lord Hatherley, Lord Penzance, Lord O'Hagan, Lord Selborne, Lord Blackburn and Lord Gordon), March 20, 21, 24, 25, April 7, 1879]

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[Reported 4 App. Cas. 337; 40 L.T. 339; 27 W.R. 603]

Trustee—Personal liability—Unlimited company—Trustees registered as stock holders "as trust disponees" of named persons.

Company—Winding-up—Unlimited company—Stock held by trustees—Contributories—Personal liability.

H It is competent for a trustee to contract by apt words in such a manner as to bind only his trust estate; but whether in any particular case the contract of a trustee is one which binds himself personally or is to be satisfied only out of the trust estate is a question of construction to be decided with reference to the circumstances of the case.

I The G. Bank, a joint stock partnership, was registered as an unlimited company under the Companies Act, 1862. The articles of the G. Bank provided that any person holding a share "shall be . . . subject to all the liabilities of an original partner of the company," and also that the person or persons, companies or corporations whose names should at any time stand in the stock ledger containing the list of the partners in the company should be taken to be the proprietors of the several shares standing in the ledger in their respective names, and should be liable for the losses to which the original proprietors of the shares in the company were liable. In 1874, Mrs. S. and Mrs. B. assigned to trustees, described in the transfer as "the trust disponees in the

deed of conveyance in trust dated Sept. 20, 1873," a quantity of stock in the G. Bank "as trust disponees aforesaid, by acceptance thereof, being, in the terms of the contract of co-partnership of the bank, subject to all the articles and regulations of the company, in the same manner as if they had subscribed the said contract," and the trustees accepted the transfer "as trust disponees." In the stock ledger of the bank the names of the trustees were entered "as trust disponees" of named persons. The stock certificate also described the trustee as "trust disponees." The G. Bank failed.

Held: the trustees were personally liable as contributories.

Lumsden v. *Buchanan* (1), (1865), 4 Macq. 950, followed.

Gordon v. *Campbell* (2) (1842), 1 Bell, Sc. App. 428, distinguished.

Notes. Applied: *Re City of Glasgow Bank, Bell's Case* (1879), 4 App. Cas. 550; *Re City of Glasgow Bank, Buchan's Case* (1879), 4 App. Cas. 583; *Re City of Glasgow Bank, Mitchell's Case* (1879), 4 App. Cas. 567; *Cree* v. *Somervail* (1879), 4 App. Cas. 648; *Gillespie* v. *City of Glasgow Bank* (1879), 4 App. Cas. 632; *Re Robinson's Settlement, Gaunt* v. *Hobbs*, [1912] 1 Ch. 717. Referred to: *Re C.M.G.*, [1898] 2 Ch. 324; *Hunt Bros.* v. *City of Colwell*, [1939] 4 All E.R. 406; *I.R.Comrs.* v. *Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667.

As to liability of trustee for calls and other obligations of membership of company, see 6 Halsbury's Laws (3rd Edn.) 212 et seq.; and for cases see 9 Digest (Repl.) 204 et seq.

Cases referred to:

(1) *Lumsden* v. *Buchanan* (1865), 4 Macq. 950; 13 L.T. 174, H.L.; 43 Digest 736, *1714.*

(2) *Gordon* v. *Campbell* (1842), 1 Bell, Sc. App. 428; 43 Digest 792, *2296 iii.*

(3) *Lumsden* v. *Peddie* (1866), 5 Macph. (Ct. of Sess.) 34; 9 Digest (Repl.) 207, **389.*

(4) *Martin* v. *Wright* (1841), 3 D. (Ct. of Sess.) 485.

(5) *Thomson* v. *M'Lachlan's Trustees* (1829), 7 S. (Ct. of Sess.) 787.

Also referred to in argument:

Bullen v. *Sharp* (1865), L.R. 1 C.P. 86; Har. & Ruth. 117; 35 L.J.C.P. 105; 14 L.T. 72; 12 Jur.N.S. 247; 14 W.R. 338, Ex. Ch.; 36 Digest (Repl.) 436, *94.*

Re London and Northern Insurance Corpn., Stace and Worth's Case (1869), 4 Ch. App. 682; 21 L.T. 182; 17 W.R. 751, L.JJ.; 9 Digest (Repl.) 279, *1748.*

Re Western of Canada Oil Lands and Works Co., Carling, Hespeler and Walsh's Cases (1875), 1 Ch.D. 115; 45 L.J.Ch. 5; 33 L.T. 645; 24 W.R. 165, C.A.; 9 Digest (Repl.) 318, *1991.*

Higgins v. *Livingstone* (1816), 4 Dow. 341; 3 E.R. 1186, H.L.; 43 Digest 962, *4018.*

Eaton v. *M'Gregor's Executors* (1837), 15 S. (Ct. of Sess.) 1012.

Jeffrey v. *Brown* (1824), 7 S. (Ct. of Sess.) 102; on appeal, 2 Sh. Sc. App. 349.

Thomas v. *Walker's Trustees* (1832), 11 S. (Ct. of Sess.) 162.

Re Nisbet's Trustees (1802), 1 Mor. Dict. 15, 268.

Fairlie v. *Neilson* (1821), 1 S. (Ct. of Sess.) 222.

Appeal from a decision of the First Division of the Court of Session in Scotland, consisting of the Lord President (Inglis), Lord Deas, Lord Mure, and Lord Shand.

The City of Glasgow Bank was established in 1839 as a joint-stock company, and in 1862 it was incorporated under the Companies Act of that year. In 1843, Mr. Murdoch, who possessed considerable property, residing in Edinburgh, executed with his wife, who pre-deceased him, a trust disposition and settlement, which took effect on his death on June 2, 1873. He was at the time of his death possessed of £5,000 worth of shares, afterwards converted into stock, in the City of Glasgow Bank, acquired after the death of his wife, and a doubt having arisen whether his settlement effectively conveyed estate acquired after the death of Mrs. Murdoch, Mrs. Syme, and Mrs. Boyd, his two daughters, made up a title as executrices-dative in the character of next of kin to the whole estate, as the only competent way of

administering to the part thereof, including the bank stock in question, which had been acquired by Mr. Murdoch after the death of his spouse; and having ex pede the usual confirmation in that character, they proceeded to execute a supplementary deed of trust, with the view (inter alia) of bringing the bank stock under the trusts of their father's will. This deed of trust, dated Sept. 20, 1873, conveyed the property, including the bank stock in question, to the appellants, Muir, Thomson, John Boyd, and James Lawrence Boyd on certain trusts. The appellants, on the execution of the deed, communicated with the secretary of the City of Glasgow Bank in order to have the stock, which had been increased to the amount of £6,000, entered in their names as trustees, it being provided by the company's contract that the deed of transfer should be prepared by such person and in such form as the ordinary directors might appoint. A deed of transfer was accordingly prepared under the direction of the company's law secretary, and was executed by Mrs. Syme and Mrs. Boyd and the appellants in their capacity of trustees. Under it the stock was conveyed to the appellants expressly as "trust disponees under the trust," and the appellants accepted the same "as trust disponees aforesaid," subject to the articles and regulations of the company. By the authority of the bank the appellants were entered in their books in the character of trust disponees of the grantors, and a certificate was issued by the bank that the trust disponees of Mrs. Syme and Mrs. Boyd had been entered in the books of the bank as the holders of the stock. The names of the appellants were written on the back of the certificate, but they did not appear in any of the published lists of the shareholders of the bank, nor in the returns made to the Commissioners of Stamps and Taxes (now the Board of Inland Revenue) and to the Registrar of Joint-Stock Companies, in which returns the stock was entered under the name of "Syme," and was described as being held by the trust disponees of Mrs. Syme and Mrs. Boyd.

The bank suspended payment on Oct. 2, 1878, and a resolution to wind-up voluntarily was passed on Oct. 22. On investigation of its affairs the bank was found to be hopelessly insolvent. The liquidators made up a list of contributories of the bank on Nov. 7, and on Nov. 13 they made a first call of £500 on each £100 of stock. On the list of contributories were placed the names of all the trustees who were entered in the books of the bank as the holders of stock in trust, whether under testamentary instruments or otherwise. These trustees were entered on the first part of the list as contributories in their own right, the liquidators alleging that they were personally liable to the full extent of their means. The trustees were all entered in the list of contributories, with the description of the particular trust appended to each, the word "as" occurring in the books of the bank and qualifying their title to the shares being dropped out. The appellants having received an intimation that their individual names had been placed on the list of contributories as holders of stock in their own right, petitioned the court for rectification of the list, with the object of having their liability, if any, defined as an obligation to make the trust estate forthcoming in due course of administration. Answers were given in by the liquidators, and a minute of admissions was afterwards adjusted between the petitioners and the respondents.

The case was heard before the First Division of the Court of Session, and judgment was given against the appellants on Dec. 20, 1878, the court being of opinion that the case was governed by the decision of the House of Lords in *Lumsden* v. *Buchanan* (1). From this decision the trustees appealed.

Napier Higgins, *Q.C.*, *McLaren* (of the Scottish Bar), and *Grosvenor Woods* for the appellants.

Kay, *Q.C.*, *Benjamin*, *Q.C.*, *Davey*, *Q.C.*, and *Kinnear* (of the Scottish Bar) for the respondents.

The House took time for consideration.

April 7, 1879. The following opinions were read.

EARL CAIRNS, L.C.—The City of Glasgow Bank is a joint-stock partnership, which has carried on business since the year 1839. In 1862, it was registered

as an "unlimited company," under the Companies Act of that year. The partnership contract (to the terms of which I shall have afterwards to refer) was registered as the articles of the company under the Act. In this bank the late John Murdoch held, at the time of his death, £6,000 of stock. He died in 1873. He had made a deed of trust disposition and settlement dated in 1843, but a question having arisen whether the bank stock would pass under it, his daughters, Mrs. Syme and Mrs. Boyd, made out a title to his estate as executrices-dative, and executed a supplementary deed of trust dated Sept. 20, 1873, by which they assigned and made over to the appellants the whole estate of their father, including the stock in question, to be held on the trusts contained in the settlement of their father. On Jan. 27, 1874, a transfer of the stock was executed by Mrs. Syme and Mrs. Boyd to the appellants, in order that their legal title to the stock might be completed. By this transfer Mrs. Syme, who was a widow, and Mrs. Boyd, with the consent of the appellant, John Boyd, her husband, assigned and made over to the appellants, described as

> "the trust disponees in the deed of conveyance in trust, dated Sept. 20, 1873, and their successors and assigns whomsoever,"

the £6,000 capital stock—the appellants

> "as trust disponees aforesaid, by acceptance thereof, being, in terms of the contract of co-partnership of the bank, subject to all the articles and regulations of the company, in the same manner as if they had subscribed the said contract";

and the appellants, "as trust disponees aforesaid," thereby accepted the said transfer on those terms and conditions.

In the stock ledger of the bank the appellants were entered by their names and addresses, their names and addresses being followed by these words

> "as trust disponees of Mrs. Mary Murdoch or Syme, widow of the late Francis Darby Syme, 14, Great King Street, Edinburgh, and Mrs. Sophia Maria Darby Murdoch or Boyd, wife of the said John Boyd."

A stock certificate was also issued by the bank to the appellants in these words:

> "Glasgow Feb. 4, 1874.—These certify that the trust disponees of Mrs. Mary Murdoch or Syme, widow of the late Francis Darby Syme, and residing at 14, Great King Street, Edinburgh, and Mrs. Sophia Maria Darby Murdoch or Boyd, wife of John Boyd, residing at 27, Melville Street, Edinburgh, have been entered in the books of this company as the holders of six thousand pounds consolidated stock."

And on the back the certificate was endorsed thus:

> "William Muir, Esq., of Inistrynich, Argyleshire, merchant in Leith; William Thomson, Esq., of West Binney, Linlithgowshire, John Boyd, Esq., residing at No. 27, Melville Street, Edinburgh, and James Laurence Boyd, Esq., Solicitor Supreme Courts, Scotland, and residing at No. 1, Regent Terrace, Edinburgh, as trust disponees within mentioned."

In the return made to the Board of Inland Revenue and to the Registrar of Joint Stock Companies, the stock is described as held by the trust disponees of Mrs. Syme and Mrs. Boyd.

The liquidation of the bank commenced on Oct. 22, 1878, and the liquidators have entered the appellants in the first part of their list as contributories in respect of the stock in question. The effect of this is to make the appellants personally answerable for calls. Whether they should thus be made answerable is the question to be determined in this appeal.

The respondents, the liquidators, contend that the appellants are personally liable, and this has been the unanimous decision of the Court of Session. The appellants, on the other hand, contend that they are not personally liable, but

that the bank entered into a special contract with them, to use the terms of their petition, "to admit them as holders of stock in their representative capacity as trust disponees," and by the terms of their obligation the appellants undertook only to subscribe to the undertaking, and to be liable in the obligation incumbent on holders of stock to the extent of the trust funds under their administration.

Whether in any particular case the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case, the nature of the contract, the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor, either under English or Scottish law, entering into a contract for payment of money, with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment not personally but out of the assets of the testator. If, for example, A. B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C. D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended. C. D., in the case supposed, would have authority to accept a contract so limited, and the words used could have no meaning and could be referred to no object other than that of limiting responsibility. I do not know that there is in this respect any difference in principle between English and Scottish law, although there may be a difference in the application of the principle. It may be (I will not say more) that from the English system of judgments in actions at common law, and from the difficulty of obtaining a judgment de bonis testatoris founded on an engagement made by the executor, the English courts have leaned against a construction which would not result in a judgment de bonis propriis; whereas in Scotland, where law and equity were jointly administered, such a difficulty did not arise. But the first question, whether in Scotland or in England, must be, What is the contract which the parties have entered into? and that must be accompanied by another question—What is the contract which the parties were competent to enter into? For if words have been used of any ambiguity, or the object of which may be open to any doubt, that construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not the construction by which the contract will be destroyed.

It is to be observed that the directors of the bank were a body with limited and clearly defined powers, and acting in the execution of a delegated and limited authority. The appellants must be taken, as must all persons who deal with the directors of a company, and especially those who deal with the directors for admission into the company, to have known the nature and extent of the authority of the directors, and the character of contract which they were empowered to enter into. With regard to the directors also it is to be borne in mind that if they exceeded the powers committed to them by the deed of partnership, if they placed the stock and capital of the bank in the power of persons brought on the register on terms less favourable to the other shareholders than the deed authorised, the directors would incur a liability to their constituents for so doing, and it is not to be supposed that they intended to incur this liability.

With these observations I will now ask your Lordships to bear in mind the general scope and provisions of the deed of partnership. There is no limit of liability whatever for the shareholders of the company. The deed takes notice that the shareholders might be individual, or companies and bodies corporate, but the scheme of the deed is that the shares shall be held by individuals, or by companies, that is to say, partnerships consisting of individuals, or by corporations, without any limit of liability in the individual so far as he has property, or in the corporation so far as it has property; and I need hardly observe that there was no power by law to affix any limit of liability on the shares except by a resort to statutable arrangements, which, in this case, were not resorted to. By cl. 4 of

the deed, the parties bound themselves to contribute and pay when required the sums of money corresponding to the number of shares of the stock subscribed. By cl. 5, the partners were to have the right to the profits and to be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the capital stock. By cl. 6, any person holding a share, whether as an assumed subscriber or as a purchaser, heir, or other representative of a subscriber, "shall be entitled to all the rights and subject to all the liabilities of an original partner of the company." Clauses 13 and 14 contain careful provisions for the purpose of preventing any person interested in a share other than the partner in whose name the share stands on the register from attending or voting, or interfering with the concerns of the company. Clauses 33 and 34 relate to the transfers.

The shares are to be transferable by the partners, and shall transmit and descend as personal property to their executors or representatives by testament. Every partner who shall dispose of his share of the company's stock agreeably to the regulations therein written, or who shall cease to have an interest in the concern through forfeiture or otherwise, in the terms of the deed, shall be entitled to relief of the whole debts owing by the company; and the party or parties acquiring the shares so disposed of, or otherwise coming in right of the party or parties so ceasing to have interest, shall take and assume the place and liability of his author, ancestor, or other cedent. A gratuitous assignment by a deed, inter vivos, of any shares, is to be effectual if sanctioned by the directors. If they withhold sanction, the share is to be sold by the directors and the price accounted for to the assignee. Shares may be disposed of onerously, but the name of the purchaser and the price must first be intimated to the directors, who are to have the option of purchasing for the bank. By cl. 37 it is provided that where the shares of any partner are transferred, conveyed, or sold in terms of the article, the deed of transference shall be prepared at the head office; and cl. 38 provides that this deed of transference, and also every assignment of shares in security or mortis causa, and confirmations thereof by right of succession, shall be recorded in a book to be kept for that purpose; and the production of such writings to the manager or directors for registration shall ipso facto infer the acceptance of the capital stock therein specified, and the liabilities of the parties having a right to the same as partners of the company; but no purchaser, or other assignee of, or successor to shares so acquired, shall be recognised as a partner until his title is recorded in the books. Clause 40 provides that the person, or persons, companies, or corporations whose names shall at any time stand in the stock ledger containing the list of the partners of the company, whether as original or as assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the ledger in their respective names, and shall be liable to the payment of every call for instalments of capital stock to be made thereon, and to all such actions, obligations, forfeitures, and penalties, and entitled to the whole profits, and liable for the losses to which the original proprietors of shares in the company are subject, liable, and entitled by the deed; and the names entered in the ledger, and the amount of shares, shall be the sole evidence receivable at any meeting of the partners as to the right of voting at the meeting.

I have now referred to the principal clauses of the deed, and it is on the terms indicated in these clauses, and on those terms alone, that the directors had any authority to admit an assignee of shares as a partner into the bank. The scheme of the deed is clear—the bank is to consist of partners, and these partners are to be either individuals or corporations. There is no limit of liability. If the partner is an individual, he is absolutely liable to the extent of his means as an individual for the proportion of the debt of the bank attributable to his share. If the partner is a corporation, the corporation is liable to the extent of all the property which it may possess. It is necessary to contrast with this the contract which the appellants allege was entered into between them and the bank by reason of the use in the transfer to them and in the stock ledger of the words "as trust

A disponees of Mrs. Syme and Mrs. Boyd." The appellants undertook, as they say, to be liable in the obligations incumbent on holders of stock to the extent only of the trust funds under their administration. In the view of the appellants there were, as to these shares, to be no partners of the bank individually liable. The liability as to these shares was not to be the liability of the trustees, but the liability of certain funds under the administration of the trustees.

B As to what these funds might be nothing is said. The trust might consist of nothing more than the shares themselves, and thus the shares be their own security, or the trust funds might be such as that in a due course of administration they might all be parted with before any liability came to be enforced against them. The bank would be obliged to consider and scan every deed of trust in order to determine whether the trust funds could, under the trusts declared, be C properly used in the purchase of bank stock, or in the payment of bank liabilities. But, putting these considerations aside, and assuming that the trust funds were a definite, declared, and always available sum of money, what would this be but the creation of shares with limited liability? And if this limit of liability could be created for some shares in the bank, why not for all the shares in the bank? If the argument of the appellants is right, what would there be to prevent every D share in the bank being held by trustees who would be furnished as a trust-fund with the precise amount to be paid on the share, and would have no further liability? But this is just what the law would not permit to be done with regard to a joint-stock company of this kind, except by means of the constitution of a company with liability limited according to the statute, and such a company the City of Glasgow Bank never was.

E I have no hesitation in saying that in my opinion the directors had no power under their deed, and the appellants must be taken to have known that they had no power, to enter into or accept a contract of this description, and the contract, if attempted to be made, would have been ultra vires and void. But for this very reason it appears to me to be necessary that your Lordships should consider whether the words on which the appellants rely require a construction which would invali- F date the contract in which they occur. These words are—"as trust disponees of Mrs. Syme and Mrs. Boyd." I do not wish to say that in a case in which such a contract would be within the competency of the contracting parties, and where these words could not be referred to any other object or purpose, they might not, on the construction of the whole instrument, be held to negative the idea of personal responsibility, but I have endeavoured to show your Lordships that such a contract G would not be within the competence of the parties in the present case, and there is no difficulty whatever in assigning to the words a meaning and a purpose clear, intelligible, and within the limits of the contracting power of the directors.

One object of these words, and one purpose served by them, is noticed in the judgments of the Lord President and LORD SHAND. The Lord President says that the practice of using them and of entering them on the register arose

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> "not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register."

The Lord President further observes that it was the Scottish practice of marking I trust stock in this way which prevented the legislature extending to Scotland the enactment that no joint-stock company should take notice of any trusts on its register of shares; and I may add there is no doubt that a permission to notice trusts on a register of shares is prima facie a permission introduced for the benefit of the beneficiaries and not of the trustees. LORD SHAND observed that the law of Scotland as to the proof of trust is very stringent

> "in requiring that in all cases the averment that property is held in trust shall be proved only by a writing subscribed by the alleged trustee, or by his oath on reference; and no more effectual way of avoiding the dangers of this

limited mode of proof can exist than by having the title of the trust property qualified by a declaration on its face that the property is held for behoof of others."

A second purpose served by the words is that they make it clear that the shares are held on a joint account, with a right of survivorship, and that they do not belong to the persons named on the register as tenants in common. It is possible —I will not say more—that there may be a third purpose served by the words, founded on the law of Scotland, which gives peculiar facility to a trustee for retiring from the trust, and which might justify, in the case of a retiring trustee, a simpler mode of removing his name from the register than in the case of another joint owner.

I have not up to this point referred to any authorities bearing on the question, and even in the absence of authority I should have been of opinion, for the reasons I have stated, that the appellants were personally liable in respect of these shares. I should have been of opinion that it was incompetent for the directors of the bank to have made with them any contract but a contract of personal liability, and that the words relied on by the appellants as limiting liability were introduced for and served a different purpose. But, my Lords, almost the whole of the observations which I have made will be found, as it seems to me, to be supported by two authoritative decisions of your Lordships' House, which will be the only cases to which I shall feel it necessary to refer your Lordships.

The first of these is *Gordon* v. *Campbell* (2). In that case certain trustees borrowed, for the purposes of their trust, from Col. Gordon of Cluny £7,000, and granted a heritable bond over the trust property to secure the loan. They also bound themselves, as "trustees aforesaid," to make payment of the loan, and in the clause of warrandice of the land they bound themselves, "qua trustees only," to warrant at all hands and against all mortals. This was exactly such a case as in the earlier part of my observations I supposed might arise. It was perfectly competent to Col. Gordon and these trustees to make any contract they pleased. Col. Gordon might have insisted that they should be personally liable to him, or he might have agreed that they should only be liable as trustees, i.e., to the extent of their trust funds. They professed in one part of the instrument to contract as trustees, and in another as trustees only, and it was obvious that they meant in both places to contract in the same way. Further, if these words, "as trustees only," were not introduced to limit liability, there was no other purpose in the deed which they could possibly serve. They were absolutely unmeaning if they did not mean that the trustees were not contracting as individuals. Under these circumstances the Court of Session, and afterwards this House, held that there was no personal liability created against the trustees beyond their possession of the trust funds.

The other case was that on which so much of the discussion before your Lordships in the present appeal took place—*Lumsden* v. *Buchanan* (1). The principal respondents in that case had signed a deed of accession for shares in the Western Bank. In the testing clause their names and designations were followed by the words, "trustees for Mrs. Ellen Brown, the majority surviving being a quorum"; and in the register of shareholders their names and addresses were entered, with the addition of the words "trustees for Mrs. Ellen Brown." This House held that the trustees were personally liable. The observations of the Lord Chancellor (Westbury) and of Lord Cranworth have been so frequently referred to during the argument of the present appeal that I will not here repeat them. They appear to me to apply conclusively to the present case, and the decision of their Lordships in *Lumsden* v. *Buchanan* (1) appears to me to derive, if it were possible, additional strength from the circumstance that Lord Kingsdown stated that it was with some hesitation and regret he felt obliged to concur in the judgment, and from the further circumstance that this House had before it a most full and learned examination of the subject from all the Scottish judges, of whom at that time four had declared

A themselves in favour of the appellants in *Lumsden* v. *Buchanan* (1), and eight in favour of the respondents.

I ought to observe that in *Lumsden* v. *Buchanan* (1) the words in the deed and in the register were "trustees for Mrs. Ellen Brown," not "as trustees." In a case, however, in the same bank which occurred immediately afterwards, *Lumsden* v. *Peddie* (3), Peddie was curator bonis to Mrs. Broomfield, and he accepted stock B in these words:

> "I, the said D. S. Peddie, as *curator bonis* aforesaid, do hereby agree to take and accept the said capital stock, and as such bind and oblige myself, etc."

The Lord Ordinary in that case and afterwards the Court of Session, held that the case was governed by *Lumsden* v. *Buchanan* (1), and that the introduction of the C word "as" made no difference. From this decision there was no appeal. The Lord Justice Clerk, in giving judgment in that case, observed:

> "It is now well settled that in this or any like company no one can become a partner with a limited liability, or with any other liabilities than such as are borne in common by all the partners."

D This decision must be taken along with that of *Lumsden* v. *Buchanan* (1), and shows what was then understood in Scotland to be established as the law in such cases.

On the whole I am of opinion that the decision of the Court of Session now under appeal is correct, and I must move your Lordships to dismiss the appeal. It is difficult to use words which will adequately express the sympathy I feel for all E those who have been overwhelmed in the disaster of the Glasgow Bank, and that sympathy is peculiarly due to those who, without any possibility of benefit to themselves, and probably without any trust estate behind sufficient to indemnify them, have become subject to losses or ruin by entering for the advantage of others into a partnership, attended with risks of which they probably were forgetful, or which they did not fully realise. The duty of your Lordships is, however, to declare F the law, and of the law applicable to this case your Lordships can, I think, entertain no doubt. I move that the appeal be dismissed, and if no other arrangement has been made between the parties, it must, I conceive, be dismissed in the usual way, with costs.

LORD HATHERLEY.—It would be impossible to come to any other conclusion G in the present case than that which has been already announced as the conclusion arrived at by my noble and learned friend on the Woolsack.

Most anxiously does one scrutinise every case, especially every case presenting an appearance in any degree whatever of novelty, in order to see that the edge of justice is administered duly and not with undesirable sharpness. But this case really did appear to be one in which the appellants must have been painfully H conscious from the first opening that they had to struggle against that which had been settled and determined by the highest court of the legislature, and which in reality, therefore, was not open to revision by any court whatsoever. In vain did I listen during the argument for that which I was most anxious to see—whether or not there had been any failure of justice in *Lumsden* v. *Buchanan* (1), but there was no distinction which could be made in any way available, pointed out between I the cases. The last distinction which was referred to by the Lord Chancellor—namely, that of the introduction of parties "as trustees"—seems to have existed in the subsequent case of *Lumsden* v. *Peddie* (3) and in that case the distinction was not found to be available, or not so available as for it to be thought possible that an appeal could be founded on such a distinction as that. The distinction raised before us was, that in the one case new shares were applied for, and that in the other case shares were accepted by way of transfer, being dealt with in the open market. I apprehend that there can be no distinction founded on any such thin discrepancy as that. The real point of the whole case is, as it appears to me,

summed-up in one or two clauses of the contract of co-partnership. Clause 4 of that deed is as follows:

> "The parties do hereby bind themselves respectively to contribute and pay when required the sums of money corresponding to the number of shares of the said stock subscribed by them, as the same are specified in the testing clause of these presents, and are likewise in majorem evidentiam adjected to their signatures, and which several sums of money are held to be herein repeated."

Clause 5 is this:

> "The said partners shall have right to the profits and be liable for the losses, and bound to relieve each other of all the debts and engagements of the company in the proportion of their respective interests or shares in the said capital stock, declaring that the whole capital stock and profits of the company, as well as the said parties and the aforesaid individually, shall be bound and obliged to free and relieve the governor and deputy-governor of the company, elected or to be elected as after-mentioned, in the event of either of them not becoming parties thereto, of all liability for the debts and engagements of the company."

And cl. 6:

> "Any person holding a share of the said capital stock, whether as an assumed subscriber or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights and subject to all the liabilities of an original partner of the said company."

What are these great companies in fact? They are very large and extensive partnerships. Every partnership, as we all know, as a matter of almost elementary jurisprudence, involves equality of liability, and equality of participation in the profit and loss, or if not equality of participation, at all events participation on some rule analogous to equality, on which the whole basis of the transaction stands. It does not depend on who are the holders of the shares. The shares themselves are the things which regulate on the one hand the responsibility of the person who is the owner of those shares, and on the other hand, the advantage and profit which the person who is the owner of the shares is to acquire. Whosoever at any given time, be it for profit or be it for loss, finds his name attached to the ownership of a given number of shares, that person has to deal with those shares as provided by the articles of the partnership deed—namely, to contribute to the loss, and to share in the profit in proportion to the number of shares that he holds.

That at once distinguishes the case from *Gordon* v. *Campbell* (2), because in that case it was held that by the terms of the bond any person who stipulated or acted as trustee could say that he stipulated or acted as trustee only, which is the just reading of that deed. But when a person says that, you must find whether the persons with whom he is dealing have power so to deal with him, and in *Gordon* v. *Campbell* (2) all the parties were sui juris, and had power to deal as they thought fit. But here, when you are dealing with a company, either in applying for new shares, or in buying shares in the share market, and bringing them to be registered, which makes you a shareholder in the company, on what terms do you become a shareholder? You must become a shareholder on the original terms and on no other terms. The directors have a good many powers of an extensive description—powers when shares are offered for sale to purchase on behalf of the company, and a variety of other powers not altogether usual in companies of this kind. But these powers which they have are the only powers they are entitled to exercise, and there is no power in the deed to allow them to treat a certain set of shares in the company as being held by a different tenure from all the other shares to be held, and liable only as certain particular estates will hold out; so that, as has been observed already, you might—to take an extreme case—imagine almost every lot of shares to be held on different tenures as between the

different proprietors of those shares; whereas the true principle from beginning to end of the deed, and the principle which, as I apprehend, was determined in *Lumsden* v. *Buchanan* (1), was that those who are partners under a deed of this description take their profits and bear their losses according exactly to the number of shares which they hold.

As regards the introduction of the names of the trustees as trustees on the share list, we perhaps in England are a little surprised at it, because we have now long been accustomed to the practice which first began with the Bank of England, which has always refused to recognise trusts at all, and the same practice has been adopted by railway companies and the like, in which, wisely or unwisely, trusts are not recognised on the face of the share list. We are surprised to find any recognition of this trust, but the use of it one can easily see. With all its advantages the rule of the Bank of England is productive sometimes of great inconvenience. I have myself known cases of considerable inconvenience where a man has become, say, the surviving trustee of three trustees. Perhaps he has in the bank £5,000 or £6,000 of his own, and £10,000 as a trustee, and some day when he goes to the bank he would be surprised to find that he has £15,000 of stock, because the bank will not recognise trusteeship at all, and he finds himself registered as the owner not only of his own stock but of the stock that he holds on trust. That is not always the most convenient arrangement, and sometimes it leads to worse accidents than that, because if the last survivor of three or four trustees happened to be a person of dishonest character, he is the sole proprietor, and has the sole command of the stock, and the bank is entirely free from all responsibility in dealing with it.

That appears to have been thought, as the learned judges say, not a desirable position to place matters in; and, therefore, in Scotland, for the sake of the cestui que trust, notice is taken on the face of the bank books of the existence of the trust, and also a second advantage accrues to him—namely, that when changes take place in the trust, then there is a note in the bank books, which tells you that that has occurred without the necessity of having a new deed entered for the purpose of saying that such a change has been made, and parties are thereby liberated from some expense, and from a good deal of inconvenience. Many reasons may be assigned for it, but whatever reasons may be assigned it is impossible to hold that the other shareholders, who have either entered into the original contract of partnership or have become shareholders since in a bank like this which we have now before us, can repudiate responsibility for anything professed to be done on their behalf by the directors contrary to the general stipulations of the deed. The directors can only do that which their power and authority entitle them to do, and in vain one has asked to have any passage pointed out in this deed which authorises the directors, in dealing with different lots of shares, to manipulate them in such a way that one lot of shares may go into one trust, and another lot into another trust, and a third lot into no trust at all, and that those shares may, in the event of disaster to the company, be held on a different footing from the other shares, so that, so far from partaking according to the number of their shares in the profit and loss, it would be found that there was, as regards a very large proportion of the individual shares of the company, a regulation contrary to the express stipulations of the deed.

Perhaps I have occupied already too much time in the few words that I have said, because I am only saying what I believe to have been the principle in *Lumsden* v. *Buchanan* (1); and beyond *Lumsden* v. *Buchanan* (1) I have not the inclination, nor do I see in any way how your Lordships have the power to go.

LORD PENZANCE.—No question involved in this appeal—though one of the deepest interest to the parties concerned—depends for its solution on any very numerous or intricate considerations. It is not to be denied that the appellants on the face of the transfer deed into which they entered with the banking company, whereby they became shareholders in it, announced in express terms that they did so as trust disponees for other people. The question is whether the statement

of this fact has in any degree exonerated them from the obligations which attached to the character and position of shareholders, which it was the object of that deed to confer on them.

Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others, in contracts or engagements of any kind into which he might enter, would not intend thereby to expose himself to personal liabilities if it could be avoided. A general consideration of this character has, I think, largely pervaded the reasoning on which the exemption of the appellants from personal liability has been based and enforced in argument. But meanwhile it will not be doubted that a person who, in his capacity of trustee or executor, might choose to carry on a trade for the benefit of those beneficially interested in the estate, in the course of which trade debts to third persons arose, could not avoid liability for those debts by merely showing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to show in addition that the creditors of the concern knew all along the capacity in which he acted. The case of an agent who acts for others is of course entirely different. His contracts are the contracts of his principal, and the liabilities, from which as a general rule he is personally exempt, fall on his principal, who acted through him. But to exonerate a trustee something more is necessary beyond the knowledge of those who deal with him that he is acting in that capacity, and it would not be sufficient in all cases to state that fact on the face of any contracts he may make. To exonerate him it would be necessary to show that on a proper interpretation of any contract he had made, viewed as a whole—in its language, its incidents, and its subject matters—the intention of the parties to that contract was apparent, that his personal liability should be excluded, and that, although he was a contracting party to the obligation, the creditors should look to the trust-estate alone. These propositions are, I conceive, conformable to the law of Scotland equally with that of this country. It is not enough, then, in the present case to show that the appellants on the face of the transfer deed accepted the stock in question "as trustees," but they must go on to show that the proper construction of that instrument showed the intention of the parties to be that, being trustees, they should not be personally liable.

It becomes, then, material to inquire what was the nature of the partnership whose stock they agreed to accept, and in whose business they agreed to become partners, and how far the nature of that stock and the constitution of that partnership are consistent with the exemption which they now claim. The constitution of this banking company was framed and declared by the partnership deed to which reference has been made. It provides for one class, and for one class only, of shares and shareholders, and declares in express terms that the partners shall have a right to the profits, and be liable for the losses, and bound to relieve each other of all debts and engagements of the company in the proportion of their respective interests or shares in the capital stock thereof. This deed the appellants have not actually signed, but they have executed the deed of transfer, in which they have expressly declared their acceptance of the stock in question, on the footing that they would be subject to all the articles and regulations of the said company in the same manner as if they had subscribed the contract of co-partnership. Having thus become shareholders in a partnership, the members of which have by their deed of partnership agreed to stand upon an equal footing one with the other, entitled equally to the profits, and bound equally to the losses, the question arises, whether by stating in that deed of transfer that they so became shareholders as trustees for other persons, the appellants have altered or limited the obligations that otherwise would attach to them? In my opinion they have not. There are many contracts in respect of which, if a man were to state in contracting that he only did so as trustee, it is quite conceivable that his contract might be construed as not being intended to bind him personally. *Gordon* v. *Campbell* (2) offers an example of such a construction.

Other cases may be easily imagined in which, on the one hand, the intention to restrict the liability of the person contracting may be clearly inferred from the character in which he declared that he contracted, taken in connection with the other circumstances of the case, and in which, on the other hand, nothing is to be found inconsistent with the restriction in the subject-matter of the contract. But in this case the subject-matter of the contract was the stock of an association whose shares were by the very terms of its constitution to be held only by persons who were all to be personally and equally liable to its obligations; and it cannot be held that the liabilities in respect of this stock were intended to be restricted by the words "as trustees," without ignoring the very nature, and inseparable incidents, of the thing which formed the subject-matter of the contract.

In a word it comes to this—such a thing as a share in this association with a limited liability in the holder of it did not exist. No such share or stock had ever been created. No provision is made for it in the partnership deed, and every provision to be there found which speaks of the liability of those who hold the shares is diametrically, and in the most express language, opposed to it. If, then, the appellants did not become bound to the liabilities attaching to ordinary shares and ordinary shareholders, they did not become bound at all, and the contract of transfer would be void. But before your Lordships can arrive at such a conclusion you must, I think, be at least satisfied that the words "as trustees" in this particular deed so clearly imported on intention not to undertake the obligations of shareholders (though the entire contract might thereby be rendered contradictory and absurd) that they could have been introduced for no other purpose. For if a reasonable interpretation can be assigned to these words, which would permit the deed to stand as a consistent one, competent to effect that transfer of stock which it was the obvious intention of the parties to bring about, your Lordships would be bound to accept that interpretation.

Such a reasonable interpretation was suggested in *Lumsden* v. *Buchanan* (1), and is referred to by the Lord President in his judgment in the present case. His Lordship says:

> "Hence arose the practice referred to in *Lumsden* v. *Buchanan* (1), of taking notice of trusts in the transference and registration of such stocks, not for the purpose of altering the liability of the holders of such stock as compared with the other holders of stock in the same company, but only for the purpose of marking the stock as the property of the particular trust named in the transference and in the register."

The whole question, then, is, as it seems to me, one of construction; and as to the proper interpretation to be put on this transfer deed and the acts of the appellants under it, and for the solution of that question your Lordships have before you these two alternatives—on the one hand, a construction which gives a reasonable and efficient meaning to the words "as trustees," and is not inconsistent with that transference and acceptance of stock which was the sole object of the instrument; and on the other hand, a construction which defeats the intended transfer of stock altogether, and reduces the deed of transfer of stock to a nullity. According to all known principles of construction, your Lordships are, I apprehend, bound to accept the construction which gives effect to the instrument.

A great deal was said in the course of the argument as to the difference between the law of Scotland and that of England in regard to trustees. But the principles on which written instruments are to be construed, and particularly the principle to which I have just alluded—that any construction which invalidates the instrument altogether ought to be rejected if a reasonable construction can be found which gives effect to it—are surely common to the law of both countries, and in whatever light the law of Scotland may regard trustees, if it does not go the length of regarding them as corporate bodies (which it has been admitted it does not)—they must, I think, remain liable on contracts and engagements, into which they

have personally entered, and in which no exemption from that liability is to be found expressed or properly implied.

I have offered these remarks to the House on the footing of the matter being res integra, but in truth the present case is, in my opinion, governed in principle by *Lumsden* v. *Buchanan* (1). The principle involved in that decision was, as I think, rightly appreciated, and declared by the learned judges in the Court of Session. The Lord President said the rule of liability then established might be stated in a single sentence as follows:

> "Persons becoming partners of a joint-stock company such as the Western Bank, and being registered as such, cannot escape from the full liabilities of partners, either in a question with creditors of the company or in the way of relief to their co-partners, by reason of the fact that they hold their stock in trust for others, and are described as trustees in the register of partners and the other books and papers of the company."

And LORD DEAS said that the grounds of decision in *Lumsden* v. *Buchanan* (1) resolved themselves into this—that where the trustees join in a contract of partnership for trading purposes, such as a contract for carrying on business of banking, the mere designation of them as being trustees will not exempt them from the same personal liability as is undertaken by the other partners or limit their liability to the value of the trust estate.

It is matter for deep concern, not unmingled with surprise, that the legal effects attaching to these contracts of trustees have been thus asserted and exposed in a notable case as long ago as the year 1865, people should have been found still willing to enter into them. But in all probability the profound conviction with respect to the great banks in Scotland that such a thing as loss or liability was not to be practically apprehended at all, may have led to a widespread indifference as to the legal consequences of this improbable event, should it ever come to pass. Be this, however, as it may, your Lordships, while bound to give effect to the lawful rights of the creditors, will not the less commiserate losses and sufferings which, in their amount and intensity, rise to the level of a national calamity.

LORD O'HAGAN.—I agree with the Lord Chancellor that it is impossible to approach the decision of this case without feelings of the deepest pain. That persons undertaking the onerous duties of trustees from kindliness to others, and without the smallest view to their personal advantage, should be involved in ruinous responsibilities, which in many cases may not have been within their contemplation when they accepted the trusts, must be regarded as a calamity appealing to our sympathy and compelling our regret; but we are bound simply to regard the legal rights and obligations of the parties before us, and I am constrained to the opinion that the unanimous judgment of the Court of Session must be affirmed.

The question of this appeal appears to be concluded by authority, and I do not feel that it is necessary to discuss the grounds on which the decision in *Lumsden* v. *Buchanan* (1) was pronounced, as it would have been if the matter were res integra. These reasons have been shown by my noble and learned friends who preceded me to have been very cogent. But I am content to rest on the decision of this House in a case which, I think, undistinguishable in any material particular from that before us. I shall only refer to the arguments by which it was justified, as applicable to both of them, and establishing identity between them.

The question is one of contract and construction, and the contract of the trustees in *Lumsden* v. *Buchanan* (1) was in substance, and, as I shall indicate immediately, almost in terms the same as that with which we deal in the present case. Then, as now, it was urged that the directors of a company formed on the principle of unlimited liability, had no authority to admit a shareholder on terms inconsistent with the principles or the competency of the directors of the Western Bank, which

A was held to be bounded by the provisions of their deed of co-partnery. They had admittedly no statutable powers under Limited Liability Acts; they had received no authority from individual shareholders to alter or modify the conditions of membership of the company; there was no pretence for saying that the words of the deed and the undertakings of the allottees or transferees had relation to anything but liability of that kind; and, therefore, it was expressly stated as the B main foundation of the judgment that, the directors being incompetent to qualify the responsibilities of the shareholders on the ground of trusteeship, or to create limited liability unauthorised by statute, they should not be assumed to have committed on act quite ultra vires, at least if the terms of the contract with the trustees were in any reasonable way capable of reconcilement with the proper discharge of their duty, and the true effect of the co-partnery deed. The custom of noticing C trusts on the register of companies in Scotland was assumed in the Court of Session and in the judgment of this House to have arisen for the purpose of facilitating the proof of the character of the property, and not as qualifying the liabilities of the shareholders, inasmuch as the Scottish law requires evidence of trusteeship either by the oath of the trustee or by a writing under his hand, which cannot always be obtained, and this was taken as a sufficient account of the reason of the thing. D The maxim ut res magis valeat quam pereat now applies. It is plain that this ground of decision is as applicable here as it was in *Lumsden* v. *Buchanan* (1). There is was determined that the terms of the deed in that case had no contemplation of more than one class of shareholders, and no regard to a distinction between fiduciary liability and personal liability.

The reasons for hesitating to admit such a distinction with a view to commercial E policy and results have already been pointed out by the Lord Chancellor, but in my view it is enough to say that that case and this case are identical in the want of a pretence for making the distinction, for in *Lumsden* v. *Buchanan* (1) one class of shareholders only was admissible, with equal privileges and equal liabilities. It is impossible to find authority for admitting another in the contract and co-partnery of the City of Glasgow Bank.

F Next, the conditions of partnership in *Lumsden* v. *Buchanan* (1) were in no way more stringent or more absolute for the purpose of creating the largest liability than in the present case. The appellants accepted a transfer of the stock of Mrs. Syme and Mrs. Boyd

> "with the whole interests, profits, and dividends that may arise and become G due thereon, the said appellants, by acceptance thereof, being in terms of the contract of co-partnership of said bank, subject to all the articles and regulations, and declaring that they accepted of the said transfer on the terms and conditions above mentioned."

The acceptance was made by them "as trust disponees," but it bound them to all the articles and regulations of the company. I shall not again go over the articles H and regulations to which my noble and learned friends have sufficiently referred in detail, but I will advert to the stock certificate procured by the appellants, referring to the entry of their names on the stock register, and describing them as "holders" of the stock, and then point to cl. 6 of the contract of co-partnery, which is in these terms:

> "Any person holding a share of the said capital stock, whether as an assumed I subscriber or as a purchaser, heir, or other representative of such subscriber, shall be entitled to all the rights, and subject to all the liabilities of an original partner of the said company."

I shall only further refer to cl. 40, which declares, that

> "the person or persons, companies or corporations, whose names shall at any time stand in the said stock-ledger containing the list of partners of the company, whether as original or assumed partners, shall be deemed and taken to be the proprietors of the several shares standing in the said ledger in their

respective names, and shall be liable to the payment of every call or calls for instalments of capital stock to be made thereon, and to all actions, suits, obligations, forfeitures, and penalties, and shall be entitled to the whole profits and liable for all the losses to which the original proprietors of shares in the company are subject, liable, and entitled to by these presents, and the names entered in the same stock-ledger and the amount of shares annexed thereto shall be the sole evidence receivable at any meeting of the partners as to the right of voting at said meeting."

Looking to the contract of the appellants as the transferees of these shares, and the articles and regulations by which they bind themselves to abide, nothing could be conceived more full and conclusive, more absolute and unconditional, than the grant on the one side and the assumption of liability on the other. It is not pretended that in this respect the contract of co-partnery of the Western Bank differed materially from that which we have been considering. Indeed, it is hard to imagine any collection of words more decisive for the purpose of negativing any distinction between classes of shareholders, or any difference in their respective liabilities, and therefore, in the important matter of the specific terms of the contracts, *Lumsden* v. *Buchanan* (1) is wholly undistinguishable. Both the contracts were manifestly framed with a view to the maintenance of the recognised rule which establishes mutuality of responsibility inter socios, and divides the profits and the losses among all the members of a partnership according to their respective interests. In neither is there the least indication of a design to depart from that rule by creating an exceptional class with peculiar immunities. The words of Lord Kingsdown, whose hesitation to agree with the majority of the Law Lords makes his ultimate concurrence more striking, significant, and important on this point, were:

> When persons have signed deeds of this description it would be very dangerous to permit them to relieve themselves from the obligations of covenants in which they have expressly entered on any speculation founded on mere probabilities that they really did not intend what the deed in terms expresses. Now, unless the covenants by which the parties subscribing the deed bind themselves, their respective heirs and successors, in the third clause of the first deed, and the second deed of accession, can be read so as by some interpretation to exclude those who sign as trustee, it is not disputed that the covenant infers personal liability, and there seems to be in this insuperable difficulty."

I shall have to observe shortly on the argument as to the omission of the word "executors" in the City of Glasgow Bank partnership contract, and I note in passing that the words "heirs and successors," on which Lord Kingsdown relies as asserting the insuperable difficulty in the way of limiting the liability of trustees, are equally inserted in the contract, in the same connection, and with the same purpose, as in the contract of the Western Bank.

The general grounds, therefore, of the decision in *Lumsden* v. *Buchanan* (1), seem to me completely applicable in this case as to the character of the contract, the incompetency of the trustees to limit liability in defiance of its terms and in disregard of the relations created by the legal impossibility of accepting fiduciary shareholders as a separate class, and the clear and unequivocal words of the covenants stipulating for no exemption as they forgo no right. If this be so as to the general grounds of decision, is there anything in the particular differences which have been suggested between the deeds that relieve us from the necessity of following the authority of *Lumsden* v. *Buchanan* (1)? It has been argued there is such a difference in the fact that in this case the appellants are described as trustees in the body of the deed, and so registered, whilst in *Lumsden* v. *Buchanan* (1) the fiduciary character appears only in the testing clause. But that clause is clearly embodied by reference in the deed, and so dealt with as being so embodied in the judgment of the noble and learned Lords. In this matter, therefore, for the purpose of decision, the difference is immaterial.

Then it was said that the introduction of the word "as" in the transfer of the City of Glasgow Bank before "trust disponees," which is not found in the testing clause in *Lumsden* v. *Buchanan* (1), demonstrates that the appellants qualified their liability, and entitled themselves to say that they are only answerable to the extent of the trust estate. There seems some plausibility in the argument representing "trustees" as a mere word of description, while the inserting of the words "as trust disponees" is indicative of the character in which alone the transfer was accepted, and *Gordon* v. *Campbell* (2) undoubtedly shows that in certain cases a trustee may, by apt words, limit his liability. The words in that case were held by this House to be sufficient for the purpose, but then the parties were free to enter into such a contract. Their intention to do so was put beyond all question by the phrase "qua trustee," and proper effect was given to it. That case, therefore, scarcely applies where the directors of a bank are incompetent to make a contract of the kind, when the nature of the dealing does not admit of it, and when, as in *Lumsden* v. *Buchanan* (1), a fair interpretation in another sense may be put on the words, reconciling them, as I have said, with the duty of the directors and the rights of the shareholders. But the decisive answer seems to be that the whole reasoning of the noble and learned Lords proceeded on the assumption that, had the trustees dealt with the Western Bank only in that character, the ratio decidendi and the decision itself would have been exactly the same had the word "as" also been employed in the testing clause. This difference alone appears to me to be insufficient to diminish the coercive force of the authority.

It was further argued that another distinction arose because the appellants were not original allottees of the stock, and did not personally enter into an undertaking which might have bound them in that character. But I fail to appreciate the value of the point. The original allottees took shares without limit of liability, and the other shareholders and creditors of the bank, therefore, acquired certain rights to be exercised in certain contingencies, and are these rights to be destroyed merely because the appellants are transferees, having accepted the transfer expressly

> "subject to all the articles and regulations of the company in the same manner as if they had subscribed the original contract?"

And had they made a transfer it seems impossible to hold that those holding under them could have been dealt with on a different principle. The directors were incompetent to deal with them on any other.

There seems to be, therefore, no material difference between the cases, for the purpose of the argument, in the diverse modes by which the shares were acquired. Then it was strongly urged that the use of the words "heirs, executors, and successors" in the deed of the Western Bank implied the liability of the trustees; and unquestionably Lord Kingsdown placed reliance on these words, although, as I have already said, he omitted from them in his citation the word "executors," and thus reduced them to the expression "their heirs and successors," which occur and have equal force in the last clause of the contract of co-partnership of the City of Glasgow Bank, which declares

> "that parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract";

so that in the view of Lord Kingsdown the words of the deed before us would equally have imputed personal responsibility with those which he thought important in the deed of the Western Bank. Besides, the absence of the word "executors" could have no differential effect which is not removed by the presence of the word "heirs," in the interpretation given to it by the Scottish law, as connected equally with the devolution of personal and real estate. On this point also the argument has failed to satisfy me that any real distinction exists between the cases.

I have adverted to the particular instances in which it has been sought to set up differences between *Lumsden* v. *Buchanan* (1) and the case of the appellants, and certainly with no indisposition to recognise such differences if they can be

shown to exist, and after very grave and careful consideration, I find myself unable to discover a real distinction between them, and I think with the Scottish judges that the decision of the former case is absolutely binding in the latter. We were pressed to regard the law and practice of Scotland as distinct from that of England, especially in reference to the position of trustees, as clothed with something of a corporate character by the former, which is admittedly unknown to the latter; and undoubtedly, if a Scottish trust constituted a trustee or a number of trustees a corporation, that would have relieved the individuals composing it from liability in their separate persons, and imposed it on the body. But I fail to discover authority for such a position, while there seems to be high authority the other way. Arguments were also founded on the registration and incorporation of the City of Glasgow Bank under the Companies Act, 1862, as distinguishing its position from that of the Western Bank. These arguments appear to have been elaborately urged in the courts below, but were not relied on much before your Lordships, and I think it enough to refer to the very able refutation which was applied to them in the judgments of the Lord President and Lord Shand in the Court of Session. The Joint Stock Companies Act, 1856, and the Companies Act, 1862, operated certain changes, but there have been none with reference to the entry of notice of trusts on the register of companies, or as to the character of the obligations undertaken by a shareholder, which were ascertained from the deed of co-partnership.

I have adverted, I think, to all the material points which have been raised in the course of the able and elaborate arguments of the counsel for the appellants, and, on the whole, while I participate fully in the painful sympathy which has been expressed by my noble and learned friend on the Woolsack, I am obliged to agree with his conclusion that the judgment of the Court of Session should be affirmed, and the appeal dismissed.

LORD SELBORNE.—By cll. 5, 6, 33, 38, 40, and last clauses of the co-partnership deed of the City of Glasgow Bank, it is in effect provided that every person who is at any time admitted as a partner shall be absolutely and without limit liable for all the debts and engagements of the company, and that all the partners shall be equally liable, inter se, in proportion to their respective shares. It is consistent with this that a plurality of persons may be (as is contemplated by cll. 13 and 14) co-proprietors of the same shares. The aliquot part of the common burden cast by the partnership contract on those shares is exactly the same whether they are held by one or more than one person. If by more than one, every one of the co-proprietors is bound to the company for the whole proportionate liability attaching to those shares neither more nor less, and they among themselves are prima facie bound to contribute equally to that liability. In this there is nothing extraordinary, nothing unjust. Whether they undertake the obligations of partners for their own benefit or for the benefit of others is a question for themselves and not for the company.

By cl. 40 it is provided that those who stand registered as shareholders in the stock ledger of the company are for all purposes of liability on the one hand, and of participation in profits on the other, to be regarded as "the proprietors" of the shares. The effect of this provision, when considered in connection with the absence in this deed and in the relative statute law of anything to prevent the company from taking notice of trusts, is that although any partner who holds his shares in a fiduciary capacity will, of course, be bound to apply and account for any share of profits to which he may be entitled according to his trust, the company is entitled and is bound to look to him, and to him only, as having for all partnership purposes the sole title to the shares both as to profit and as to liability, and he must be taken to have known and understood this when he accepted them. Corporations (including, of course, incorporated companies, and, therefore, all companies formed with limited liability under the Companies Act, 1862) might, under cl. 40, be members of this co-partnership, and being legal persons, they would be subjected in respect of any shares which they might hold to precisely the same

A equal and unlimited liability with individual shareholders, every one of them being liable to the full extent of his whole means and estate. In the one case the whole property of the individual, in the other the whole property of the corporation, would be answerable to the creditors and (in contribution) to the co-partners of the bank.

If by the law of Scotland every trustee, or body of trustees acting in that B character, were a corporation, and the trust estate corporate property, the appellants in this case would be right. There would, on that hypothesis, be no need to show that there was any special or exceptional contract between the appellants and the co-partnership. The corporation would be liable, and not the individual corporators. But no authority has been produced showing this to be the law of Scotland, and it appears to me (postponing for the present all consideration of C the effect of the decision of *Lumsden* v. *Buchanan* (1)) to be at variance with *Martin* v. *Wright* (4). There LORD MACKENZIE said:

> "A trust with a power of assumption does not establish a corporation. I do not think that a private trust is to be considered as of the nature of a corporation";

D and LORD FULLERTON said:

> "The case is different from a corporation, which is held to be one person. A trust for purposes does not create a separate constructive person like a corporation. The title of each trustee stands on the right made up in his own person."

These observations related indeed to the mode of making up titles to heritable E property held in trust when new trustees had been assumed, but the principle could not be limited to that case. If authority had been wanting, reason would lead to the same result. Corporations, properly so called, are public bodies, created for definite purposes by royal charters or by public law, and this is equally true of quasi-corporations, or bodies having some, but not all, of the incidents of corporations. But if the constitution of any private trust could in law have a F similar effect, every individual would be able for purposes and on conditions of his own choice, without any restraint or regulation by public law, to invest himself or others with a corporate character, and so to limit and subdivide by mere operation of law what would otherwise be the effect of his and their engagements.

In *Lumsden* v. *Buchanan* (1) the respondents were five persons, individually named and described in the testing clause of the deed, with this designation super- G added to their personal names and descriptions, "Trustees for Mrs. Ellen Brown, the majority surviving being a quorum." That designation, though occurring in the testing clause, was incorporated by words of the reference into the inductive and operative parts of the deed. That could mean nothing less than that the title and interest of these five persons to and in the shares for which they subscribed was fiduciary and not beneficial, and that in this sense, at all events, they sub- H scribed "as trustees." If by the general law of Scotland they were a corporation or quasi-corporation (it was admitted at the Bar that trustees cannot sue or be sued under any collective designation without using their own individual and personal names), I can imagine no ground on which it could possibly be held that they did not subscribe that deed in their corporate character. But the decision of this House was that they were all individually and personally liable.

I To my mind the present case depends on this single point. But I think it right, also, to consider another and less technical way by which it has been sought to reach practically the same conclusion. The inequality which would be produced by allowing trustees to be accepted or assumed as partners on the footing that the whole trust property, and that only, should be liable, is said to be apparent only, and not real, because the co-partnership and its creditors can never in any case get more from any partner than the whole of his property available for the payment of his debts, which property must in all cases have some limit less or more, according to circumstances of which the other partners may know nothing,

and must take their chance, and in some cases may really be worth nothing at all, and it is contended that if they get the liability of the whole property, subject to a particular trust, they get what is as good as, and may perhaps be better than, the liability of individuals.

On these grounds it has been contended that it was open to the directors of the City of Glasgow Bank to accept the appellants as partners on those special terms, and that they, in fact, did so. The principle of this argument, when applied to such a co-partnership as the City of Glasgow Bank, seems to me altogether fallacious, however common a practice it may be in Scotland for simple money obligations and other ordinary contracts to be made between trustees and other persons competent to contract in any manner which they think fit, on the footing that the trust estate only is to be held liable. A contract of the kind supposed would really be for limited liability, though of an anomalous nature, the limit being undefined as to amount, variable in different cases, and subject in many conceivable cases to various doubts and questions. By the Companies Act, 1862, provision is made for limiting liability in either of two ways, one of which is called liability limited by guarantee. This consists in an engagement by each shareholder to contribute towards the payment of the debts and engagements of the company in case of its being wound-up a sum of money not exceeding a certain specified amount. The City of Glasgow Bank was not a company limited by guarantee or otherwise. If an individual shareholder had proposed to the directors to take an allotment of shares on the condition that he should in no case be liable beyond a certain specified amount (in other words, that he should be a shareholder limited by guarantee), it is clear that the directors would have had no power under this deed to agree to such a condition, whether accompanied or not by a pledge in security of any particular fund or property. A fortiori such a condition could not be annexed to a transfer of shares originally issued and held by the transferor upon the ordinary terms of unlimited liability.

The effect of the appellants' contention practically is that, on the occasion of the transfer to them of the shares registered in their names, something equivalent to this was done, though without specifying the amount of the trust funds constituting the assumed limit of their liability. It is stated that in the present case there were trust funds beyond the shares, themselves of large amount. But the principle of the argument when taken in connection with the terms of this co-partnership deed goes much further. If sound, it would enable a trustee shareholder, when no other property was in trust, to become a partner without any personal liability at all, and also without any liability of any property or fund beyond the shares themselves. There is nothing in this deed to prevent any purchaser of shares in the market from causing them to be transferred into the name of a trustee declared to be such on the face of the transfer, who, according to this view, would be under no personal liability, and therefore would have no occasion for or right to any indemnity against the beneficiaries, or against the author of the trust; and the purchaser himself, having never become a partner, would also be free from all liability. Nor would such a transaction (at all events if it took place when the bank was a going concern, and in good credit) be impeachable for fraud.

The co-partnership deed does not anywhere contemplate that shares once issued can undergo any alteration in their character or incidents by reason of any subsequent transfer. No authority is given to the directors to impose or accept any special terms on the accession of any transferee to the contract. They have power under cl. 34, in the case of a gratuitous transfer, to require shares to be sold in the market, and in the case of a transfer for value, to purchase them at the price proposed to be given if they think fit to do so. Unless they exercise this power they cannot intercept the right of transfer or object to receive any transferee on the ground that he is a mere trustee, or for any other reasons arising out of his relations to the transferor or any other person—relations into which, so far as I can see, he is not bound to recognise their right even to inquire. All that they can do is to regulate under cl. 37 the form of the transfer. The effect of the

A transfer when made is treated by the deed as the same in all cases. Under cl. 6 the transferee (when registered) becomes "entitled to all the rights and subject to all the liabilities of an original partner of the company," and under cl. 38 he is to "take the precise place of his author."

What, then, under these circumstances, is the effect of the introduction of the word "as" before "trust disponees" in the transfer deed, by which the appellants B in this case expressly agreed to become,

> "in terms of the contract of co-partnership of the said bank, subject to all the articles and regulations of the said company in the same manner as if they had subscribed the said contract?"

This word "as" (twice used) constitutes the sole difference which can possibly C be represented as substantial between the present case and *Lumsden* v. *Buchanan* (1), the omission of the word "executors" in the obligation undertaken at the end of the partnership deed by "the parties thereto and their heirs and successors" being certainly immaterial. It is urged that the necessary import of a contract in Scotland "as trustees" is to exclude unlimited personal liability, and that if that could not be done the transfer and consequent registration did not impose on D these trustees a liability to which they had never consented, but must wholly fall to the ground. Whether, if the premises were right, this conclusion would follow, it is unnecessary to inquire, because I think that the premise is not correct. The authorities cited at the Bar—*Gordon* v. *Campbell* (2) and *Thomson* v. *M'Lachlan's Trustees* (5)—show that there is no fixed rule in Scotland as to the effect of such words, but that it must always depend on the context, and on the nature and E circumstances of the contract in which they occur. If they are open to either of two constructions—the one consistent with the context and with the substance of the contract, the other repugnant to and destructive of it—the former ought certainly to prevail.

Applying that test, it appears to me that in this deed of transfer the words "as trust disponees" not only may mean but do mean the same thing which was meant F by the designation of trustees (though without the word "as") in *Lumsden* v. *Buchanan* (1) and, therefore, that the Court of Session was right in holding the position of the present appellants to be undistinguishable from that of the respondents in *Lumsden* v. *Buchanan* (1) and to be governed by your Lordships' decision in that case.

It is hardly necessary for me to add that I concur to the fullest extent in the G expression given by my noble and learned friend on the Woolsack to the sympathy which all your Lordships must feel for sufferers in this most painful case.

LORD BLACKBURN.—I also am of opinion that the judgment of the Court of Session in this case was right, and should be affirmed. In an ordinary case I should have contented myself with an expression of a general agreement with the various H reasons given by the noble and learned Lords who have already spoken, but the amount at stake, and the hardship on the appellants is so great, that I think it right to give my own reasons.

The facts on which the question arises are few, and may be briefly stated. The contract of co-partnership of the City of Glasgow Bank was originally framed in 1839. Clause 6 provides that any person becoming the holder of a share shall have I all the rights and be subjected to all the liabilities of an original partner. The shares have since been converted into stock, and this clause now applies to holders of stock. By the last clause

> "The parties hereto and their heirs and successors shall be bound and obliged to observe and perform their respective parts of the present contract."

It seems to me quite clear, and, I think, was not disputed, that those who took shares or stock, and acceded without qualification to this contract, became personally liable to fulfil the terms of it as much as the original subscribers.

But the appellants contend that they did not accede without qualification, and it is necessary to inquire how they acceded.

By a deed of transfer, dated Jan. 27, 1874, the then holders of £6,000 stock transferred and made over to William Muir and three others named the "trust disponees," in a deed described "their successors and assignees," £6,000 stock in the City of Glasgow Bank,

> "the said William Muir and others named as trust disponees aforesaid, by acceptance hereof, being in terms of the contract of co-partnership of the said bank, subject to all the articles and regulations of the said company, in the same manner as if they had subscribed the said contract, and we, the said William Muir, etc., as trust disponees aforesaid, do hereby accept of the said transfer on the terms and conditions above mentioned."

And this is subscribed by the four persons in their own names, and there was an entry made in the stock ledger of the company, "William Muir" and the three others "as trust disponees." I do not think that there is any other fact affecting the question before the House.

It appears, therefore, that these four gentlemen are in the same position as if they had with their own names subscribed the contract of co-partnership, but stated on the face of the instrument that they were trust disponees, and that the stock was conveyed to them as trust disponees, their successors and assigns, and that they, as such "trust disponees," accepted the stock, and as if the bank, knowing all this, entered their names as trust disponees; and the question raised I take to be whether these statements do so qualify the contract into which they entered as to make them not bind themselves, their heirs and successors, personally as would have been the case if they had subscribed the contract without any qualification.

Before the decision of this House in *Lumsden* v. *Buchanan* (1) in 1865 this question was one on which much difference of opinion prevailed, but nine years before the parties executed this transfer, the decision of this House, so far as it extended, settled the law. I have carefully considered the judgments in that case, and I think this much at least must be considered as decided and settled—viz., that trustees (not created by a statute) are not by the law of Scotland a body corporate, or, as it has been loosely said, a quasi-corporation. I have myself no doubt that if individuals enter into a contract because they are trustees and for the benefit of the trust, it would be prudent in them to stipulate that, should they bind themselves to see that the trust funds are properly applied to fulfil that contract, their contract shall extend no further, and that they will not be personally liable to make good the deficiency; and if they express such a limitation with sufficient clearness, and the other contracting party (being sui juris) accepts such a limited engagement, he cannot call on the trustees to do other than to fulfil that limited engagement.

There was an opinion entertained by many Scottish lawyers—and to some extent countenanced by the decision in this House in *Gordon* v. *Campbell* (2)—that by the law of Scotland the mere statement on the face of the contract that the contractors were trustees and entered into the contract because they were trustees was, as a matter of law, enough to express that the engagement was of this limited kind. I do not, speaking for myself, doubt that it is an important element to be taken into consideration in construing a contract, but I think the decision of *Lumsden* v. *Buchanan* (1) determines that it is not by itself enough to give any contract this limited effect, and certainly that it is not enough to do so when the contract is a contract of co-partnership, the nature of which would make such a limited engagement, to say the least, very inconvenient.

If the matter were res integra I think I should have come to the same conclusion, for the statement that the parties are trustees is not thereby made an idle or inoperative statement. It marks, as has been pointed out, that the property in the shares is trust property, which is, it is true, for the convenience of the trust only, but it also informs the bank that the property belongs to trustees, and will

consequently, in case of death, vest by survivorship, and it is for the benefit of both parties that this should be known from the beginning. But, even if it were an inoperative statement, I do not think it a sound rule of construction that some effect must be found for every word, even if that can only be done by giving it a force beyond what it can reasonably bear.

But I do not rest my judgment on this. I act on the ground that the decision in *Lumsden* v. *Buchanan* (1) is binding as far as it goes, and I see what I think good reasons for acting on it strictly in this and the other cases arising out of the stoppage of this bank. I think that the main object of the parties in the present case was that the shares should vest in the four gentlemen, and it is at the best very doubtful whether, if the contract was understood as the appellants contend, that object should not be frustrated. As a general rule of construction, ambiguous expressions in a contract should not be construed in a sense that would frustrate the main object of the contract. They should be construed ut magis valeat, and if the trustees meant to limit their liability, it was for them to see that the words were sufficient to make that clear.

For both reasons it seems to me to rest on anyone who after 1865 became or continued a shareholder to show that there is some substantial difference between the terms of his accession to the contract and the terms of that which in 1865 had been determined not to restrict the liability of the trustees. As far as I can see, there is scarcely any difference in form, and none at all in substance between the two. The contract of co-partnership of the Western Bank began by saying that the parties bound themselves, "their heirs, executors, and successors"; that of the City of Glasgow Bank by declaring that they bind themselves, "their heirs and successors." Does the omission of the word "executors" make any difference? I cannot think that it does, and it is perhaps worth noticing that LORD KINGSDOWN quotes the words of the contract in *Lumsden* v. *Buchanan* (1) (inaccurately it is true) as being that they bound themselves, "their heirs and successors," showing that he did not think the word "executors" was material. The parties in *Lumsden* v. *Buchanan* (1) acceded to the contract by subscribing a contract. That deed of accession narrated that the directors had created new shares and allocated them to a large number of persons designated in the testing clause. The designations were differently worded, I presume, according to the words in which the applications for shares were expressed. The designation of the appellants in *Lumsden* v. *Buchanan* (1) was "trustees for Mrs. Ellen Brown, the majority surviving being a quorum"; that in the present case is "as trust disponees." Can that make any difference? I think not. I, therefore, agree in the motion of the Lord Chancellor, that this appeal should be dismissed with costs.

LORD GORDON.—After the very full expression which has been given of the grounds on which your Lordships have proceeded, it would be quite out of the question for me to detain the House by saying more than that I concur in the judgment of your Lordships.

Appeal dismissed.

Solicitors: *W. Robertson*, for *Boyd, Macdonald & Co.*, Leith; *Martin & Leslie*, for *Davidson* and *Syme*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

NANSON AND ANOTHER *v.* GORDON

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley and Lord O'Hagan), February 29, March 2, 1876]

[Reported 1 App. Cas. 195; 45 L.J.Bcy. 89; 34 L.T. 401; 24 W.R. 740]

Bankruptcy—Proof—Partnership—Proof by partner in competition with creditors of firm—Proof by executor of deceased partner.

By a partnership deed it was provided that, in the event of the death of a partner, the survivors should take his share at its value in the books, and pay the amount to the executors of the deceased partner by instalments. After the death of one partner and before the instalments were paid, the firm filed a liquidation petition, there being debts in existence incurred during the lifetime of the deceased.

Held: it was a settled rule that a partner in a bankrupt firm could not prove in competition with the creditors of the firm, and this rule applied to the executors of a partner who had died before the bankruptcy; accordingly, the executors of the deceased partner could not prove in the liquidation for the amount due to them.

Ex parte Sillitoe (1) (1824), 1 Gl. & J. 374, and *Ex parte Carter* (2) (1827), 2 Gl. & J. 233, approved.

Notes. Applied: *Re Blythe, Ex parte Blythe* (1881), 16 Ch.D. 620. Distinguished: *Re Wilcoxon, Ex parte Andrews* (1884), 25 Ch.D. 505. Referred to: *Re Hind, Ex parte Hind* (1890), 62 L.T. 327; *Re Howes, Ex parte Trustee*, [1934] 1 Ch. 49.

As to proof of debts in bankruptcy by partner, see 2 Halsbury's Laws (3rd Edn.) 492–493; and for cases see 4 Digest (Repl.) 496–501.

Cases referred to:

(1) *Re Goodchilds & Co., Ex parte Sillitoe, Ex parte Hunter* (1824), 1 Gl. & J. 374; 2 L.J.O.S.Ch. 137, L.C.; 4 Digest (Repl.) 498, *4381.*

(2) *Re Minchin, Ex parte Carter, Ex parte Gibson* (1827), 2 Gl. & J. 233, L.C.; 4 Digest (Repl.) 501, *4401.*

(3) *Re Motion, Ex parte Bass* (1867), 36 L.J.Bcy. 39, L.JJ.; 4 Digest (Repl.) 501, *4405.*

(4) *Re White, Ex parte Westcott* (1874), 9 Ch. App. 626; 43 L.J.Bcy. 119, 30 L.T. 739; 22 W.R. 813, L.JJ.; 4 Digest (Repl.) 500, *4400.*

(5) *Ex parte Kendall* (1811), 17 Ves. 514; 34 E.R. 199; sub nom. *Re Dawes, Ex parte Kendall*, 1 Rose 71, L.C.; 36 Digest (Repl.) 492, *601.*

(6) *Re Holdsworth, Ex parte Collinge* (1863), 4 De G.J. & Sm. 533; 33 L.J.Bcy. 9; 9 L.T. 309; 9 Jur.N.S. 1212; 12 W.R. 30; 46 E.R. 1026, L.C.; 4 Digest (Repl.) 501, *4406.*

(7) *Re Levy and Robson, Ex parte Topping* (1865), 4 De G.J. & Sm. 551; 46 E.R. 1033; sub nom. *Re Levey, Ex parte Topping*, 5 New Rep. 390; 34 L.J.Bcy. 13; 12 L.T. 3; 11 Jur.N.S. 210; 13 W.R. 445, L.C.; 4 Digest (Repl.) 502, *4413.*

Also referred to in argument:

Ex parte Hargreaves (1788), 1 Cox, Eq. Cas. 440; 29 E.R. 1239, L.C.; 4 Digest (Repl.) 496, *4371.*

Ex parte Johns (1802), 1 Cooke's Bkpt. Laws, 8th Edn., p. 534, L.C.; 4 Digest (Repl.) 497, *4379.*

Ex parte St. Barbe (1805), 11 Ves. 413; 32 E.R. 1147, L.C.; 4 Digest (Repl.) 497, *4380.*

Re Sheath, Ex parte Moore (1826), 2 Gl. & J. 166, L.C.; 4 Digest (Repl.) 501, *4410.*

Oakeley v. *Pasheller* (1836), 10 Bli.N.S. 548; 4 Cl. & Fin. 207; 6 E.R. 202, H.L.; 26 Digest (Repl.) 187, *1402*.

Vyse v. *Foster* (1874), L.R. 7 H.L. 318; 44 L.J.Ch. 37; 31 L.T. 177; 23 W.R. 855, H.L.; 36 Digest (Repl.) 559, *1178*.

Ex parte Goodwin (1740), 1 Atk. 100; 26 E.R. 66; 4 Digest (Repl.) 119, *1049*.

Re Naylor, Ex parte Grazebrook (1832), 2 Deac. & Ch. 186, Ct. of R.; 4 Digest (Repl.) 502, *4412*.

Re Beater, Dennant and Russ, Ex parte Edmonds (1862), 4 De G.F. & J. 488; 31 L.J.Bcy. 15; 8 Jur.N.S. 629; 45 E.R. 1273; sub nom. *Re Coster, Beater & Co., Ex parte Coster's Executors*, 6 L.T. 199, L.JJ.; 4 Digest (Repl.) 498, *4391*.

Re Lomax, Ex parte Bauerman (1838), 3 Deac. 476; Mont. & Ch. 569, Ct. of R.; 4 Digest (Repl.) 478, *4194*.

Re Entwisle, Ex parte Kennedy (1852), 2 De G.M. & G. 228; 42 E.R. 859; 4 Digest (Repl.) 479, *4203*.

Ex parte Reeve (1804), 9 Ves. 588; 32 E.R. 731; 4 Digest (Repl.) 465, *4069*.

Lodge v. *Prichard* (1863), 1 De G.J. & Sm. 610; 2 New Rep. 537; 32 L.J.Ch. 775; 9 L.T. 107; 11 W.R. 1086; 46 E.R. 242, L.JJ.; 4 Digest (Repl.) 472, *4141*.

Appeal by the executors of Peter Dixon, deceased, formerly a partner in the firm of Peter Dixon & Sons, from an order of the Court of Appeal (JAMES and MELLISH, L.JJ.), reported sub nom. *Re Dixon, Ex parte Gordon*, 10 Ch. App. 160, reversing a decision of BACON, C.J., reported 31 L.T. 40, by which he admitted their proof in the liquidation of the firm.

The question was, whether the executors of a deceased partner could prove against the estate of the surviving partners, in competition with the creditors of the original firm.

Peter Dixon was a partner in the firm of Peter Dixon & Sons, and by the partnership deed it was provided that, on the death of any partner, his share in the assets was to be taken as it stood in the books of the firm on the previous July 1, and to be paid out by the surviving partners to the executors in fourteen annual instalments. Peter Dixon died in April, 1866, having appointed the appellants his executors. In July, 1872, the continuing partners filed a petition for liquidation, and the respondent was appointed the trustee in the liquidation. At the death of Peter Dixon his share in the business was estimated at £34,000, and the executors had allowed it to remain in the hands of the surviving partners, as they were authorised to do under the will. Under the liquidation, they made a claim against the firm for £36,094 7s. 8d. for capital and interest. It was admitted that at this time a large sum was still owing to creditors of the old firm before Peter Dixon's death. The county court judge at Carlisle expunged the proof, but BACON, C.J., admitted it as above mentioned.

Marten, Q.C., and *F. H. Colt* for the appellants.

De Gex, Q.C., and *Davey, Q.C.*, for the respondent.

LORD CAIRNS, L.C.—It appears to me that the question which is submitted to your Lordships on appeal in this case is entirely covered by authority, which has ranged over a great number of years, and has become a leading principle in the administration of the law of bankruptcy. The statement of the general principle may be taken from a number of cases, but I may conveniently refer to the enunciation of it by LORD ELDON in *Ex parte Sillitoe* (1) (1 Gl. & J. at p. 382):

> "A partner in a firm against which a commission of bankruptcy issues, shall not be allowed to prove in competition with the creditors of the firm, who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself."

In the present case there is a gentleman of the name of Dixon in business with certain other partners; he dies, and, according to the contract of partnership, upon

the occurrence of the death of a partner, his share of the assets is to be taken as it stood in the books of the concern on the 1st of the previous July; it is to be paid out in instalments ranging over fourteen years, and the surviving partners are to continue the business, paying out the capital in that way. Before the share of this partner was paid out, the surviving partners became bankrupt. This transaction has been called a purchase and a sale, and has been treated as if it were something altogether independent of the partnership. It is impossible to disguise the transaction by applying to it terms of that kind. It was a mode by which, for the obvious convenience of all parties, it was arranged that upon the death of a partner his share of the assets should be paid out to him in certain instalments of money, in place of the concern being broken up and liquidated by a sale, and he was a creditor of the continuing partners for the amount of his interest in the concern thus ascertained.

Before the continuing partners became bankrupt Dixon died, and his estate is now being administered in the Court of Chancery. A large amount of debt which existed against the firm at the time when he died is still unpaid, and the creditors entitled to those debts have proved them in administration in the Court of Chancery. These debts, of course, have to be paid by the estate of Dixon, but they are also debts in the bankruptcy against the continuing partners, and, there being no joint estate belonging to the firm as it was originally constituted, these debts will have to be paid out of the only estate in the bankruptcy, namely, the joint estate of those who were partners at the time of the bankruptcy. Your Lordships have, therefore, a case in which the estate of the deceased partner Dixon is liable to pay to these creditors that I have mentioned the amount of their debts, and those creditors are at the same time entitled to come upon the fund in bankruptcy to have their debts paid out of that fund; and just in proportion as the estate of the deceased, Dixon, will carry away a portion of that fund for the payment of the debt due to him, in that proportion the fund which would be available for the payment of those creditors in the bankruptcy will be lessened.

It is said that although it may appear at first sight to be a diminution by the estate of Dixon of the fund that would be paid to these creditors in the bankruptcy, that is to say, would be paid to those persons in the bankruptcy who are creditors of himself besides, still in reality they will benefit and not suffer by that arrrangement, because, inasmuch as they are the whole, or almost the whole of the creditors against his estate, the dividend will be brought into his estate, and they will have the benefit of it there. That is an accident. There might have been separate creditors of Dixon to the amount of hundreds of thousands of pounds, in which case the process that I have described, in place of being beneficial to his creditors, who were creditors at the time he was in the business, would have been in the highest degree injurious to them. And I think your Lordships have not heard any authority cited in which the court has entered into an investigation of how the general rule enunciated by Lord Eldon, in *Ex parte Sillitoe* (1), will apply in a particular case. Indeed, in a case which came before the lords justices, *Ex parte Bass* (3), it was expressly stated that it was not the habit of the court, and would not be right in the court to investigate what might be called the outcome of the accounts in order to determine a priori whether the rule ought or ought not to be applied.

Then, my Lords, it is contended, and this really has been the great topic of argument before your Lordships, that although the rule mentioned by Lord Eldon in *Ex parte Sillitoe* (1), and applied in so many other cases, exists where the person who seeks to prove against the estate in bankruptcy is a living person, that rule does not apply where he has died, and where it is not himself, but his estate which is coming, and seeking to prove against the estate in bankruptcy. If there were no authority upon that point, I should have said that it would be in the highest degree unreasonable and irrational to hold that if a trader had retired from a partnership, and that partnership became bankrupt, he should not prove in competition with creditors as long as he lived, but that the moment he died his executors could do what he could not have done himself, and come in and prove in competition

A with the creditors; that is to say, that the firm in which he was a partner having become bankrupt he would be unable, we will say for one month after the bankruptcy, to prove in competition with the creditors, but if he were to die on the last day of the month, then his executors, as soon as they had proved his will, might at once come in and do the very thing that he could not have done. Could anything more whimsical, more capricious, or more irrational be supposed? If
B the reason is that the hand to pay should not prove in competition with those who are to receive, then whether that hand to pay is the living hand of the man himself or is the deputed hand of his executors, is utterly immaterial.

But is there any authority upon the subject? *Ex parte Carter* (2) is distinct upon the point. LORD ELDON there took no distinction of this kind whatever, although he had before him the case of executors. He treated the case of executors exactly
C as if it had been the case of the person to whom they were executors. There is no authority produced in the opposite direction, and I apprehend that to make a distinction upon a ground so unsubstantial, so unreal, so irrational, would be a course which your Lordships would be slow to adopt. I am bound to say that I concur entirely with the judgment delivered by the lords justices, and I submit to your Lordships that this appeal should be dismissed with costs.

D

LORD CHELMSFORD.—The sole question to be determined is whether the rule that a partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm applies to this case. Under the will of Peter Dixon his executors allowed his share in the partnership to continue in the business, and the amount of it became a debt due to his estate
E from the continuing partners, as said by LORD ELDON in *Ex parte Carter* (2). At the time of the petition for liquidation being presented by the continuing partners there were unpaid debts to the amount of £27,000, which were contracted by the firm at the time that Peter Dixon was a member of it, and consequently for which his estate was liable. The debt claimed by the executors was in fact incurred by the continuing partners under the terms of the partnership deed, which provides
F that in case any partner should die without having made a valid bequest of his share, the share of such deceased partner should be taken at its value, and the amount found due should be paid in a certain manner. If there had been no actual bequest of Peter Dixon's share in the partnership the value of it would have gone to his executors as a debt from the continuing partners to his estate, and the actual bequest does not vary but confirms the relation between the parties.
G The position of the executors in their representative capacity is exactly similar to that of their testator; they are liable in respect of the estate to the executors for debts incurred by the firm while Peter Dixon was a partner, and they are creditors of the firm in respect of the debt due to their testator for his share in the partnership. Therefore, there can be no difference between the case of the partner himself and of his executors. They are equally within the range of the principle that a
H man shall not come into competition with his own creditors. This conclusion seems to me to be supported by those authorities which are directly applicable to the circumstances of the present case, and is not to be shaken by cases on the other side which were decided upon the ground of not being at all within the rule, as *Ex parte Westcott* (4); or of being exceptions to it, as *Ex parte Kendal* (5), cited by LORD ELDON in *Ex parte Sillitoe* (1). Under these circumstances, my Lords,
I I agree with my noble and learned friend that the order appealed from ought to be affirmed.

LORD HATHERLEY.—I entirely concur in the conclusion at which your Lordships have arrived in this case. It appears to me that to decide otherwise than as the lords justices did when the case was before them, would be to overthrow a rule which seems to have been settled at least some eighty years ago, and to have been acted upon ever since with certain exceptions, which I agree with the learned counsel in saying only tend to confirm the established rule. That rule is a simple

one, and founded in justice in every respect, although there may be particular cases and occasions, as must be the case with regard to the general administration of assets, in which it may operate so as to involve hardship as regards the individual against whom it is applied. I do not myself, however, think that anything of that kind occurs here. The rule is that all the assets of a trading firm are first to be dealt with to satisfy the creditors of that firm, following those assets through all their devolutions, with only certain regulations as between the different classes of creditors affecting those assets as they may happen to be found at the time of the bankruptcy, the time when it becomes necessary to adjudicate upon the fund. Those assets are to be so applied before a person who has been a partner in the firm, and who is liable in respect of the dealings of that firm, can receive anything in respect of principal, or (for LORD ELDON said he could see no difference at all which would justify him in making a distinction) in respect of being interested as a creditor before the time of distribution. This is laid down in *Ex parte Sillitoe* (1), that the funds should be so applied that no partner should be allowed to take anything as long as a single creditor remains unpaid, either as to his principal or as to his interest. The foundation of the rule seems to me a rational and a just one.

When we come to apply that rule to this particular case, it is immaterial whether it applies to a deceased person or to the executors of a deceased person. No shadow of a distinction can be drawn, it seems to me, between the position of that deceased person the day before his death, and the position of his executors immediately afterwards. To allow executors to draw out of the fund a dividend in respect of a debt due to their testator, a quondam partner in the business, and a debtor, as well as the surviving partner to the creditors of the firm, would be to establish a distinction without there being the least shadow of a difference, and to run counter to the principle which occasioned the rule to be laid down; namely, that there should be a complete payment to the creditors before one of the partners can come into competition with them. Some exceptions have been made to that rule: one was the case of a breach of trust on the part of executors; another was the case of separate firms who had clearly got a distinct and separate basis to stand upon; it was entirely confined to trade transactions between the two firms, not money transactions, such as a loan from one firm to the other. The exceptions being confined to cases of that description, tend very strongly to confirm and corroborate the rule, a rule which has never heretofore been departed from, and which it would ill become this House, after a long series of decisions, now to depart from, unless it can be shown that the rule had been established on a false principle, which in the present argument has not in any way been shown.

LORD O'HAGAN.—Your Lordships are asked by the appellants to set aside a well established rule, supported by a series of decisions of the highest authority, which are not really encountered by a single decision on the other side, and without any special grounds of reason or justice to induce your departure from it in this particular case. The admission by the learned counsel that the estate of Dixon continues liable for the joint debts of the partnership appeared to me to bring it at once within the application of the principle which forbids a partner to prove in competition with the creditors of his firm, who are, as LORD ELDON has said, "his own creditors," so as to diminish the funds available for their benefit. Very ingenious efforts have been made, but in my opinion vainly, to distinguish this case from *Ex parte Carter* (2), and *Ex parte Collinge* (6), which are precisely in point, and distinctly applicable to the circumstances presented to your Lordships. They are sustained strongly by *Ex parte Bass* (3), and other cases; and *Ex parte Topping* (7) and *Ex parte Westcott* (4) alone relied on for the appellants, when rightly understood, are quite consistent with them. The death of Dixon appears to me to be immaterial for the purposes of your Lordship's decision. Executors who represent their testator in such a case as this stand in his place quoad a debt which was his during his lifetime, having the rights which he would have possessed, and

affected by the disqualification to which he would have been subject had he continued to exist; and so Lord Eldon held in *Ex parte Carter* (2). I think it also immaterial whether the claim sought to be proved by the partner is a definitely ascertained debt, or a debt merely ascertainable, and I see no reason for holding that the demand of the executors being for money lent, they are on that account enabled to evade the rule which in my view of it, forbids them to prove in competition with the creditors of their testator. These were the chief grounds of the argument for the appellants. In my opinion it failed on both of them, and this being so I content myself by saying that I think your Lordships have been well advised to refuse to disturb a rule of law so long in operation, having such high sanction, and apparently so equitable in itself, and so beneficial to the public interests. I think that the proof should be disallowed, the judgment of the lords justices affirmed, and the appeal dismissed.

Appeal dismissed.

Solicitors: *Pattison, Wigg & Co.*, for *Andrews, Barrett & Andrews*, Weymouth; *James, Curtis & James*, for *Nanson & Clutterbuck*, Carlisle.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re GENERAL SOUTH AMERICAN CO.

[Chancery Division (Malins, V.-C.), November 17, 24, 1877]

[Reported 7 Ch.D. 637; 47 L.J.Ch. 67; 37 L.T. 599; 26 W.R. 232]

Bill of Exchange—Dishonour—Liability of acceptor to drawer—Measure of damages—Re-exchange.

Where a bill of exchange is dishonoured the drawer of the bill is entitled to recover against the acceptor not only the amount due upon the bill and the interest upon it, with the notarial and similar charges, but also the reasonable amount of expenditure which has been caused to him to get the bills paid elsewhere—a re-exchange or that which is substituted or equivalent to the re-exchange.

Woolsey v. *Crawford* (1) (1810), 2 Camp. 445, and *Napier* v. *Schneider* (2) (1810), 12 East, 420, treated as overruled.

Notes. As to measure of damages against parties to a dishonoured bill, see the Bills of Exchange Act, 1882, s. 57.

Followed: *Re Gillespie, Ex parte Roberts* (1885), 16 Q.B.D. 702. Distinguished: *Banque Populaire de Bienne* v. *Cave* (1895), 1 Com. Cas. 67. Referred to: *Re Gillespie, Ex parte Robarts* (1886), 18 Q.B.D. 286.

As to damages in respect of dishonoured instruments, see 3 Halsbury's Laws (3rd Edn.) 220–223; as to proof in bankruptcy in respect of negotiable instruments, see 2 Halsbury's Laws (3rd Edn.) 474 et seq.; and for cases see 4 Digest (Repl.) 311–314. For the Bills of Exchange Act, 1882, s. 57, see 2 Halsbury's Statutes (2nd Edn.) 536.

Cases referred to:

(1) *Woolsey* v. *Crawford* (1810), 2 Camp. 445, N.P.; 6 Digest (Repl.) 315, *2295*.

(2) *Napier* v. *Schneider* (1810), 12 East, 420; 104 E.R. 164; 6 Digest (Repl.) 317, *2314*.

(3) *Walker* v. *Hamilton* (1860), 1 De G.F. & J. 602; 45 E.R. 495, L.C. & L.JJ.; 6 Digest (Repl.) 317, *2316*.

(4) *Francis* v. *Rucker* (1768), Amb. 672; 27 E.R. 436; 4 Digest (Repl.) 313, *2833*.

(5) *Prehn* v. *Royal Bank of Liverpool* (1870), L.R. 5 Exch. 92; 39 L.J.Ex. 41; 21 L.T. 830; 18 W.R. 463; 6 Digest (Repl.) 316, *2304*.

(6) *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; 1 Tyr. 77, n.; 9 L.J.O.S.K.B. 42; 109 E.R. 842; 3 Digest (Repl.) 237, *613*.

(7) *Rolin* v. *Steward* (1854), 14 C.B. 595; 23 L.J.C.P. 148; 18 Jur. 536; 2 C.L.R. 959; 139 E.R. 245; sub nom. *Rollin* v. *Steward*, 23 L.T.O.S. 114; 2 W.R. 467; 3 Digest (Repl.) 237, *614*.

(8) *Larios* v. *Bonany y Gurety* (1873), L.R. 5 P.C. 346, P.C.; 17 Digest (Repl.) 95, *123*.

Adjourned Summons to determine whether the Bank of Lima should be allowed to prove in the winding-up of the General South American Co., Ltd., for a sum of £2,469 11s. 6d. alleged to be due to it.

On April 11, 1871, the bank wrote to the company's agent at Lima a letter proposing that the bank should open a credit with the company upon terms which were (so far as material) as follows:

"1. The total amount of the credit will be £100,000 to dispose of all or part as it may suit, the bank drawing bills on London at ninety days on the General South American Company (Limited).... 3. The bank will pay to the said South American Company a commission of ¾ per cent. for acceptance and payment of bills on the amount of drafts the Bank of Lima may draw on them.... 5. The Bank of Lima are under the obligation to cover their drafts, within ninety days after the dates of their acceptance in London, with other bills at ninety days, which may not be drawn on the same General South American Co. 6. The credit of £100,000 will always be in force for the Bank of Lima, according as they place the General South American Co. in funds for the amounts they may have drawn against them."

On April 13, 1871, M. Chavey, the agent of the company, wrote to the bank accepting "the business under the conditions contained in the letter of April 11, 1871." Business was carried on on the terms of this agreement between the bank and the company until Mar. 18, 1875, when an order was made to wind-up the company. Up to that time there had, in the opinion of the court, been no substantial default on the part of the bank in performing their part of the agreement. At the time of their stoppage the company had accepted current bills for the bank to the amount of £76,000. It then held £37,000 in bills and cash belonging to the bank, and a few days afterwards received £5,000 more. This was more than sufficient to cover all the acceptances then due, but not apparently to cover all which would fall due before the next remittances would be received from Lima. The dishonoured bills were returned to the holders at Lima, and the bank paid them, together with a charge of 10 per cent. in lieu of re-exchange to compensate the holders. The bank claimed to be repaid this charge of 10 per cent. by the company. It appeared from the evidence that there was no regular rate of exchange between London and Lima; that it was, therefore, usual to pay compensation to holders of dishonoured bills in Lima in lieu of re-exchange; that 10 per cent. was a usual rate for such compensation, and that any attempt to sell in London bills drawn on Lima would have resulted in greater loss.

Pearson, *Q.C.*, and *Kekewich*, *Q.C.*, for the bank.
Glasse, *Q.C.*, *Higgins*, *Q.C.*, and *Sidney Woolf* for the official liquidator.

MALINS, V.-C., stated the facts, and continued: The consequence of this stoppage of the company was that the acceptances were dishonoured and thrown back on the drawers, the Bank of Lima. What are the consequences of that dishonour is the question I have to decide.

It is admitted by the company that they are answerable for the consequences of the dishonour of their acceptances, for the notarial charges, telegraph messages—

in fact, that they are liable for all the Bank of Lima claim, except that which is called the re-exchange, which probably is not the real sense of the word for the reason stated, there being no settled rule of exchange between this country and Lima; but they admit their liability, except for the charge 10 per cent., which the bank say and prove they paid to put themselves in the situation which they would have been in if those bills had been duly honoured by the company.

One point I have had argued at considerable length is that, although a drawer is liable for this re-exchange (because, if this is not a re-exchange, it is a substitution for re-exchange, and it is immaterial whether it is in the strict sense of the word re-exchange or something by way of substitution), an acceptor is not. The only authorities appealed to for that are the two cases of *Woolsey* v. *Crawford* (1) and *Napier* v. *Schneider* (2). First, whatever the decision may be I think, after the case in the Court of Appeal of *Walker* v. *Hamilton* (3), those authorities must be considered as entirely overruled. LORD CAMPBELL in giving his judgment does not say that he overrules them, but he speaks of one of them as a nisi prius decision, and the other as a case in which if certain things had been known the result would have been different, and, as counsel for the bank stated, both of them were cases not of a drawer, but of a holder or a payee of the bill. I cannot in the smallest degree accede to the argument that the drawer of a bill is under a greater liability than the acceptor. I have always understood, and I think every man who has the slightest knowledge of mercantile affairs must always understand, that the person primarily liable on a bill of exchange is the acceptor. The liability of the drawer is a secondary liability, and so is that of the endorser. Therefore, I am perfectly satisfied upon every principle that if it is possible, as it would be, that a drawer would be liable for this exchange, it must necessarily follow that an acceptor must be so also.

Counsel for the bank has relied, and I think very properly relied, upon three very important cases which seem to me to decide the whole of this case. First, *Francis* v. *Rucker* (4), before LORD CAMPERDOWN. That was a case against the acceptor, and the liability of the acceptor was that, he having dishonoured the bill, his drawer was entitled to recover against him in bankruptcy, and to prove not only for the amount of the bill but for the amount which, according to the law of the country (which was Pennsylvania), would have been payable for the default of the acceptor. That was proved to be 20 per cent. This liability was inherent in the whole transaction, and, therefore, without any special contract but that which was implied in the nature of things, the acceptor was liable to have proved against him not only the amount of the bill but the 20 per cent. which represented the re-exchange.

Then, as counsel for the bank pointed out, there is a lapse of more than a century before this case comes before the Court of Appeal in Chancery, and then it formally comes before the court in the very remarkable case to which I have referred, of *Walker* v. *Hamilton* (3). In *Walker* v. *Hamilton* (3), the marginal note is this (1 De G.F. & J. 602):

> "A drawer in Louisiana of bills of exchange upon acceptors in London—held, entitled to prove under a deed of arrangement executed by the acceptors upon their becoming insolvent, to their creditors, not only for the amount of the bills but also for 10 per cent. upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills on their return dishonoured and protested for non-payment in Louisiana."

Here again it is against the acceptor, and it is put in the most distinct manner, that he was bound to pay the bills, and also this re-exchange, or that which was substituted for re-exchange, being in that case the amount of expenses to which the drawer was put in consequence of the non-payment of the bill by the acceptor.

But I think the case which finally disposes of this is that of *Prehn* v. *Royal Bank of Liverpool* (5). That case, like the present, which both parties agree is an English contract, was treated as an English contract. A firm of merchants in

Egypt desired to draw upon their customer in England for corn which they bought in Egypt. They drew upon the Royal Bank of Liverpool. The Royal Bank of Liverpool gave notice before the bills arrived at maturity that they would be unable to meet them. The consequence was that the drawer of the bill was obliged to have recourse to other houses to have those bills protected, to get them re-discounted or protected by a firm in Liverpool, and he paid for re-discount £548 11s. 4d. The plaintiff brought the action, as the case states, to recover £548 11s. 4d. paid for a commission, £97 4s. 3d. for telegrams, £44 13s. 4d. for notarial expenses; the defendants denied their liability as to the £548 and £97 4s. 3d. The decision of the Court of Exchequer is very clear and distinct, that the acceptors of the bill, the Royal Bank of Liverpool, were liable for that £548, being the expenses which the drawer had incurred in obtaining payment of the bill by other persons instead of the bank. If a man draws a cheque upon his banker, the banker having funds in hand, and the banker dishonours the cheque, he is liable for damages. He is liable, as was decided in *Marzetti* v. *Williams* (6), under any circumstances, to nominal damages; and it follows from that, and also from *Rolin* v. *Steward* (7), that if special damages can be shown (I do not mean such special damages as a man being short of money, being obliged to borrow upon mortgage, but those expenses which necessarily flow out of the transaction of his getting the bill paid by other persons instead of the acceptor) he is entitled to be indemnified against them. In *Prehn* v. *Royal Bank of Liverpool* (5), KELLY, C.B., says (L.R. 5 Exch. at pp. 97–99):

> "The contract is one under which a mercantile house, having to obtain credit to a large amount, and being, according to the usages of trade, unable to do so unless they could draw upon a bank, have contracted with a banking company that the latter shall, in consideration of ½ per cent., accept and at maturity pay their drafts, the merchants undertaking to supply funds by putting the bank in possession of goods, or the title to goods, which may be converted into money before the bills reach maturity. Bills are drawn under this contract, and are duly accepted, and before maturity the plaintiffs perform their part of the contract by supplying funds to meet the acceptances. The defendants, feeling themselves unable to perform their contract by meeting the bills accepted, very properly inform the plaintiffs of their inability, in order that the latter may resort to such means as they see fit to protect their credit and to prevent the loss which would be caused by the dishonour of the bills and their return to Alexandria. The plaintiffs, acting upon this, borrow from Marriott & Co. the sum necessary to meet these bills, and have to pay for the accommodation the sum of £548, and further, in order to ascertain who are the holders of the bills, and to communicate the arrangements they have made, so as to prevent the presentment and dishonour of the bills, they necessarily incur expense in telegraphing to Alexandria. By the use of these means they are enabled to prevent the loss of credit and of money which would otherwise have ensued. The question is, whether this was not such a course as was not only reasonable and prudent, but such as any man of business in Liverpool would have resorted to in the like circumstances. It is no doubt exactly the course which the defendants themselves would have pursued, and it was doubtless with a view to its being pursued that they gave notice to the plaintiffs of their inability to meet the bills; for it is impossible to imagine for what other purpose they gave the information, but that the plaintiffs might protect themselves as they best could against the injury and loss which would otherwise have been incurred. Suppose that, in place of what happened, the bills had been returned to Alexandria, and that the plaintiffs had then brought their action for the expenses so caused, it cannot be doubted that they would have been entitled to recover; and it is not because the defendants properly gave information which had the effect of preventing that loss that the plaintiffs are disentitled to recover the money necessarily expended for that purpose. And,

A further, if the bills had simply been dishonoured, and the plaintiffs had brought their action, then, without proof of any such special damage, the jury would, on the principle of *Rolin* v. *Steward* (7) and *Marzetti* v. *Williams* (6), have been entitled to consider all the probabilities and circumstances of the case, and to give reasonable damages accordingly. The plaintiffs are therefore at least entitled to recover the money they have necessarily paid to prevent the B further loss, and to recover it as a general damage."

The principle I understand to be decided in that case is, that whatever necessary expenses are incurred by the dishonour of a bill, the drawer of the bill is entitled to recover as against the acceptor. In *Larios* v. *Bonany y Gurety* (8) that view was adopted. Those four cases appear to me firmly to establish the rule that where a bill is dishonoured, the drawer of the bill is entitled to recover against C the acceptor, not only the amount due upon the bill and the interest upon it, and the notarial and other charges such as those, but the reasonable amount of expenditure which has been caused to him to get the bills paid elsewhere—a re-exchange, or that which is substituted or equivalent to the re-exchange.

Upon those grounds, therefore, I am of opinion, in this case, that the company is liable to the bank for that which has properly and reasonably been paid in place D of re-exchange. The bank has actually paid 10 per cent., and no evidence has been given that that is an unreasonable amount. I think, therefore, the bank is entitled to recover the amount it has claimed. The costs of both parties must come out of the estate.

Solicitors: *Freshfield & Williams*; *Michael Abrahams & Roffey.*

E [*Reported by* J. R. BROOKE, ESQ., *Barrister-at-Law.*]

F

OTTAWAY *v.* HAMILTON

[COURT OF APPEAL (Bramwell, Baggallay and Thesiger, L.JJ.), June 18, 19, 1878]

G [Reported 3 C.P.D. 393; 47 L.J.Q.B. 725; 38 L.T. 925; 42 J.P. 660; 26 W.R. 738]

Divorce—Costs—Wife's costs—Liability of husband—Liability for costs fairly and reasonably incurred, and disallowed on taxation as between party and party.

A solicitor employed by a wife to prosecute a divorce suit against her husH band, which terminated in a decree absolute for a dissolution of the marriage, had his costs in the suit taxed, as between party and party, in the Divorce Court. He then sued the husband for (i) costs incurred before but in reference to the institution of the suit; (ii) extra costs in the suit as between solicitor and client, disallowed on the taxation as between party and party; and (iii) the extra costs as between solicitor and client of rectifying the wife's marriage I settlement after decree nisi, these costs having been allowed on taxation as between party and party.

Held: the wife could pledge her husband's credit for, and the solicitor was entitled to recover, such of the costs included in all the three classes as had been reasonably and fairly incurred.

Notes. The Matrimonial Causes Act, 1857, s. 51, has been repealed: see now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50 (1). The Matrimonial Causes Act, 1958, s. 13, was repealed by the Statute Law Revision Act, 1892. For the Rules as to costs, see now the Supreme Court Costs Rules, 1959.

Considered: *Re Wingfield and Blew*, [1904] 2 Ch. 665; *Michael Abrahams, Sons & Co.* v. *Buckley*, [1924] All E.R.Rep. 634; *Gibbs* v. *Gibbs*, [1952] 1 All E.R. 942. Referred to: *Read* v. *Price* (1903), 19 T.L.R. 563; *Cobbett* v. *Wood*, [1908] 1 K.B. 590; *Gilroy* v. *Gilroy*, [1914] P. 122; *King* v. *King*, [1943] 2 All E.R. 253; *Brighstein* v. *Brighstein*, [1947] 2 All E.R. 121.

As to a wife's implied authority to pledge her husband's credit for costs, see 19 HALSBURY'S LAWS (3rd Edn.) 867–869; and for cases see 27 DIGEST (Repl.) 197–200. For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, see 18 HALSBURY'S STATUTES (2nd Edn.) 486.

Cases referred to:

(1) *Brown* v. *Ackroyd* (1856), 5 E. & B. 819; 25 L.J.Q.B. 193; 26 L.T.O.S. 215; 2 Jur.N.S. 283; 4 W.R. 229; 119 E.R. 686; 27 Digest (Repl.) 197, *1568*.

(2) *Re Hooper*, *Baylis* v. *Watkins* (1864), 2 De G.J. & Sm. 91; 33 L.J.Ch. 300; 9 L.T. 741; 10 Jur.N.S. 114; 12 W.R. 324; 46 E.R. 309, L.JJ.; 27 Digest (Repl.) 198, *1577*.

(3) *Allen* v. *Allen and D'Arcy* (1860), 2 Sw. & Tr. 107; 30 L.J.P.M. & A. 9; 3 L.T. 480; 7 Jur.N.S. 103; 9 W.R. 389; 164 E.R. 933; 27 Digest (Repl.) 671, *6378*.

(4) *Stocken* v. *Pattrick* (1873), 29 L.T. 507; 27 Digest (Repl.) 198, *1569*.

Also referred to in argument:

Rice v. *Shepherd* (1862), 12 C.B.N.S. 332; 6 L.T. 432; 142 E.R. 1171; 27 Digest (Repl.) 200, *1587*.

Wilson v. *Ford* (1868), L.R. 3 Exch. 63; 37 L.J.Ex. 60; 17 L.T. 605; 16 W.R. 482; 27 Digest (Repl.) 198, *1572*.

Jones v. *Jones* (1872), L.R. 2 P. & D. 333; 41 L.J.P. & M. 53; 26 L.T. 106; 20 W.R. 449; 27 Digest (Repl.) 268, *2150*.

Flower v. *Flower* (1873), L.R. 3 P. & D. 132; 42 L.J.P. & M. 45; 29 L.T. 253; 21 W.R. 776; 27 Digest (Repl.) 567, *5203*.

Appeal by the defendant, Mr. Hamilton, from a decision of DENMAN, J., holding that the plaintiff, who had acted as solicitor to Mrs. Hamilton in divorce proceedings against the defendant, was entitled to recover against the defendant such part of the costs claimed by him (amounting to £263 10s. 3d.) as the referee should find had been reasonably and fairly incurred.

The defendant's wife instituted proceedings in the Divorce Court against her husband, and the plaintiff acted as her solicitor. The defendant appeared and traversed the allegations in the wife's petition, but was not represented on the hearing of the suit, and a decree nisi for the dissolution of the marriage on the ground of adultery and cruelty was pronounced against him on June 30, 1876. This decree was made absolute on Jan. 23, 1877. In November, 1876, the plaintiff filed his bill of costs in the registry of the Divorce Court. This bill comprised charges from the institution of the suit down to and including a motion for the allowance or for the maintenance of the children of the marriage, which was made July 25, 1876. The bill amounted to £544 1s. 1d., and, on taxation, one of the items, a sum of £201 2s. charged as paid to a detective for collecting evidence against the husband, was disallowed. The plaintiff was afterwards allowed to bring in a supplementary bill with respect to the £201 2s., and on taxation this supplemental bill was reduced by a sum of £153 9s. 2d. The result of the whole taxation of costs as between party and party was that £271 12s. 9d. was allowed. On Feb. 6, 1877, an order was made on the petition of Mrs. Hamilton varying the trusts of her marriage settlement. The plaintiff filed a further bill of costs shortly after the decree was made absolute. This bill included the remainder of the plaintiff's costs down to the termination of the divorce suit, and on taxation, as between party and party, a small sum was disallowed. All the costs allowed on taxation were paid by the defendant soon after the taxation took place.

On April 6, 1877, the plaintiff sent to the defendant a further bill of costs amounting to £263 10s. 3d. The bill was made up of costs which in the Court of Appeal

were referred to as being divisible into three heads: (i) Charges for attendance on, and correspondence with, Mrs. Hamilton, and for instructing counsel on her case before the institution of the divorce suit, and not included in either of the taxed bills, £32 19s. 6d. (ii) Charges made as between solicitor and client comprised in and disallowed on taxation of the previous bills (including the £107 14s. 9d. for the detection), £204 18s. 7d. (iii) Costs as between solicitor and client (chiefly relating to the rectification of the wife's marriage settlement), and included in the previous bills, £25 12s. 2d.

On the defendant refusing to pay these charges, the plaintiff brought his action in the Common Pleas Division to recover them. At the trial before DENMAN, J., the foregoing facts were admitted, and DENMAN, J., gave judgment that the plaintiff was entitled to recover all the costs which the referee should find had been "reasonably and fairly incurred in the prosecution of a proceeding, in itself reasonably instituted for the protection of the wife." The defendant appealed.

By s. 51 of the Matrimonial Causes Act, 1857:

> "The court, on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords, on the hearing of any appeal under this Act, may make such order as to costs as to such court or house respectively may seem just; provided always that there shall be no appeal on the subject of costs only."

By s. 13 of the Matrimonial Causes Act, 1858:

> "The bill of any proctor, attorney, or solicitor for any fees, charges, or disbursements in respect of any business transacted in the Court for Divorce and Matrimonial Causes shall, as well between proctor or attorney or solicitor and client, as between party and party, be subject to taxation by any one of the registrars belonging to the principal registry of the Court of Probate, and the mode in which any such bill shall be referred for taxation, and by whom the costs of taxation shall be paid, shall be regulated by the rules and orders to be made under the Act of 20 & 21 Vict., c. 85, and the certificate of the registrar of the amount at which such bill is taxed shall be subject to appeal to the judge of the said court."

J. C. Mathew for the defendant.
Wilberforce (*Waddy, Q.C.*, with him) for the plaintiff.

BRAMWELL, L.J.—I am of opinion that this appeal should be dismissed. It seems to me that a suit for divorce is in the same plight as the old suit for a separation a mensa et thoro on the ground of cruelty or adultery, or both, and that the same power exists of pledging the husband's credit for the costs of a solicitor employed by the wife in a suit for divorce now, as there was formerly in a suit in the old ecclesiastical court for a separation. Counsel for the defendant does not admit that that is so, and he says that if it is, and the primary liability is on the husband, in two different ways the Matrimonial Causes Acts, 1857 and 1858, afford him an answer to this action. He says that the Acts have made provision for the payment of costs, which is in lieu of or in substitution for the provisions of the common law, enabling a wife to pledge her husband's credit in respect of those costs. I cannot see why that consequence should follow. There are certain provisions relating to costs in the Acts, but there is no statement that they are in lieu of what otherwise would have been the common law powers of the wife, and the common law liability of the husband. I think one may put an illustration which is almost decisive that that is so. Suppose the husband kept out of the way, and died before a decree was pronounced against him, the provisions of the Acts would not apply, and the common law liability would continue. I think, therefore, that the suit for a divorce is as much a necessary as the old suit in the ecclesiastical court was, and I do not think that the Matrimonial Causes Acts have taken away the wife's power to pledge her husband's credit. The same power exists since the Acts as existed before.

As to counsel's next answer that, supposing that the remedies were concurrent, and the solicitors chose to have recourse to the powers given by the Matrimonial Causes Acts, the wife and the solicitor could not rely upon the wife's power to pledge the husband's credit at common law. I do not think that is an answer, it is a supposition—a suggestion which there is nothing in the Acts to justify. If the liability existed before, and the reasons for it continue still, I do not see that going to the officers of the court to ask for such sum as was set out in the Acts affords any answer to the solicitor's claim for extra costs to be recovered by action against the husband. Supposing they had been properly incurred, I think the solicitor's claim for extra costs is in the same plight as the solicitor's claim against his client for extra costs in any action. I think that this second head of claim must be allowed, subject to the question of the items being proper expenses to be incurred, and which could be properly charged against a client who had made an undertaking to employ a solicitor and pay him proper costs.

As to the first head, the £34 19s. 6d., which includes expenses for preliminary inquiries previous to the institution of the suit, it would be most unreasonable if the wife could not pledge her husband's credit in respect of them; they are not costs which could be allowed in the suit, but costs anterior to the suit, and to suppose she could pledge his credit for costs incurred in the course of the suit, but not for these preliminary costs, seems almost impossible. I think, therefore, if the wife had (as she undoubtedly had in this case) good ground for consulting a solicitor for her own protection, with a view to instituting the suit, she had power to pledge her husband's credit, and I think that the items under the first head must be allowed, too, subject to the inquiry as to whether the amount of them is proper.

As to the last items I have not the slightest doubt that the costs of rectifying the wife's settlement after decree nisi are costs of the suit. I had a doubt whether she was not a feme sole after decree nisi, and so could pledge her own credit; but it has been decided that she is not, and looking to the Matrimonial Causes Acts, and what we may call the good sense of the matter, it certainly seems that she is not a feme sole, not an independent person, not capable of pledging her own credit until after the decree has become absolute. I think that the third head of claim is legitimately and properly part of the costs in the suit, and that the husband is liable to these costs as much as to the others. I am of opinion, therefore, that each of the several heads of claim in this case must be allowed.

BAGGALLAY, L.J.—I am of the same opinion. The result of the proceedings in the Divorce Court has shown that those proceedings were necessary, and properly instituted for the protection of the wife. That being so, I think that the principle enunciated in *Brown* v. *Ackroyd* (1) is not narrowed by the decision of the Court of Appeal in *Re Hooper* (2), and that these cases show the wife had authority to pledge her husband's credit for the expense of the costs reasonably incurred as between solicitor and client. If then there was formerly a right to institute these proceedings, and pledge the husband's credit for the cost of them, had it not been for the passing of the Matrimonial Causes Acts, there could have been no question as to the right of the solicitor to proceed against the husband in respect of the expenses so incurred. Thereupon two questions arise. Have the Acts in any way deprived the solicitor of the common law rights which he would have had if these Acts had not been passed? And, secondly, if prima facie he was not so deprived, has he deprived himself by reason of his having made what might be called an election by carrying in a bill of costs under the Acts? For the reasons, which I need not repeat, given by BRAMWELL, L.J., I am of opinion that both these questions should be answered in the negative.

The claim which is the subject of the present suit resolves itself into three items. First of all, there are the various costs incurred in the course of the proceedings in the suit, the costs of a detective, and other expenses of that kind which have been disallowed by the registrar in the Divorce Court. As regards all of these costs it appears to me that they are such as have been rightly and properly incurred, and

A are recoverable from the husband. The costs of the plaintiff in respect of these various items will have to be taxed, and any such costs as have not been properly incurred will of course be disallowed. As regards the sum of £32 19s. 6d. for preliminary inquiries before the institution of the suit, it appears to me that they are really a fortiori necessary as regards the suit. It is possible that they may not have been properly carried in under the proceedings in the divorce suit, but it B appears to me most necessary to have incurred them in respect to the proceedings. The remaining class of claim is that of the costs of rectification of the wife's settlement, and it is quite clear that the rectification of the settlement did proceed in the divorce suit as provided by the Act of Parliament, and it was one of those proceedings which ought to be instituted by the wife's authority after the decree nisi had been granted. I am of opinion that these are costs in the suit, and ought C to be allowed.

THESIGER, L.J.—I am entirely of the same opinion. It has been argued that, although a separation suit may be a "necessary," a divorce suit is not. It seems to me that all the principles upon which it has been decided that a separation suit is a "necessary," the consequence following that the husband is liable to the D solicitor of the wife, apply equally to a divorce suit. The principle seems to be this: the wife may obtain a separation as a protection from her husband, and may pledge her husband's credit for the costs of obtaining it. This principle equally applies when you come to the protection of the wife not only from a cruel, but also from an adulterous husband; and although it may be true that in a part of the United Kingdom, and also in some foreign countries, the divorce suit is one E that cannot be maintained, yet it does not in any way follow from that that a divorce suit is not a "necessary" within the legal meaning of that term as it is known to our law. It is not viewed in the sense of a physical "necessary," but it is viewed in the sense of being something which the wife should reasonably have.

There the question arises whether or not the Matrimonial Causes Acts and Rules have given the only remedy either to the wife, or to the solicitor employed by the F wife. If it had been shown that the Acts provided for the taxation of costs, or rather for the giving of costs by the court, as between solicitor and client, then I think there would have been a strong argument that the remedy which should be adopted would be that of going to the court for the purpose of obtaining their costs. At all events the argument would have been well founded that, where a solicitor, or a wife who employs the solicitor, has taken the course of going to the G court for the purpose of obtaining these costs, there has been an election of a remedy which would prevent the wife or the solicitor from subsequently founding an action at common law. But that is found not to be the case when the Acts and Rules are looked to. Section 51 of the Matrimonial Causes Act, 1857, obviously contemplates the taxing of costs as between party and party. The words are that "on the hearing of any suit, the court may make such order as to costs as may H seem just." The words "as may seem just" are used in connection with the words "on the hearing of the suit." I think it follows from this connection that the costs which are to be allowed are to be costs as between party and party. It is absolutely necessary that in many cases they should be as between party and party, for the court has to deal not only with husband and wife, but also (certainly in cases where the husband is suing for a divorce) with third parties.

I Then when we come to look at the Rules, I think, to begin with, that these Rules cannot go further than the Act enables them to go. In the second place, I think the Rules clearly indicate that prima facie the court has the power, and only the power, of giving costs as between party and party, and apart from the construction which I should be disposed to put upon the Act and the Rules, I think the case cited to us of *Allen* v. *Allen and D'Arcy* (3) is a clear authority for the proposition, not only that the old ecclesiastical courts used to give costs as between party and party, but that the present Divorce Court has followed the practice of the ecclesiastical courts. It may well be that, in the taxation of costs as between party and

party, the taxation may proceed upon more liberal principles in the Divorce Court than were formerly adopted in the old common law courts, although now I think we may say that the principles adopted in the Divorce Court are those which are adopted in the common law Divisions of the High Court of Justice.

But, however that may be, *Allen* v. *Allen and D'Arcy* (3) certainly decides this, that the giving of costs by the Divorce Court is not as between solicitor and client, but as between party and party, and, when that is once established, it seems to follow as a necessary consequence, that the solicitor must be entitled to costs as between solicitor and client, and that, while of course he must give credit for any costs received by him through the taxation in the Divorce Court, he has at the same time the right to treat the husband as his client in respect of all the costs which have been reasonably incurred in a suit reasonably instituted. That would be my opinion if there were no authorities on the point; but I think *Re Hooper* (2), which was a decision by which we are bound, and also *Stocken* v. *Pattrick* (4), are entitled to be viewed as distinct authorities on this proposition, namely, that the husband is liable for these costs. If that be so, then I agree with the other members of this court, that the particular items of this claim are costs reasonably incurred in the prosecution of a suit which the result proves to have been reasonable.

Appeal dismissed.

Solicitors: *G. J. Ottoway*; *Meade & Daubeney.*

[*Reported by* W. Appleton, Esq., *Barrister-at-Law.*]

RALPH *v.* CARRICK

[Court of Appeal (James, Brett and Cotton, L.JJ.), April 25, 26, 1879]

[Reported 11 Ch.D. 873; 48 L.J.Ch. 801; 40 L.T. 505; 28 W.R. 67]

Will—Construction—General rule—Construction in same manner as any other document—Need of technical words to show testator's intention.

The court, as a general rule, should construe a will as it should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that technical words, which would be necessary in some other instruments, should be used to give effect to the intention of the testator.

Will—Implied gift—Implication of life estate—Gift to heir or next-of-kin to take effect on death of named person—Gift to heir or next-of-kin and also to strangers to take effect on death of named person.

Where in a will there is a devise of realty to the testator's heir-at-law or a bequest of personalty to the next-of-kin to take effect after the death of a person named in the will that person takes a life estate by implication, but no such estate will be implied where the devise or bequest is to the heir-at-law or next-of-kin and also to strangers, for in such a case the heir or next-of-kin takes, not the whole estate, but only a share in it.

Notes. Considered: *Woodhouse* v. *Spurgeon* (1883), 52 L.J.Ch. 825. Considered and Applied: *Re Springfield, Chamberlin* v. *Springfield*, [1894] 3 Ch. 603. Considered: *Re Willatts, Willatts* v. *Artley*, [1905] 1 Ch. 378. Applied: *Re Swain, Brett* v. *Ward*, [1918] 1 Ch. 399. Referred to: *Re Judd's Trusts*, [1884] W.N. 206; *Re Morgan, Morgan* v. *Morgan* (1893), 69 L.T. 407; *Re Roberts, Percival* v. *Roberts*, [1903] 2 Ch. 200; *Re Rawlinson, Hill* v. *Withall*, [1909] 2 Ch. 36; *Re Embury, Page* v. *Bowyer* (1913), 109 L.T. 511; *Re Timson, Smiles* v. *Timson*,

A [1916] 2 Ch. 362; *Re Burnham, Carrick* v. *Carrick*, [1918–19] All E.R.Rep. 1194; *Re Hipwell, Hipwell* v. *Hewitt*, [1945] 2 All E.R. 476.

As to construction of wills, see 39 HALSBURY'S LAWS (3rd Edn.) 973 et seq.; and as to implied gifts, see ibid. 1161–1170. For cases see 44 DIGEST 550 et seq., 1250 et seq.

B Cases referred to:

(1) *Upton* v. *Lord Ferrers* (1801), 5 Ves. 801; 31 E.R. 866; 35 Digest (Repl.) 213, *187.*

(2) *Humphreys* v. *Humphreys* (1867), L.R. 4 Eq. 475; 15 L.T. 557; 15 W.R. 391; 44 Digest 1256, *10,840.*

(3) *Aspinall* v. *Petvin* (1824), 1 Sim. & St. 544; 2 L.T.O.S.Ch. 121; 44 Digest 1254, *10,825.*

C (4) *Stevens* v. *Hale* (1862), 2 Drew. & Sm. 22; 6 L.T. 453; 10 W.R. 418; 44 Digest 1079, *9312.*

(5) *Hutton* v. *Simpson* (1716), 2 Vern. 722; sub nom. *Sympson* v. *Hornsby*, Prec. Ch. 439, 452; Gilb. Ch. 115, 120; 24 E.R. 196, 202; 44 Digest 496, *3162.*

D (6) *R.* v. *Inhabitants of Ringstead* (1829), 9 B. & C. 218; 4 Man. & Ry.K.B. 67; 2 Man. & Ry.M.C. 71; 7 L.J.O.S.M.C. 103; 109 E.R. 82; 44 Digest 1251, *10,787.*

Also referred to in argument:

Blackwell v. *Bull* (1836), 1 Keen, 176; Donnelly, 54; 5 L.J.Ch. 251; 48 E.R. 274; 44 Digest 887, *7432.*

E *Bird* v. *Hunsden* (1818), 2 Swan. 342; 1 Wils. Ch. 456; 36 E.R. 647; 44 Digest 1256, *10,838.*

Cockshott v. *Cockshott* (1846), 2 Coll. 432; 15 L.J.Ch. 131; 6 L.T.O.S. 389; 10 Jur. 41; 63 E.R. 802; 44 Digest 1252, *10,805.*

Roe d. Bendall v. *Summersett* (1770), 2 Wm. Bl. 692; 5 Burr. 2608; 96 E.R. 407; 44 Digest 1252, *10,803.*

F *Holgate* v. *Jennings* (1857), 24 Beav. 623; 53 E.R. 498; 44 Digest 204, *332.*

Re Smith's Trusts (1865), L.R. 1 Eq. 79; 44 Digest 1159, *10,035.*

Cock v. *Cock* (1873), 28 L.T. 627; 21 W.R. 807; 44 Digest 1255, *10,835.*

Appeal from a decision of HALL, V.-C. (L.R. 5 Ch.D. 984), in an administration action.

By his will, dated Mar. 10, 1837, the testator, Andrew Carrick, gave, devised, G and bequeathed the whole of his property to trustees, and directed that after the death of his wife, and after the payment of all debts and legacies, the whole residue of his property should be divided into twelve portions, whereof three should be given to the children of his late aunt, Mrs. W., equally among them, the descendants (if any) of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive, and the H remaining nine portions were to be given in the same manner to the children and descendants of others of the testator's aunts in the will mentioned. If there were no children or lawful descendants of any of his aunts remaining at the time these bequests should become payable, then the portions of his residuary estate thereby devised and destined for such of them should be placed in the general residuary fund. The testator directed that the division of his residuary estate among his I relatives should not be made till two years after his wife's death, and he directed funds to be set apart to provide for an annuity of £700 payable to his wife under their marriage settlement. Some of the children of the testator's aunts were his co-heirs-at-law, and some of them were his next-of-kin, but the others were neither. The testator died in June, 1837, seised and possessed of considerable real and personal estate. The testator's aunts named in the will all left children, but such children had all long since died, many of them leaving descendants.

A suit was instituted in 1870 by James Hugh Ralph, who was a great-grandson of the testator's aunt, Mrs. Monteath, for the purpose of ascertaining the residuary

estate of the testator and securing the same for the persons entitled thereto, for ascertaining and declaring the rights of such persons, and having the estate administered and the trusts of the will executed under the direction of the court. The testator's widow, Caroline Carrick, died in 1872. The plaintiff in the suit having died in 1874, the suit was revived by his widow, Frances Ann Ralph. On the hearing of the cause, on further consideration, the vice-chancellor held that the gift to the children of the testator's aunts and their "descendants" included children and grandchildren only and not remoter descendants, and also that the testator's widow did not take an estate for life by implication in the residue. From the latter part of the decision the legal personal representatives of the testator's widow appealed; and the plaintiff, who claimed, as widow of one of the great-grandchildren of one of the testator's aunts, gave notice that she should contend that the former part of the decision was wrong.

W. Pearson, *Q.C.*, and *Byrne* for the appellants.

Bristowe, *Q.C.*, *Dickinson*, *Q.C.*, *Eddis*, *Q.C.*, *G. J. Forster Cooke*, *Hardinge Giffard*, *E. Ford*, *and J. Gerard Laing*, for parties interested, were not called on to argue.

JAMES, L.J.—I am of opinion that it is impossible for us to differ from the vice-chancellor's conclusion as to the meaning of the will. Possibly we may say, as was said by Sir Peter Harding in *Upton* v. *Lord Ferrers* (1), that a private person would say in this case that the testator must have intended that his wife should take for her life, but courts of law have always said that they cannot in such a case draw that inference where there is a devise of this kind.

Counsel for the appellants, in contending that the testator's wife was entitled to a life estate in the whole residue by implication, said that a general rule of construction had been established which applied both to real and to personal estate, viz., that where there was a devise of realty to the heir-at-law or a bequest of personalty to the next-of-kin, to take effect after the death of a person named in the will, that person took a life estate by implication. Then he argued that the rule went further than that, and that it was now settled that an estate for life was given by implication when some one of the persons who were to take after the decease of the person named in the will was heir-at-law or next-of-kin of the testator. Where, however, there is not a gift simpliciter to the person who was heir-at-law or next-of-kin at the date of the will, all the cases except *Humphreys* v. *Humphreys* (2), which is inconsistent with the current of authority, show that the appellants' contention cannot be supported. The ultimate gift here is to a class of persons to be ascertained at the death of the person who is named, and the question is whether that person is tenant for life or not. It is impossible to apply the rule of construction, to which I have referred, to the present case. The ultimate gift here is not a gift to a person who is heir-at-law or next-of-kin. It must be dealt with as a gift to persons who are not in the position of heir-at-law or next-of-kin. It is a gift to a class of persons to be ascertained at a particular time, and in that case there is no implication that there is a gift for life to the testator's widow. To hold that there was would be merely deciding that the widow is to have something because the gift of it is postponed till after her death, that being in contravention of the rule laid down. If you cannot bring the case within that rule, what can you bring it within? There is nothing in this case except that the gift is not to take place as a gift till after the death of the widow. There is a direction in the will that the estate shall not be sold for two years. That does not seem to make any difference. The gift is thus reduced to the common case of a gift to a class of persons after the death of another person, those persons not necessarily being heirs-at-law or next-of-kin of the testator. It seems to me that this is clearly a gift to a stranger after the death of another person, and we are not at liberty to draw the inference that there is an implied gift for the life of that person until after whose death the gift in remainder is postponed.

I am not inclined to go through the cases which the vice-chancellor has gone through, and I need only say that I agree with him. I think the cases are stronger than he put them, but it is not necessary to go further than to say that the appellants have failed to bring themselves within the rule which alone would entitle us to give the estate for life by implication.

BRETT, L.J.—All the court can do is to construe according to settled rules the terms of a will just as it construes the terms of any other written document. This will is obviously the will of a foolish, thoughtless, and inaccurate man. If he really intended his wife to have an estate for her life, as the vice-chancellor points out, what on earth was more easy than for him to say it? If you suppose he had any real intention in his mind at the time, he must have deliberately refrained from expressing it, and expressed himself in the way in which he has.

The question is: What, according to recognised rules, is the construction of this will? The first argument was that there was a general rule applicable to it, and that that general rule is that, in order to give an estate for life by implication, it suffices that some one of the persons to whom the property is given after the decease of the person named in the will should be the heir-at-law or next-of-kin. If that rule were established as a rule of construction, it would be applicable to this will, and we ought to decide the construction of this will according to the contention of the appellants; but, to my mind, not only is it not made out that that is a rule which is to be applied, but the contrary is made out, and the authorities are against the proposition and in favour of the converse of it.

It seems to me that *Aspinall* v. *Petvin* (3) is directly contrary to that proposition. So also in *Stevens* v. *Hale* (4) the proposition is laid down by KINDERSLEY, V.-C., directly to the contrary. It is true, as it seems to me, that the rule laid down by STUART, V.-C., in *Humphreys* v. *Humphreys* (2), would support the proposition if it were not that, to my mind, the authorities had decided the contrary. I should be happy to hold with him what he was inclined to hold in that case; but I think the authorities are predominant and are conclusive against a dictum of his with regard to the rule he would have preferred to have established. It might have been said that *Hutton* v. *Simpson* (5) was an authority in favour of that proposition; but when that case was examined by BAYLEY, J., in *R.* v. *Inhabitants of Ringstead* (6), it seems to me that it appeared not to be an authority in favour of the proposition.

The only question is whether there is anything in this will which would enable us to construe it outside the general rule which is otherwise applicable to it. I have not heard any circumstances on this will that enable us so to do, and, therefore, I am of opinion that the decision of HALL, V.-C., was strictly correct according to the technical and settled mode of construing such a will.

COTTON, L.J.—I am of opinion that upon the point now argued the vice-chancellor was right, but, in consequence of the course the argument has taken, I think it right to say something as to the general rules that should govern us in deciding on the construction of wills, and as regards the rule applicable to gifts which it is attempted to raise by implication.

As regards our duty when wills come before us for construction, it is obvious to say our duty is to consider the will. I say that for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to deal with wills in construing them as ordinary intelligent persons would do. There is a fallacy there. Of course we are bound to have regard to any rules which have been established by the courts for the purpose of enabling us to say what the words used by the testator mean; subject to that we are bound to construe the will as trained legal minds, and that differs from the mind of an ordinary person in this way, that even persons of ordinary intelligence not so trained are accustomed to jump at the conclusion as to what a person means by the words he uses by fancying he must have done what they under similar

circumstances think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because although, if the facts before them and in evidence were all the facts, they may think that they would have taken a particular course, yet it does not follow that all the facts known to the testator are in their minds or in evidence before them, or that the testator's mind was in any way constituted as regards the attention he paid to the rights and claims of the different parties dependent upon him as their minds are constituted, or that he would have acted in the same way as they. Therefore, as lawyers we must construe the will, as BRETT, L.J., has said, as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that technical words, which would be necessary in some other instruments, should be used for the purpose of giving effect to the intention of the testator.

Let us see before we come to this will whether or not there is any general rule that will help us in interpreting it. As regards the attempt to raise gifts for life by implication arising by a gift to some person after the death of the person to whom there is a gift by implication for life, we have two rules. As to real estate, if there is a gift to a testator's heir-at-law after the death of A., that does give by implication a life estate to A. If there is a gift of the testator's real estate to a stranger after the death of A., that does not raise the implication. For the purpose of seeing whether, if there be no rule laid down by the cases, the principle of one of those rules or of the other applies to the present case, we must consider what we conceive is the principle of the two rules. As regards an heir-at-law, if the real estate is given to him alone there is a gift to him of that which in the absence of any gift he would take, not only after the death of the person named and to whom it is attempted to give a life estate by implication, but during the life of that person immediately after the death of the testator. That is giving to a person at a future time that which in the absence of gift he would have had then, and would have taken before. Therefore, to give sense to that gift you must imply an intention to exclude him, the heir-at-law, till that future time arrives.

How can an heir-at-law be excluded? The heir-at-law can only be excluded from taking the estate of his ancestor by that ancestor giving it to somebody else, and, therefore, I am of opinion that when there is a gift to the heir-at-law alone of real estate after the death of A., that shows an intention to give a life estate to A., because in no other way can the heir-at-law be excluded except by gift to another person, and that can have no meaning unless it is to postpone the heir-at-law, and then it is done in that way. But if the gift of that estate after the death of A. is to a stranger, that does not apply; the stranger takes simply and entirely by the bounty of the testator, and, in the absence of any gift, neither after the death of the named person nor at any other time will he take anything. Moreover, it is not necessary to give to the person named on whose death the gift is to arise in order to postpone the gift to the stranger, even if you gather from the other parts of the will that he is to take something. The testator can say when the gift to him is to arise without giving it in the meantime to anyone else. There is no difficulty in saying that a gift to a stranger after the death of A. raises by implication no life estate to A., but is simply a gift to the stranger after the death of A., leaving the estate in the meantime to go either to the heir-at-law, or, if the gift carries intermediate rents, carrying that over to the stranger.

In the present case, is there any rule established by the authorities as applicable to a joint gift after the death of A. to B. and another person, not the heir-at-law? I am of opinion that none of the cases establishes any rule of construction applicable to such a case. Although cases have been quoted in which in a gift to a person as heir-at-law and others after the death of A. a life estate to A. has been implied, none of the judges has laid down that there is a general rule of construction, which, independently of the terms of the will, will give effect to a devise in those terms. In my opinion, the way they have dealt with those cases has been by putting them on the special circumstances of the will and the expressions of the will as against

A there being any such general rule of construction, because otherwise the judge would have said: "I need not trouble myself to spell out the intention upon the particular expressions of the will; there is the general rule of construction not rebutted by anything in the will." That is the way in which the judges have dealt with those cases as against the existence of any general rule. I must except *Humphreys* v. *Humphreys* (2) before STUART, V.-C., in which he does lay down a B general rule applicable to these cases, but, in my opinion, he went beyond the authorities on which he purported to rely. That being an exception, as it is, from the general current of authorities, we cannot consider that as laying down any rule of construction which will help the appellants in the present case.

That being so, within which principle does this case come? Does it come within the principle of the rule applicable to the gift to the heir-at-law after the death C of A., or within the principle of the rule applicable to the gift to a stranger after the death of A.? In my opinion, it comes within the principle on which the latter rule is founded, because although an heir-at-law is one of the persons to whom the gift of the real estate is made after the death of the widow, yet there are others joined with him, and those others are as regards the real estate strangers, they taking nothing except by the gift of the testator. It is not necessary to give to D anybody else in order to postpone the interest he is to take under the will, and moreover the heir-at-law does not under that gift take that which, independently of gift, would come to him. The two things are different. Independently of the gift, he takes the whole real estate, but under the gift he takes only a share in it. So that, both as regards the interest given to the stranger, and as regards the modification of the interest which the heir-at-law takes, it cannot be said that this is E inoperative unless you treat it as a postponement of the gift and giving the life interest to the person after whose death the gift is to arise. This case of a gift to the heir-at-law, and others comes within the second rule, and not within the first, and that being so, we have nothing which can be called a canon or rule of construction to help us, unless there is on the face of the will an expressed intention F by the testator that the widow shall have a life interest. I can see nothing in this will that can be held to show an expressed intention on the part of the testator to that effect. I should say that there was rather an indication of an intention to the contrary, because he refers to the fact that his wife was to have £700 a year, and he provides for it by saying that the rents or income of the invested real estate should be applied in paying that £700 a year. I should say he would have gone G on and directed that the balance also, after providing for that, should be paid to her if anything had been in his mind, but possibly the care of providing for his wife's annuity may have been the ground for postponing the division of his estate. That is conjecture; but to give a life estate to his widow would be a conjecture, and we are not entitled to conjecture what the testator meant to do. We can only look and see what on the face of the will he has said is to be done. The order of H the vice-chancellor on this point must, therefore, be affirmed.

Will—"Descendants"—Gift to "children and descendants" of named person—No limitation to children of children—Inclusion of remoter descendants.

By his will the testator directed that the residue of his property should be divided into twelve portions of which three should be given to the children I of his late aunt, W., equally among them, the descendants (if any) of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive, and the remaining nine portions were to be given in the same manner to the children and descendants of others of the testator's aunts in the will mentioned. If there were no children or lawful descendants of any of his aunts remaining at the time these bequests should become payable, then the portions of his residuary estate thereby devised and destined for such of them should be placed in the general residuary fund.

Held: on the true construction of the will "descendants' 'was not confined only to the grandchildren of the testator's aunts, but extended to include their remoter descendants.

Notes. Distinguished: *Re Judd's Trusts*, [1884] W.N. 206; *Re Timson, Smiles* v. *Timson*, [1916] 2 Ch. 362. Doubted: *Re Burnham, Carrick* v. *Carrick*, [1918–19] All E.R.Rep. 1194. Referred to: *Re Morgan, Morgan* v. *Morgan* (1893), 69 L.T. 407; *Re Embury, Page* v. *Bowyer* (1913), 109 L.T. 511; *Re Roberts, Percival* v. *Roberts*, [1903] 2 Ch. 200; *Re Hipwell, Hipwell* v. *Hewitt*, [1945] 2 All E.R. 476.

As to the meaning of "descendants," see 39 Halsbury's Laws (3rd Edn.) 1062; and for cases see 44 Digest 850, 851.

Cases referred to:

(1) *Sibley* v. *Perry* (1802), 7 Ves. 522; 32 E.R. 211, L.C.; 44 Digest 532, *3487*.
(2) *Pruen* v. *Osborne* (1840), 11 Sim. 132; 59 E.R. 824; 44 Digest 857, *7115*.
(3) *Ross* v. *Ross* (1855), 20 Beav. 645; 52 E.R. 753; 44 Digest 857, *7119*.

Also referred to in argument:

Gibson v. *Fisher* (1867), L.R. 5 Eq. 51; 37 L.J.Ch. 67; 16 W.R. 115; 44 Digest (Repl.) 998, *8554*.
Robinson v. *Sykes* (1856), 23 Beav. 40; 26 L.J.Ch. 782; 28 L.T.O.S. 114; 2 Jur.N.S. 895; 53 E.R. 16; 40 Digest (Repl.) 501, *138*.
Crosley v. *Clare* (1761), 3 Swan. 320, n.; Amb. 397; 36 E.R. 881; 44 Digest 992, *8499*.
Smith v. *Horsfall* (1858), 25 Beav. 628; 53 E.R. 776; 44 Digest 857, *7121*.

Argument on the contention of the plaintiff that the vice-chancellor's judgment was wrong in holding that the limitation to descendants of children of the testator's aunts was confined to the children of those children.

Eddis, Q.C., and *E. Ford* for the plaintiff.
Dickinson, Q.C., and *H. A. Giffard* for the grandchildren of Mrs. Wingate.
Bristowe, Q.C., and *G. J. Forster Cooke* for the trustees of the will.
J. Gerard Laing for a party interested.

JAMES, L.J.—In my opinion, we cannot agree with the decision which the vice-chancellor arrived at in this case. I am bound to say that, though I have been more than once referred to *Sibley* v. *Perry* (1) as having laid down the law, or what has been adopted as a rule, it is, I think very much to be regretted that that case was ever made a leading case, because, according to the report of what Lord Eldon himself said in that case, it is, to my mind, perfectly clear that he never intended to lay down any general rule or canon of construction whatever, but was in terms dealing with the very peculiar language of the will in that case. He found one gift in it which led him to the conclusion that there the testator had used the word "issue" to signify "child" only, and then he said: "I give the same meaning to the word 'issue' in other parts of the will."

It is, I think, settled by *Pruen* v. *Osborne* (2) that there is a general rule that, when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, then in that case the word "issue" is cut down to mean children. I am not quite sure that some of the consequences of that decision laid down as a general rule have always received the attention they ought to have received, because, if that be laid down as a general rule of construction, not improbably, the testator might leave his property to his wife for life, at her death to all his children equally to be divided between them, and then, if they should die leaving issue, the issue only to take the parent's share, and then a gift over in terms. In that case the testator's children might die, their children having predeceased them leaving families, and the whole of the grandchildren might go to the workhouse while the family estate would go to a stranger under a residuary gift. That seems to me to be a very possible result of that rule.

A The word "issue" is an ambiguous word. In the ordinary parlance of laymen it means children and only children. When you talk of what issue a man has or what issue there has been of a marriage you always talk of children, not grandchildren or great-grandchildren. You would say a man had issue so many sons and daughters. But in the language of lawyers, and only in that language, it means descendants. In the particular will in *Sibley* v. *Perry* (1), LORD ELDON B found ground for coming to the conclusion that the word "issue" had the layman's meaning of "children" and not the lawyer's meaning of "descendants." In the present case there appears to be a perfectly unambiguous word "descendants," a word which I venture to say no layman or lawyer would use to designate children only. "Descendants" mean descendants, that is children and their children, and their children to any degree. I find it difficult to find any context except in express C words by which the word "descendants" could be limited to mean children only. I should, therefore, say that *Sibley* v. *Perry* (1) has no application whatever to this will.

Supposing the word not to have been "descendants," but to have been "issue." It seems to me impossible to distinguish the case from *Ross* v. *Ross* (3), and, according to my view, it is impossible to say that *Ross* v. *Ross* (3) was not decided D upon very sound principles. There it was held that the language of the gift over rendered it impossible to give a limited meaning to the word. It is one of the most settled and most reasonable rules of construction that where there is a gift over on the failure of certain persons the previous gift must, if the words reasonably admit of it, be construed as a gift to the same persons, and that is what occurred in *Ross* v. *Ross* (3), and here. In the present case it is beyond all question that the E gift is only to take effect upon an absolute failure of the descendants of any one of the heirs, and all the descendants must fail. We are bound, unless there is something which absolutely compels us to the contrary, to suppose that the gift was to be to persons in whose favour the gift over was to take effect. The courts have constantly by implication done the same thing. It is the common thing when you create an estate tail to say, I give an estate to A. for life, and, if he shall die F without issue, then over. Of course the estate is not to go over until the natural failure of issue takes place. The words imply an estate tail, with a gift to the issue. It also refers to the case of cross-remainders which are constantly limited by implication in the same way where there is a gift to classes and to their children, and then an ultimate gift on failure of all of them. You imply cross-remainders until there is a failure, and then the gift over takes effect. Here you G have not a gift over except in this sense: a gift over of each particular share in such a way that it would go to other persons and create cross-remainders, which cross-remainders are not created except in the particular case where there is a total failure of the class. That is exactly what was decided in *Ross* v. *Ross* (3); and it seems to me rightly decided, and what I should myself decide now if it were a new point occurring for the first time upon the gift in this will. I cannot bring H myself to entertain any doubt whatever as to the meaning of this will. I have no doubt that when the testator said "descendants" he meant descendants and that the descendants were to take. It appears that the effect of the word "parent" would be that they would take per stirpes, not per capita; and that, giving all the effect that is required to that, there is no incongruity or inconsistency in that part of the will.

I We are, therefore, of opinion that the descendants will take per stirpes and not per capita, and that there is a gift over. Therefore we must discharge the declaration of the vice-chancellor as to that part, and declare that all the descendants were entitled, but not, of course, to come into competition with the parent. They are only to take in any degree the share their parents would have taken.

BRETT, L.J.—I think after the way in which *Sibley* v. *Perry* (1) has been spoken of in subsequent decisions, we are not at liberty to say that it does not contain a rule. But I think I see the fate of that rule. It will be the fate which usually

accompanies a rule laid down in a case which is not liked, and, therefore, it will be applied to cases exactly like *Sibley* v. *Perry* (1) and to no others. In other words, it will be no general rule at all; and after hearing what the effect of such a general rule may be as described by my lord, I should have no objection to be present at the funeral of *Sibley* v. *Perry* (1) as soon as that can take place.

But, assuming *Sibley* v. *Perry* (1) to lay down a general rule, it seems to me that general rule is not applicable to any part of this will. That general rule applies to the collocation in a particular manner of the words "issue" and "parent," but it seems to me that it does not apply, neither does the principle of it apply, to any collocation of the words "descendants," and "parent." I agree that in ordinary parlance the prima facie meaning of "issue" is children. In legal documents if the word "issue" is used without anything to restrict it, the prima facie meaning of issue is descendants; that is to say, that the word issue may mean children only, or it may mean descendants. But the prima facie meaning of "descendants" in ordinary parlance is all descendants and not only children. I know of no authority for saying that in any legal document the word "descendants," merely because it is in collocation with the word "parents," is to have any other than its meaning in ordinary parlance. It is said that the converse is to be true if the word "issue" is the converse of the word descendants; but very often converses are not correct, and I do not think that it can properly be said that because "issue" may mean either children or descendants, "descendants" may mean either children or descendants. I do not deny that, if it could be shown by something much more clear than the mere collocation of the words "parents" and "descendants," that a particular testator had used the word "descendants" in a way in which no other person would use it, that might not be the construction of the will; but the mere presence of the collocation of "parents" and "descendants" does not bring the case within the rule of *Sibley* v. *Perry* (1). Even if the word "issue" had been used in the first part of this will, it seems to me that the construction of the will would have been different from that in *Sibley* v. *Perry* (1), and would have been in accordance with the construction of the will in *Ross* v. *Ross* (3).

With regard to *Ross* v. *Ross* (3), I have tried hard to understand the first part of the judgment of Sir John Romilly, M.R., in that case. I have no doubt that it is some obtuseness of mine, but as to that part of the judgment dealing with the shifting meaning of the word "parents," I confess I do not understand it. But we do gain from that case a very distinct ground of decision, which is the decision arising from the gift over and the way in which the terms are used in the gift over, and it lays down a rule that, notwithstanding in one part of the will you find the collocation of "issue" and "parents" as it existed in *Sibley* v. *Perry* (1), if you can show by other parts of the will that the testator did not use "issue" in that sense, then it is not to be used in the sense of *Sibley* v. *Perry* (1), even in the place where it is collocated with the word "parents." So here, if you take "descendants" to be the same as "issue" in the first part of the will, when you come to the gift over, or the gift of cross-remainders, as it has been said, and find that this testator did not use the word "descendants" in the manner supposed, it seems to me that *Ross* v. *Ross* (3) is an authority applicable to this case, seeing the way in which the testator clearly uses the word "descendants" in the gift over, and we must determine that he intended to use it in the same sense in the former part of the will. Therefore, it does not seem to me, on the present occasion, that we have to determine what is the full effect of *Sibley* v. *Perry* (1), because it does not seem to me to govern this case.

COTTON, L.J.—I am of opinion that the decision of the vice-chancellor on this point cannot be sustained. I should have thought it unnecessary to add anything to what has already been said, but for the course of the argument in this case. It has been very much pressed upon us that there was a general rule laid down by Lord Eldon in *Sibley* v. *Perry* (1) and that to reverse the decree of the vice-chancellor would be in fact to depart from the general rule so laid down. Certainly

for myself, if there had been a general rule of construction laid down I should be unwilling, whoever the judge was who laid down that rule, to depart from it, or to distinguish a will and take it out of the rule on slight grounds, and certainly if LORD ELDON had laid down any general rule of construction which would apply to the present case I should follow it. But one must consider what general rules of construction are. They are not fetters so as to prevent the testator, if he pleases, expressing a meaning not in accordance with the construction established on a particular will by that rule of construction. It is this, as I understand it. Unless there is anything to control the expressions used in the will, certain expressions are to bear a particular meaning. I may instance that by referring to the meaning which has been given to the word "survivors." We all know that, if there is a life estate and a gift to survivors, it means those, as a general rule of construction, who survive the life estate, or the particular estate, if there is not a life estate. Prima facie, as a general rule, "survivors" refers to those who survive the testator —a general rule to be controlled in each particular case by the expressions used by the testator if those are sufficient to indicate an intention contrary to the general rule of construction. So that, even if there had been a general rule laid down in *Sibley* v. *Perry* (1), we must apply that to the words used in this particular will, and see how far those words do or do not take the case out of the general rule.

This case has been argued as if *Sibley* v. *Perry* (1) had laid down the general rule that wherever you find "issue" and "parent" in collocation "issue"—although, unless restrained, the word is most general in its meaning, and includes all descendants—will be cut down to mean children of the persons described as parents. In the first place, *Sibley* v. *Perry* (1), as far as the decision went, laid down no general rule whatever, because LORD ELDON, in framing the decree, was careful to declare his opinion in these terms: "I shall express the ground of my opinion in the declaration. Declare that upon the true construction of this will, and the whole of it taken together, the testator by the words 'lawful issue' in these clauses meant children, and the distribution shall be accordingly." He most carefully guarded himself. The general principle which he laid down was that "issue" included all descendants, but it was a word capable of being controlled by the context, and with regard to the will before him he held that, looking at the will as a whole, the meaning of the word "issue" was cut down and confined to children.

The statement most favourable to the respondents' contention on this appeal is that which arises on the third clause of the will which, no doubt, LORD ELDON did consider assisted him in arriving at the meaning of the word "issue" in other clauses. The third clause gave £1,000 to each of three persons named, and then it went on:

> "And if all or any of them shall die before I do, then I will that the lawful issue of every one of them so dying before me shall share and share alike, have, and enjoy that £1,000 stock which their respective parents, if living, would have had and enjoyed."

No person or parent of anybody could enjoy the £1,000 as a whole except the three individuals named; and all, therefore, that LORD ELDON laid down on the construction of this clause as differing from the others was that "parent" in that clause must bear its proper meaning of father or mother, as there was nothing to control it. I find a person referred to, to whose "issue" there is a gift, and the original taker is referred to as the "parent" of all the issue. It must be that person referred to because no other person could take the £1,000 as a whole. When I find that a person to whose issue there is a gift is referred to as the parent of all the issue to whom the gift is given, "issue" in that will must mean children. That is all the rule, if there is any rule. He also goes through the rest of the will most carefully to see whether, throughout the will, the testator had used the word "issue" as synonymous with "children".

Assuming that that is all the rule, let us see how far that governs the present case. Here we have a gift of certain portions of the estate. The first only is the

limitation, but a share is given "to the children of my late aunt Mrs. Wingate, equally among them the descendants (if any) of those who may have died being entitled to the benefit which their deceased parent would have received had he or she been then alive." There is nothing to show that the person there referred to as parent must of necessity be the child of Mrs. Wingate, and, if that be so, the foundation of LORD ELDON'S decision upon the third clause of the will which was before him goes, because it is evident that the person referred to as parent must of necessity be one of the three persons named, one of the first takers of the £1,000. But assume that the descendants here could be construed to be children of the children of Mrs. Wingate. If LORD ELDON laid down a general principle it was that he considered the word "issue" in the portion of the will under consideration to mean children because that was the meaning which the testator showed throughout the will he intended to give to that word.

Can we for a moment say that throughout this will "descendants" is used to mean "children"? You have to refer to the limitations that follow these gifts and then you find that the word cannot be used in that way because there are these words: "and should there be no children or lawful descendants of any of my aunts above named remaining at the time these bequests shall become payable," it is to go among the other stirpes. Then we have these words: "no children or lawful descendants of any of my aunts," showing clearly that in that part of the will the testator did not consider "descendants" to mean children, because, if that had been so, "children or descendants of any of my aunts" would be synonymous; but he intended there to provide in the first instance for the failure of children, and unless one can restrict it in any way failure of all the descendants of any of his aunts. "Descendants" of his aunts must go beyond children as children have been already mentioned. In that last gift over I can see nothing whatever to restrict the meaning of the word "descendants," and, therefore, I consider that throughout the will the testator has not used the words "descendants" as meaning children only; and that that ground, therefore, is cut away, and here it is impossible, I think, to say that he meant this forced limitation to take effect, unless there had been an entire failure of one of the stirpes. I think that the share given originally to one of the stirpes was only to go to the other if there was an entire failure of that stirpes. I think it is a sound principle that when there are ambiguous words in the original gift you should not construe the gift over in a restrictive sense which it does not otherwise bear, but you should construe the ambiguous words in the previous gift so as to mean the unambiguous words contained in the other gift. If there were any general rule laid down, this will controls that general rule; it does not show that the word "descendants" is used in the restricted sense of children, but it shows that it is used in its general ordinary sense of descendants. It is not necessary in this case to consider how far the word "descendants" is liable to be restricted. In my opinion, there is not sufficient here to restrict it in the way in which it was restricted in *Sibley* v. *Perry* (1), but I must say that as a mere matter of ordinary construction "descendants" is a more difficult word to control than "issue."

Solicitors: *Patrick, Clarke, Woodcock & Ryland*, for *Isaac Cooke & Sons*, Bristol; *Walter, Moojen & Son*; *Nelson, Son & Hastings*; *Phelps, Sidgwick & Biddle*.

[*Reported by* H. PEAT, ESQ., *Barrister-at-Law*.]

A

GREAT NORTHERN RAIL. CO. *v.* SWAFFIELD

[COURT OF EXCHEQUER (Kelly, C.B., Pollock, Pigott, and Amphlett, BB.), April 23, 1874]

[Reported L.R. 9 Exch. 132; 43 L.J.Ex. 89; 30 L.T. 562]

B

Carriage of Goods—Common carrier—Preservation of goods carried—Animal—Expenditure—Right to recover from owner—Carrier's lien.

It is the duty of a common carrier, although the actual carriage of the goods is at an end, to take such reasonable care of the goods as a reasonable owner would take of his own goods. In providing for the safety and preservation of the goods (including animals) the carrier may incur reasonable expenses, and he may recover those expenses from the owner of the goods.

C

Notes. Referred to: *Sims* v. *Midland Rail. Co.*, [1913] 1 K.B. 103; *London and North Western Rail. Co.* v. *Duerden* (1915), 85 L.J.K.B. 176; *Coldman* v. *Hill*, [1918–19] All E.R.Rep. 434; *Transoceania Soc. Italiana di Navigazione* v. *Shipton*, [1923] 1 K.B. 31; *Prager* v. *Blatspiel, Stamp and Heacock, Ltd.*, [1924] All

D E.R.Rep. 524.

As to the liability of a carrier as warehouseman, the duty to care for animals, and a carrier's lien, see 4 HALSBURY'S LAWS (3rd Edn.) 149, 166–168, 194, 195. For cases see 8 DIGEST (Repl.) 38, 39, 142–148, 160–165.

Cases referred to:

E

(1) *Notara* v. *Henderson* (1872), L.R. 7 Q.B. 225; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Exch.; 41 Digest 292, *1519*.

(2) *Cargo ex Argos, Gaudet* v. *Brown, The Hewsons, Geipel* v. *Cornforth* (1873), L.R. 5 P.C. 134; 42 L.J.Adm. 1; 28 L.T. 77; 21 W.R. 420; 1 Asp.M.L.C. 519, P.C.; 41 Digest 494, *3236*.

(3) *Christy* v. *Row* (1808), 1 Taunt. 300; 127 E.R. 849; 41 Digest 623, *4541*.

F **Appeal** by Case Stated by the plaintiffs, the Great Northern Rail. Co., from a decision of the judge of the county court of Bedfordshire, holden at Biggleswade, given in favour of the defendant on Nov. 11, 1873.

J. P. Aspinall for the plaintiffs.

Graham for the defendant.

G **KELLY, C.B.**—We are clearly of opinion that this judgment must be set aside, and that judgment and verdict must be entered for the plaintiffs for the £17 which they seek to recover. It appears that the defendant sent a horse, carriage paid, by the plaintiffs' railway from King's Cross to Sandy station on their line. The horse was consigned to the defendant himself, and to the horse box in which the animal was sent was affixed a ticket having upon it the address: "Swaffield,

H Sandy." There was, however, no direction as to the horse being taken to or delivered at any particular place. The horse arrived in due course at Sandy station, where the defendant, or some one on his behalf, ought to have been ready to receive the horse on its arrival, and take it away. But no one was there, and both the defendant and his residence were unknown to the company's servants at the station. It does not appear that there was any stable or other accommodation of that kind

I attached or belonging to the station.

The question arises: What was the duty of, and what was it competent for, the railway company to do thereupon? I do not think that we need do more than ask ourselves this question, as a matter of common sense and common understanding. Had they any choice? They must either have allowed the animal to stand somewhere at their station and remain there until he was starved, in a place of danger where it would have been exceedingly imprudent and unsafe to have allowed him to remain, or they must have put him in safe custody—in other words, put him where they did, namely, under the care of a livery stable keeper who lived close

at hand. By and by a servant of the defendant came and demanded the horse; but it was then no longer in the possession of the plaintiff company, and the man was referred to the livery stable keeper. The man went to the livery stable keeper, and it is stated that he might then have had the horse upon payment of 6d. It may be, for aught I know, looking at some of the cases, that if then he, representing the owner, had said: "I will not pay you the 6d. You can summon me in the county court for it; but if you do not deliver up the horse to me I will bring an action against you"—it may be, I say, that he would have been able to maintain that action. But he did nothing of that kind. The horse was left there. The next day, when the charges had amounted to half-a-crown (which the Case finds to be a reasonable charge), the owner himself went to the station and demanded the horse. An altercation took place about this trumpery charge of half-a-crown on the part of the livery stable keeper, who refused to deliver up the horse except on payment of that sum, whereupon the station master, Mr. Mason, said that, rather than there should be any further fuss about it, he would pay the half-crown out of his own pocket. Thereupon the defendant declared he would have nothing to do with it, and went away leaving the horse behind him in the possession of the livery stable keeper.

What were the company to do? Were they to leave the horse there or allow it to perish? A correspondence then ensued between the parties, in which the defendant was told that he could have the horse on sending for it. He replied in effect: "I will not send for it. You may send it to me by tomorrow morning, as I am going away for a couple of days; but unless you deliver it at my house free of expense, and pay me for my loss of time and expenses, I will not accept it at all." That is the mode in which he met the repeated proposals on the company's part to restore the horse to him, and to put an end to the dispute. Thus matters remained, the defendant not sending for the horse and nothing more being done, until the livery stable keeper required payment of his charge for the horse's keep. In fact, the railway company, who had placed the horse under his care, and were liable, therefore, to satisfy his claim, ran up a bill with him to the amount of £17, for which they were clearly liable. They paid that bill, sent the horse to the defendant, and then brought this action to recover from him the amount which they had so paid to the livery stable keeper.

In my opinion, it would clearly be a perfect outrage upon justice and common sense to entertain a doubt as to the right of the railway company to recover this money. My brother POLLOCK has referred to a different description of case, but one which is identical in principle with the present case, in which it has been held that, where a shipowner has a cargo of goods which he is to deliver to the consignee and something occurs which renders it necessary for the safety of the cargo that he should do something whereby an expenditure is incurred and he thereby incurs a debt, he is justified in doing that necessary thing, and can maintain his claim upon the owner of the cargo for reimbursement of the debt which he has so incurred. It is exactly the same in this case. The railway company are put in much the same position as the shipowner under the circumstances which I have mentioned. They have no choice but to leave the animal to roam about and starve on the highway, to the danger of the Queen's subjects as well as to the poor animal itself, or to put it into the livery stable keeper's care. It appears to me to be a perfectly analogous case, and as they were bound, by the implied contract between themselves and the livery stable keeper, to satisfy the latter's demand, a cause of action accrues to them, and a right arises on their part to be reimbursed the charges which, for the benefit of the owner of the horse, they have incurred. That is what they seek to recover in this action, and I am clearly of opinion that they are entitled to recover it.

PIGOTT, B.—I am of the same opinion. I do not think that we have to deal here with any question of lien, or that we have anything to do except to see whether the plaintiffs, the railway company, necessarily incurred this expense in con-

A sequence of the defendant's conduct in not accepting the horse—that is to say, that they were obliged to keep the horse and to defray the expenses of his keep—and then we have to see whether, under the circumstances, the defendant is under an implied obligation to reimburse that amount to them. It seems to me that he clearly is.

[HIS LORDSHIP stated the facts and continued:] What, then, were the carriers B to do? They could not turn the horse into the highway, nor allow it to starve. They were bound, if only out of ordinary feelings of humanity, to take care that the horse was provided with food and drink. That became a necessary consequence of the defendant's own conduct, he having entered into a contract with the plaintiff's, and having refused to receive the living animal at the end of the journey. What occurred after that? The defendant refused to receive his horse, and he C went away. After that he wrote saying that he should claim the price of the horse, and so on. The station master's answer to that was:

> "I am instructed by our superintendent to deliver the horse consigned to you from London on Friday last, without payment of the livery charges; but, at the same time, to inform you that we shall look to you for payment of the same."

D The defendant wrote back requiring a great many things, and, among others, demanding a sum of 30s. for his expenses, etc. He again refused to send for the horse. Upon the whole, I come to the conclusion, whoever was right or wrong on the night of the horse's arrival at the station, that, when on the following day the plaintiffs' servant offered to deliver the horse without claiming any lien, and the defendant refused to receive it, the defendant was then clearly in the wrong. The expense was rightly incurred, and there was an implied contract which entitles E the plaintiffs in this action to succeed as against the defendant.

POLLOCK, B.—I am of the same opinion. If the case had rested upon the first occasion, when, the horse having arrived at Sandy station, a charge was made in respect of which a lien was insisted upon, I should have thought that the railway company were wrong, because, although a common carrier has by the F common law of the realm a lien for his carriage, he has not a lien in his capacity of warehouseman, and it is only for the warehousing or keeping of this horse that the railway company could have made any claim against the owner of it.

But the matter did not end there. It is distinctly set out in the evidence and in the judgment of the learned county court judge, that, upon the next day, when the owner himself came for the horse, he declined to pay the livery stable keeper G Bennett's charge, and said

> "he would not recognise Bennett at all, but offered to pay any demand of the company, if I [the station master] would give him a proper receipt. I said the company's demands had been met by payment in London, and we had no further demand to make. He still declined to pay Bennett, and I, thinking it would be a pity for him to go away without the horse after coming some H sixteen miles for it, said, rather than he should go away without it, I would pay the charges out of my own pocket. He then declared he would have nothing to do with it, and went away."

It is clear to me that the reasonable inference from that evidence is that the horse was there and the defendant could have had it without the payment of any money I at all. He declined to take it, and he went away. Then comes the question: What was the duty of the company, as carriers, with regard to that horse? Secondly, supposing that they had incurred any charges in carrying out that duty, could they recover them in any form of action against the owner of the horse?

In my opinion, it was the duty of the company, as carriers, although the transit of the horse was at an end, to take such reasonable care of that horse as a reasonable owner would take of his own goods; and that if they had turned the animal out on the highway, or allowed it to go at large, they would have been in default. Can they recover any expenses incurred against the owner of the horse? As far

as I am aware—and certainly I have had some experience in these cases—I do not know of any decision of English law by which an ordinary carrier of goods by land has been held entitled to recover this sort of charge against the consignee or consignor of goods. In my opinion, he is so entitled.

It has long been debated whether a shipowner has the right, and gradually—partly by custom, and partly by some established opinions in this country—the right has been held to be a good right. That, I think, was clearly established in *Notara* v. *Henderson* (1). In the considered judgment of the Exchequer Chamber, delivered by WILLES, J., in that case all the authorities are referred to and discussed with very great care. That case was cited in *Cargo ex Argos* (2) before the Judicial Committee of the Privy Council, and, although that is not a court the decisions of which are binding upon us sitting here, I certainly should on all occasions pay every respect to their decisions. In that case the decision of the Privy Council was clearly in accordance with what should be law, according to all reason and right. In delivering the judgment of the Judicial Committee, after alluding to the decision of the Court of Common Pleas in 1808, delivered by SIR JAMES MANSFIELD, C.J., in *Christy* v. *Row* (3), SIR MONTAGUE SMITH proceeds to say (L.R. 5 P.C. at p. 164):

> "The precise point does not seem to have been subsequently decided, but several cases have arisen in which the nature and scope of the duty of the master, as agent of the merchant, have been examined and defined."

After citing the cases, and among them *Notara* v. *Henderson* (1), his Lordship proceeds:

> "It results from them that not merely a power is given, but a duty is cast on the master, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and that, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing."

This seems to me to be a sound rule of law. That the duty is imposed upon the carrier I do not think anybody has doubted. If there were that duty without the correlative right here spoken of, it would be a manifest injustice. Therefore, upon the whole of the circumstances, I am glad to come to the conclusion that this was a proper claim on the part of the company, and that the judgment of the county court judge in this case ought to be reversed.

AMPHLETT, B.—I am entirely of the same opinion. In this somewhat trumpery case I should hardly like to make any lengthened observations, but it appears to me that, although trumpery in itself, it involves rather important principles.

It seems to me to be perfectly clear that the railway company, when the horse arrived at the station and no person was there to receive it, were not only justified, but were bound, to take reasonable care of it. If only as a matter of common humanity, they could not leave the animal without food and water during the whole of that night, and if they had turned it into the road, they would not only have been responsible to the owner of the horse, but, if any accident had happened in consequence to any of the general public, they (the company) would have incurred a liability in that respect. Therefore, as it appears to me, there was nothing that they could reasonably do except that which they did do, namely, send the horse to the livery stable keeper to be taken care of.

Then comes the question that has been discussed by POLLOCK, B. I should not venture to differ with him without very great diffidence indeed, but I should be very sorry, as at present advised, to be considered as holding, without further consideration, that in a case of this sort, where it was necessary that the horse should be taken care of by somebody and where the owner of the horse would undoubtedly be bound to indemnify the person who so took care of it, the person who so took care of and expended money upon the horse would not be entitled to a lien upon it for the expenses so incurred before being obliged to give the horse up.

A But that point does not arise here. Whatever might be the case with respect to that, all question relating to it appears to me to be gotten rid of, because, even if the company were wrong in claiming payment of the sixpence on the night when the horse arrived, the next day, when the railway company said: "Rather than have a bother about it, although we think that we ought to be paid, we will pay the livery stable keeper and you may take your horse away," the defendant B refused that very reasonable offer. What, then, were the company to do with the horse? They left it at the livery stable. It was being taken care of, and the defendant had had an offer made to him to take the horse away without payment of the small amount that was then due upon it. At last, after a substantial amount had been incurred, namely, the sum of £17, the horse was sent back to the defendant.

C The question is, who is to pay that sum of £17? Who was in the wrong? If the plaintiffs were in the wrong, which I am by no means certain that they were, in not giving up the horse on the night of its arrival at the station, nevertheless, from the moment that that was set right by the station-master's offer the next day, the defendant was in the wrong, and the railway company were right. It appears to me, therefore, quite clear that the railway company are entitled to recover the D money which they have been obliged to pay to the livery stable keeper, and that the judgment of the county court judge must be reversed.

Appeal allowed.

Solicitors: *Johnston, Farquhar & Leech*; *W. Rogers*, for *W. Stinson*, Bedford.

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MINORS *v.* BATTISON AND OTHERS

[HOUSE OF LORDS (Lord Chelmsford, Lord Hatherley, Lord O'Hagan and Lord Selborne), May 23, 26, June 1, 1876]

[Reported 1 App. Cas. 428; 46 L.J.Ch. 2; 35 L.T. 1; 25 W.R. 27].

G *Trust—Trust for sale—Construction of will—Absolute trust—Discretion as to manner and time of sale.*

By his will, dated Feb. 27, 1857, the testator left his property to trustees and directed them "from and after the decease of my said wife (or during her life, if she and the majority of my children and my trustees shall think it proper and expedient to do so) at the sole discretion of my trustee or trustees H to sell and absolutely dispose of all my real and personal estate and my trade or profession and the goodwill thereof and to divide the proceeds thereof" as then stated. The will also contained a provision that "in case any of my said children shall survive my said wife and die before he or she shall have received his or her share of my said trust estate and without leaving lawful issue," such share should go over. With regard to his "trade or profession" (the proprietor- I ship of a newspaper) the testator empowered his trustees to carry on the newspaper and to employ for that purpose such part of his real and personal estate as should then be employed therein, with a power to increase or diminish the amount so employed and he directed them to set apart annually one-fourth of the profits as a reserve fund and to divide the remaining three-fourths among his wife and children.

Held: on the true construction of the will, the intention of the testator was that the newspaper business should be carried on during the life of his wife except in the event of the wife, the majority of the children, and the trustees,

agreeing to sell it; on the death of the wife there was imposed on the trustees an absolute and imperative trust for sale, but the trustees had a discretion as to the manner and time of sale which they were to exercise reasonably.

Notes. Applied: *Re Collison, Collison* v. *Barker* (1879), 12 Ch.D. 834; *Johnson* v. *Crook* (1879), 12 Ch.D. 639; *Re Williams, Spencer* v. *Duckworth* (1881), 18 Ch.D. 634. Referred to: *Kirkpatrick* v. *Bradford, Bradford* v. *Kirkpatrick* (1878), 4 App. Cas. 96; *Bubb* v. *Padwick* (1880), 13 Ch.D. 517; *Roberts* v. *Youle* (1880), 49 L.J.Ch. 744; *Re Chaston, Chaston* v. *Seago* (1881), 18 Ch.D. 218; *Money* v. *Money* (1881), 44 L.T. 639; *Re Teale, Teale* v. *Teale* (1885), 53 L.T. 936; *Re Hotchkys, Freke* v. *Calmady* (1886), 34 W.R. 569; *Re Sampson, Sampson* v. *Sampson*, [1896] 1 Ch. 630; *Re Goulder, Goulder* v. *Goulder*, [1905] 2 Ch. 100; *Re Petrie, Lloyds Bank, Ltd.* v. *Royal National Institute for the Blind*, [1961] 3 All E.R. 1067.

As to a trustee's power of sale, see 38 Halsbury's Laws (3rd Edn.) 1016–1019; and for cases see 43 Digest 896.

Cases referred to:

(1) *Re Arrowsmith's Trust* (1860), 2 De G.F. & J. 474; 30 L.J.Ch. 148; 3 L.T. 635; 7 Jur.N.S. 9; 9 W.R. 258; 45 E.R. 705, L.JJ.; 44 Digest 1169, *10123*.

(2) *Martin* v. *Martin* (1866), L.R. 2 Eq. 404; 35 L.J.Ch. 679; 15 L.T. 99; 12 Jur.N.S. 889; 14 W.R. 986; 44 Digest 1160, *10038*.

(3) *Hutcheon* v. *Mannington* (1791), 1 Ves. 366; 4 Bro.C.C. 491, n.; 30 E.R. 388, L.C.; 44 Digest 293, *1254*.

(4) *Elwin* v. *Elwin* (1803), 8 Ves. 547; 32 E.R. 467; 44 Digest 1066, *9188*.

Also referred to in argument:

Walker v. *Walker* (1860), 2 De G.F. & J. 255; 29 L.J.Ch. 856; 45 E.R. 619, L.C.; 44 Digest 479, *2968*.

Re Phene's Trusts (1868), L.R. 5 Eq. 346; 44 Digest 979, *8346*.

Newman v. *Warner* (1851), 1 Sim.N.S. 457; 20 L.J.Ch. 654; 61 E.R. 177; 43 Digest 875, *3191*.

Appeal from a decision of the Court of Appeal reversing an order of Hall, V.-C., relating to the construction of the will of Frederick Hobson deceased. The appellant was Emma Minors, the legal personal representative of William Hobson, one of the children of the testator, who claimed a share of the residuary estate. The testator died on Feb. 18, 1863, leaving his wife and five children him surviving. His widow died on April 9, 1870, two of the children having died before her without issue. William Hobson died without issue on Jan. 11, 1872, and the appellant was his executrix.

E. K. Karslake, Q.C., and *Ford North* for the appellant.

Dickinson, Q.C., De Gex, Q.C., Brodrick, W. Joyce, J. W. Dunning, F. Clarke and *Pattison* for the various respondents.

Their Lordships took time for consideration.

June 1, 1876. The following opinions were read.

LORD CHELMSFORD.—The question to be determined in this appeal is whether, upon the true construction of the will of Frederick Hobson, the appellant, Emma Minors, as the representative of William Hobson, is entitled to a one-third share of the part of the testator's residuary estate, which consists of the proprietorship of the "Leeds Times" newspaper and of a fund called the reserved fund, connected with it. The manner in which the will is drawn presents some difficulty in construing it satisfactorily. The testator gives all his real and personal estate under various descriptions, including the proprietorship of the newspaper, to trustees upon trust during the life of his wife to carry on the newspaper, which he calls the trade or profession in which he is engaged, and to use and employ for that purpose such part of his real and personal estate as shall be then used and employed therein, with a power at their discretion to increase or diminish the

A estate so employed. He then directs his trustees to set apart annually one-fourth of the profits of the trade or profession as a reserve fund to aid in carrying it on, or to meet emergencies or losses, and to divide the remaining three-fourths of the profits, and also the rents, issues, profits and proceeds of all his other real and personal estate into six parts, and to pay one-sixth to each of them his wife and five children, or to the children of any of them who shall die in the lifetime of the B wife, and if any shall so die without issue, to divide the income of the share among the wife and the surviving children.

Then follows the clause upon which the question mainly depends, which is rather out of place, in these terms:

> "In case any of my children shall survive my said wife and die before he or she shall have received his or her share of my trust estate and without leaving C lawful issue I give such share equally among my surviving children."

This clause is followed by one which ought to have preceded it. It directs the trustees

> "from and after the decease of my said wife (or during her life if she and the majority of my children and my trustees shall think it proper and fit so to do) D at the sole discretion of my trustees or trustee, to sell and absolutely dispose of all my real and personal estates and my trade or profession and the goodwill thereof, and to divide the proceeds thereof among my wife and children and their issue, if the division be made in the lifetime of my wife but if the division be made after her death, among my children and their issue."

Upon these two last mentioned clauses the question arises whether the directions E with regard to the sale of the testator's real and personal estate and his trade or profession, give to the trustees a mere power to be exercised or not at their discretion, or are an absolute trust for sale, their discretion not applying to the sale itself, but only to the manner of effecting it.

The question of the construction of the will has come before the court at different times, but only, as it were, by piecemeal. In 1866 a bill was filed by two of the F trustees, Battison and Buckton, against Mary Hobson, the widow, and William Hobson, the third trustee, and others interested under the will, for an administration of the trusts of the will, and praying for an enquiry whether it is fit and proper, and for the benefit of all parties, that the trade or business of a newspaper proprietor should be carried on and continued, and if it shall appear not to be fit and proper, that the stock in trade, goodwill, and proprietorship of the newspaper be G sold with the approbation of the judge. STUART, V.-C., made an order declaring it to be fit and proper, and for the benefit of all parties interested, who are not sui juris, that the newspaper should be carried on. I do not comprehend how this inquiry came to be directed, and the order of the vice-chancellor made; because, during the life of the testator's widow the newspaper is directed to be carried on and continued, unless she and the majority of the children and the trustees think H it fit and expedient that it should be sold. After the death of the testator's widow, Buckton, one of the trustees, on July 8, 1870, presented a petition, praying, among other things, that the unsold real and personal estate of the testator, including the proprietorship of the newspaper, and the goodwill of the trade or business, should be sold by and under the direction of the court. STUART, V.-C., on Nov. 24, 1870, made an order that, being of opinion that the directions contained I in the will of the testator as to a sale and disposition of all his real and personal estate, and his trade or profession, and the goodwill thereof after the decease of his wife, at the sole discretion of his trustees, is a power enabling such trustees to sell and dispose of the same, and is not to be construed or held as an absolute trust for the sale and disposition thereof on the happening of such event, and being also of opinion that it is for the benefit of all persons interested that the business of the "Leeds Times" and the real estate of the testator should not at the present time be sold, but that the business should be continued and carried on until further order, a scheme should be settled for carrying it on.

I will not here advert to the opinion of the vice-chancellor as to the trustees having a power and not a trust; but I must remark upon his opinion that it was for the benefit of all persons interested that the business of the "Leeds Times" should be continued and carried on, when it was stated in the petition that William Hobson claimed to be entitled under the will to purchase the stock in trade and proprietorship of the "Leeds Times" at the sum of £500 less than the market price thereof. William Hobson appealed by petition from this order, but the lords justices, by an order of May 3, 1871, dismissed his petition. The newspaper continued to be carried on under these orders, and a further order of WICKENS, V.-C., of July 18, 1871, down to the time of the death of William Hobson on Jan. 11, 1872. After his death the cause came on for further consideration to determine the rights of all parties before HALL, V.-C., who, by an order of Feb. 17, 1874, declared that the appellant, Emma Minors, as personal representative of William Hobson and Fanny Metcalfe, and Mary Buckley, were entitled in equal shares to the rents and income of the testator's real and personal estate, accrued since the death of William Hobson, including as part of such income three-fourths of the profits of the testator's business, until the sale and conversion thereof, and that for the purposes of distribution the testator's estate, including his business of the "Leeds Times" newspaper, ought to be considered as sold and converted at the expiration of twelve months from the death of the testator's widow.

Upon appeal from this order the lords justices reversed the decision of HALL, V.-C., JAMES, L.J., being of opinion that the point was really decided for all purposes by the former decision of the court which affirmed the decision of STUART, V.-C. They held that there was not an absolute trust to sell on the death of the widow, but simply a power to sell at the discretion of the trustees. As JAMES, L.J., said:

> "an absolute discretion extending beyond the death of the wife, and extending apparently until there would be some person or persons entitled absolutely to say, we will have nothing more to do with the trust, and we claim the property ourselves."

It is to be regretted that the lords justices should have thought the question settled by their former decision, as it probably prevented a more close and careful consideration of the case, which might possibly have led them to a different conclusion, for after a repeated examination of the will I am unable to acquiesce in their judgment. It appears to me that with regard to the business of the newspaper, the principal subject in the mind of the testator, he contemplated its being carried on and continued during the life of his wife, except in the event of the wife, the majority of the children, and the trustees agreeing to sell it, and that upon the decease of the wife it should absolutely be sold. It is observable that the discretion to use and employ the real and personal estate in the business applies only to its being carried on during the wife's life, and the creation of the reserve fund is confined to the same period. The trustees are directed, while the business is being thus carried on, to divide the profits of the trade or profession, and also the rents, issues, profits, and proceeds of all his other real and personal estate among the wife and children. This direction appears to me to give the wife and children, not a share of the profits merely, but an absolute share in the business itself, and in the real and personal estate. If that be so HALL, V.-C., was incorrect in holding that for the purposes of distribution the testator's estate ought to be considered as sold and converted at the expiration of twelve months from the death of the widow, so as to entitle William Hobson to his share of the trust fund under the clause providing for the case of children surviving the wife and dying before they had received their share, because before the death of the wife William Hobson's share was vested in him, and was, to use the words of JAMES, L.J., "de jure receivable." If, as I have said, William Hobson's share was vested at the time of the wife's decease, the clause as to children receiving their share can only be regarded as a divesting clause, and is either repugnant, as, after vesting, a share

could not be divested, or it must mean not before actually receiving it, but before becoming entitled to receive it. MELLISH, L.J., is of opinion that if according to the true construction of the will there was an absolute trust to sell on the death of the widow, this would be the meaning of the word "received."

That there was such a trust created, and not an absolute discretion in the trustees, as held by the lords justices, appears to my mind—I will not say clear after their opinions—but to be the better construction of the clause for sale, and to be recommended by the consequences which would follow from the adoption of the view of it taken by the lords justices. An absolute discretion in the trustees to sell whenever they thought proper would, as HALL, V.-C., said, "prolong indefinitely the ascertainment of the persons to be beneficially interested in the property, by an undefined and indefinite continuance of the business," and would thus place in the absolute power of the trustees the interest of all the children and their issue given them by the will. Such a construction of the clause ought not to be adopted if it is capable of a more reasonable one. In my opinion, the true meaning of the clause is that it imposes upon the trustees an absolute trust to sell, but gives them a discretion as to the manner in which, and to a certain extent the time at which, the different properties may be sold to the best advantage.

Counsel for the respondents argued in favour of the absolute discretion of the trustees by referring to the clause declaring "that in case it shall be agreed or the trustees shall decide to sell" they are authorised to sell to the sons at £500 less than the market price. This clause seems to be inserted in the will for the benefit of the sons, and the word "decide" was, perhaps, inadvertently used. But the moment it is ascertained that an absolute trust for sale is created all nice criticisms as to the meaning of the words "received" or "decide" fall to the ground. I cannot help observing, though perhaps it is unnecessary, that even assuming the lords justices' opinion that the trustees had an absolute discretion to be correct, yet this would not prevent the appellant from being entitled to her share of the testator's residuary estate as the representative of William Hobson, because during the life of William Hobson the trustees had retired from the trust and placed themselves in the hands of the court by the bill filed by them for administration of the trusts, and the order founded thereon, after which they could not exercise any discretion with which they were invested without the sanction of the court. Therefore, as the business could no longer be carried on by the trustees, the period must at all events have arrived when the persons interested were entitled to their shares in the business, and in the real and personal estate of the testator. I submit to your Lordships that this appeal ought to be allowed, and that the case ought to be disposed of in the manner which I believe your Lordships have agreed upon.

LORD HATHERLEY.—I concur in the interpretation which has been put upon this will by my noble and learned friend who has just addressed the House. I think if we make allowance for certain difficulties introduced by the testator throwing in parenthetical expressions in scarcely the fit place for their insertion, the interpretation of the will is really of the simplest character.

[HIS LORDSHIP went through the earlier clauses of the will, and continued]: So far the will is very plain and intelligible. There is a trust to carry on the business during the wife's life, and a trust to sell at her death, and your Lordships will observe that this is the only place where we find any trust at all to sell any part of the property, including this business, and, further, after what I have already referred to in the will there is no direction giving the trustees full powers for carrying on the business after the wife's death, as they could carry it on before, there is no direction for their setting aside a fourth part of the profits after that time, as they were to do before, and there is no direction about applying the income of the general estate towards the carrying on of the business. Possibly if the construction of the whole will had forced the court upon such a construction all that might have been held to be implied after the death of the wife, as it had been

directed during the wife's lifetime. That would have been a strong conclusion, that the business was to be carried on in a certain event after her death. But, in the absence of any expressions leading to that strong conclusion, the observation seems to me to have great weight as leading us to what is the real interpretation of the will, and tending to show that the testator did not contemplate the business going on for any length of time after the wife's death, that what he does direct in the parenthesis is this:

"From and after the decease of my wife (or during her life, if she and the majority of my children and my trustees shall think it proper and expedient so to do)."

Observe what happens there. Having given his wife only a life interest in her share, because there is no portion of the corpus given to her, or to her representatives absolutely, she does not take in any sense absolutely, but after her death her representatives lose the income derived from the estate, and the whole bulk of the property goes to be sold and divided among the children—having done that, it occurs to the testator as possible that during his wife's lifetime a sale may be desirable, and he makes a provision for it, which I think is of some importance with reference to the subsequent discretion of the trustees. He says, if that is done in my wife's lifetime I notice that her position under the previous part of the will will necessarily be changed, because then she will come in for a portion of the corpus together with her children, instead of having solely a life interest. That being the case he thinks it desirable that it should not be the wife's sole voice, or the sole voice of the children, or the sole voice of the trustees which should determine that such a change of interest as that should take place. Therefore, he says, if it is sold in her lifetime it must be done by the voice of the majority of his children and his trustees, if they think proper and expedient to do so. There is no such direction about the majority of the children and the trustees after the death of the wife.

Your Lordships will observe, if the respondents contention be true, what a position the trustees are placed in with reference to the interest of the children. If they are to have an absolute discretion, unfettered by any majority of the voices of the children, and unfettered by any direction on the testator's part, it is left to them to say whether or not they will continue the business, the position of the family being, two children having died without issue in the lifetime of the wife, their shares have passed over; William Hobson has no children, his brother and sister have children, so that their shares will pass over to their children, while according to the construction of the respondents his would be limited and confined to his own life, and afterwards pass over to them; and, moreover, William Hobson has an interest, if the business is sold to the extent of £500 in value, because he was to be allowed to buy it at £500 less than the market price. He being placed, therefore, in a position in which his interests were extremely antagonistic, as far as pecuniary interests went, to the interest of his brother and sister, would be left to be dealt with by the trustees to this very considerable extent at their discretion solely, without any regard to the claims that he might have to have the property so managed that he should not lose the benefit of those interests, which were in the first instance obviously contemplated for him by the will.

These considerations would lead me to think it was a very difficult conclusion to arrive at to hold that the trustees could postpone the sale to an unlimited period, to any period up to William Hobson's death, and then direct a sale without giving him an opportunity of making the purchase for the £500 less than the market price, and in the absence of any issue on his part to whom the share which he would lose by death anterior to the sale should pass over for the benefit of his family. On the other hand, leaving out the parenthesis, it seems to me as plain and simple a trust as possible for a sale to be made, and it contains an expression which is not at all unusual, leaving a certain liberty to the trustees as to the mode of dealing with the estate, especially as it consists in part of a newspaper, requiring

some considerable extent of management in the proper disposition and sale of it. That is left to the discretion of the trustees, but it is not left to their discretion whether they shall sell or not. It is a trust that they shall sell, but when they do sell fault is not to be found with them because they have sold at a later period than others might have thought beneficial, if they have acted with proper and reasonable discretion. The word "decide" occurring later in the will, I think means nothing more than that. Having said, if a sale takes place during my wife's life there must be a form gone through, and more than a form, a resolution come to by the majority of my children and the trustees in this matter, to all of whom I give a voice, he then says, if it takes place after her death, it is to be at the discretion of the trustees; whether it be in the wife's lifetime, or whether it be after her death, they must decide what is the right moment in their reasonable discretion, for the sale, which they must effect in a reasonable time, especially having regard to the circumstances I have mentioned as to the interest of parties, the testator having said, when the time for the sale has come, whether it is at one period or the other, I mean William Hobson to have £500.

That seems to me a strong expression of intention on the testator's part that whenever the sale takes place his son is to have that benefit; but I cannot understand it to imply anything which gives to the trustees anything like that wide discretion which appears to have been thought by the court below to have been vested in them. Still less can I come to the conclusion to which Stuart, V.-C., came, in which he was afterwards confirmed by the lords justices, that this was not a trust, but a power for sale. I hold, on the contrary, that it is a distinct trust for sale. Nothing is left to the trustees, but that discretion of dealing with it which must be reasonably expected in the conduct of trustees who are anxious to perform their duty. Supposing that this is not a power, but a discretion, in the sense in which I use the word, then it is possible that you might apply the doctrine of *Re Arrowsmith's Trusts* (1) and consider that it was in this case a reasonable time for the sale, or you might, following other cases, say that in regard to the expression, "children dying before the period of division," you cannot hold that to be an unlimited period, and that the reasonable discretion of the trustees cannot be prolonged to an indefinite time, especially having regard to that £500 clause, which I referred to. I should be disposed to hold that it came within one or other of those views.

What seems to me to make the whole matter clear as to the trustees is this. Almost immediately after the death of the wife, Buckton, one of the three trustees, presented a petition to the court setting forth a desire expressed by the cestuis que trust other than William Hobson, and one of the trustees, Battison, that he, Buckton, should retire from this trust, and he prays for a sale, and asks for a direction by the court as to what is his proper course to pursue. We must bear in mind that anterior to this petition, there had been, during the lifetime of the wife, an order made by Stuart, V.-C., directing an inquiry whether it was for the benefit of all parties that the business should be continued or not, instead of taking the course of the majority of the children and the trustees deciding on that point. There was a finding upon that, and then Buckton, the wife being dead, prays for a sale. William Hobson, as of course was shown by his subsequent petition, was also desirous that there should be a sale. There were, therefore, two out of the three trustees desirous that a sale should then and there take place. The court then again inquired whether it would be for the benefit of all parties. That does not mean that the court wished to alter the rights of all the parties who might have acquired vested interests by the death of the widow and the postponement of the sale, during which those rights would be seriously affected; it merely means that, taking the rights and interests of all parties under the will as remaining unaffected by the inquiry what is best for their benefit; their rights will remain exactly as before, and will have to be determined by the true construction of the will. Assuming that the court was right in coming to the conclusion that it was for the benefit of all parties, including William Hobson, that there should not be

a sale, it seems to me quite clear that the inquiry would make no difference whatever in the construction we ought to put upon the rights which accrue to all parties under the will, whatever arrangement may have been made by the court, for the sake of the convenience of the estate.

I think that is the view we ought to take of an inquiry of that kind directed by the court, and having come to the conclusion that William Hobson did certainly, notwithstanding the clause about children dying before the period of division, acquire an interest, if not before, according to the view adopted in *Re Arrowsmith's Trust* (1), at least after the presentation of the petition, when he and Buckton desired that a sale should take place, I see nothing at all that can be held, upon the face of this will, to displace that interest, and, therefore, it seems to me that the decision which has been come to by STUART, V.-C., in the first instance, and by the lords justices affirming him, cannot be a right conclusion. It is a very singular circumstance in this case that a different view should have been taken with regard to the other part of the testator's property. He has put them all evidently into one fund, and it does seem to me a very singular construction which would sever one part of this property from the other. The result of the decision already come to is that a separate inquiry seems to have been necessary with regard to a variety of the portions of the testator's property, and a very different result is applied to one class of the property from that which is applied to the other, although the whole appears in the will to be given over to one class, and to be intended to be divided as for one class. I cannot think that any such conclusion could have been arrived at, had it not been for the unfortunate course which this case has taken. It has been brought before the court in half a dozen different ways at half a dozen different times, under varying circumstances, and the court has never had a clear exposition of the whole will to fasten its judgment upon, but it has been asked to pronounce first on one point, and then on another, until in the end the whole general scope of the testator's will seems to me, with great respect to the lord justices, to have been lost sight of.

LORD O'HAGAN.—Although I do concur, I cannot say that I concur undoubtingly in the conclusion of my noble and learned friends. The first judgment of the lords justices seems to me from the observations of HALL, V.-C., to have impressed that learned judge as conveying an opinion in the main matter before us different from that which their second judgment, founding itself on their first, indicates as having been expressed in the latter. But, however this may have been, the question is one of those in which we are forced to seek the true construction of a document, in the absence of the means of determining with absolute certainty, by the exercise of common sense, guided by the ordinary meaning of language, and the circumstances of each particular case, and with such light as may be gained from legal principles in ascertaining the probable intention of a testator.

Endeavouring in this way to interpret a difficult will, I concur, with hesitation, in the proposed resolution. It is to be observed that the literal meaning of the words we have to construe is not insisted on. The provision that if any of the children shall die "before he or she shall have received his or her share" of the trust estate is not interpreted in the judgment under appeal as if it meant to point to an actual receipt of the share, as in *Martin* v. *Martin* (2) which is very different from that before us; but the word "received" is held by the lords justices, and rightly held, to have the meaning of "de facto received or de jure receivable"; and if such an interpretation can be admissible, the only question really is, at what time were the shares de jure receivable? If at the death of the widow, or twelve months afterwards, cadit quaestio. The fact of the non-receipt becomes immaterial, and the judgment of the vice-chancellor is sustained. It seems to me, obscure as the phraseology is, that it sufficiently indicates, according to the view of the vice-chancellor, the creation of a trust, and not the creation of a power—of a trust to sell "all the real and personal estate and the trade or profession" of the testator, accompanied by a "discretion" in the trustees as to the time and manner of

A the selling, and I think that the word "decide" in a subsequent part of the will may fairly be taken to point, not to a capricious or unlimited capacity of action or postponement, but to the exercise of the discretion in fixing judiciously the period for the fulfilment of the trust to sell. I do not conceive that the mere fact of the non-sale up to the present time prevents the vesting of shares.

I quite agree that if the testator had unequivocally expressed a contrary intention B it would have been our duty to carry it into effect. But as the matter stands I think we are driven to consider his whole will in relation to the circumstances with which he was dealing; and, so considering it, I do not feel obliged to attribute to him the contemplation of an indefinite postponement of the sale; of the keeping his legatees in a state of doubt and uncertainty, perhaps for all their lives; of giving to his trustees, or to a single one of them, the power to nullify his bequest C at their or his absolute pleasure; or of the prevention of the ascertainment of the beneficiaries really to take, while trustee might succeed trustee in a lengthened series. It may be that an absolute intestacy might not be wrought, but the view of the respondents would make possible and probable such a delay of vesting, to the prejudice and confusion of the legatees and their families as, in my opinion, the law should not and will not countenance without coercive reason.

D *Hutcheon* v. *Mannington* (3) and *Elwin* v. *Elwin* (4) certainly sustain this view. In the former the gift over was defeated because the purpose was, in the words of the Lord Chancellor "unreasonable," because it was "all too uncertain"; and the uncertainty and difficulty of ascertaining the intent which operated there exists also in the case before us, while in the latter case a different rule was reached, because the intention was declared with a "definite certainty," which does not E here compel us to an injurious decision. To justify this reasonable view I do not think it necessary to strike any words out of the will, or to depart further from its verbal effect, or to give it any more flexibility than is involved in the alternative meaning attributed to the word "received" by the lords justices, and accepted at the Bar. Besides it seems to me that the will contains indications of the testator's intention with reference to the newspaper property which persuasively support the F construction of the vice-chancellor. The "discretion" given to the trustees is not to carry on the business, but "to sell and absolutely dispose of all my real and personal estates, and my trade and profession, and the goodwill thereof." These words put the real and personal estate, and the trade of the journalist on precisely the same footing, and indicate that they should be dealt with in the same way.

If the real and personal estate only had been mentioned, I apprehend that there G could have been little controversy as to the existence of a trust to sell, and that the observations of LORD THURLOW, L.C., in *Hutcheon* v. *Mannington* (3), would have had clear application:

> "where there is a trust that is always considered to be done which is ordered to be done."

Again:

H

> "If the testator had given a real estate in the same way, it would not depend upon the trustee to sell, nor upon his dilatoriness."

Pressed by this consideration, the respondents vigorously contended that the testator had in view a distinction between his business and his real and personal estate, and desired that they should be dealt with in different ways; and it was I suggested that even if the lords justices were wrong as to the freehold and personal property, they were right as to the newspaper. I fail to discover this difference in the terms of the will, or the reason of the thing. True it is, as was ably urged, that the business might, from its peculiar nature, require a different exercise of discretion from the freehold or the personalty, but these again might require a difference as between themselves; and I am not satisfied that there was any such distinction in the mind of the testator as would warrant a dealing with them for the purposes of this case on different principles. It was urged by counsel for the respondents that the prevailing idea of the will regarded the continuance of the

newspaper, and his inference from that would seem to tend to the justification of the indefinite postponement of the sale, involving unlimited delay in the settlement of the rights of the parties, and the ascertainment of the beneficiaries entitled to take advantage of them. That the testator had no such view of splitting up his property when the time of distribution should arrive, seems intimated not only by the identical treatment of the real and personal property and the business, to which I have already adverted, but by the marked distinction between the provisions affecting the newspaper during the life of the testator's wife, and after her decease.

As to the business, the trustees are to carry it on during the life of the wife; during her life accounts are to be rendered, and distributions made; the newspaper is to be maintained by advances of money, and a reserve fund is to be created. In the face of these arrangements, it is impossible to say that the business was not to be continued during the life of the wife. But after her death there is an end of all this complicated machinery. The single provision is for the sale of all the testator's property, and for the distribution of the proceeds. May not this manifest distinction be fairly taken to imply a difference in the testator's purpose with respect to the business during the life and after the death of his wife, and a design that it should cease to be carried on, and be absolutely sold like his other property, at the earliest moment, when his trustees, in their discretion, should be able to dispose of it to reasonable advantage? The respondents appear to me to have failed in their attempt to escape the effect of the uncertainty involved in their construction, or to show that the testator meant his business, after his wife's death, to be dealt with differently from his freehold and personalty. The clause as to the right of pre-emption in his son only regulates the price to be received when the sale should be resolved on, but not at all the period at which that sale should take place. On this view of the case I am content to rest my judgment, but it is well sustained also by the effect of the difference between the trustees, the invocation of the court, and its active intervention, which, with their legal consequences, were pressed on the attention of the House. Holding the reasons I have given sufficient and satisfactory, I do not wish to occupy time unnecessarily, and I express my concurrence with the noble and learned Lords who have preceded me.

LORD SELBORNE.—After what has been stated by the noble and learned Lords who have preceded me, I think it is sufficient to state shortly as to several points in the case the conclusions only at which I have arrived, and as to which I must confess I have felt no doubt or difficulty from the commencement of the argument.

First, then, I think that the declaration contained in the order of STUART, V.-C., of Nov. 24, 1870, was erroneous, and ought not to have been made. Whatever might be the true construction of the will on the point dealt with by that declaration, the court had full power, on the hearing of the petition then before it, to postpone a sale of the newspaper business and of the real estate of the testator, if it appeared, as it did, to be for the benefit of all parties interested to do so, although one of the cestuis que trust, William Hobson, who, besides his interest under the will, had an option to purchase, asked for an immediate sale. Secondly, I am of opinion that there was under this will an absolute and imperative trust for sale, taking effect from and immediately after the death of the widow, although with a discretion both as to the manner and as to the time of sale, which was, in my opinion, to be reasonably exercised by the trustees for the purpose of executing, and not of defeating, that trust for sale. Next, I am very clearly of opinion that there was under this will one, and only one, period at which the corpus of the testator's estate, directed by him to be sold, became de jure distributable, that period being the time of the widow's death.

Counsel for the respondents relied much upon the words in the clause giving the sons an option to purchase the newspaper, "in case under the clause hereinbefore contained it shall be agreed, or any trustees or trustee shall decide, to sell my stock-in-trade and partnership of the 'Leeds Times' newspaper, and my sons or

any of them shall by writing offer to purchase," etc. These words, it was argued, prove that there was to be no sale of the newspaper unless the trustees should so decide. I am not of that opinion. So far as those words contemplate an event contingent and not certain, it is to be observed that the event so spoken of is a complex one, not simply a decision by the trustees to sell, but together with that an offer by one or more of the sons to purchase. This complex event might never happen, although the trustees might not only be bound to sell, but might actually sell the newspaper. The trustees having a reasonable discretion to exercise as to the time of sale, there could be no actual sale till they decided to sell, although the trust was absolute; and these words, from their association with the alternative of a sale by agreement are used as descriptive only of a sale after the widow's death, when the time of selling would depend on the sole discretion of the trustees, as compared with a sale in the widow's lifetime, when it would also depend upon the consent of other persons. This clause gives no new or separate power at all as to the newspaper property; it simply refers to a sale "under the clause hereinbefore contained." If it could be held to reduce the preceding clause, so far as relates to the newspaper property, from a trust to a mere power of sale, it must have the same effect with respect to all the rest of the testator's real and personal estate. Any such inference from such words seems to me not only unnecessary but altogether unreasonable. In a later clause the testator directs that until all his real and personal estates should be sold and converted into money, the trustees should pay to the cestuis que trust the income of such part thereof as should for the time being remain unsold or unconverted. This shows clearly enough that the testator fully understood that, in the course of the execution of the trusts of the will, it might be found necessary or convenient to sell different parts of his property at different times, and that he intended to provide for that case. But it confirms, rather than otherwise, the conclusion that, subject to the exercise of a reasonable discretion as to time, he intended everything to be sold.

These points being ascertained, we are brought to the consideration of the divesting clause introduced by these words:

> "And in case any of my said children shall survive my said wife, and die before he or she shall have received his or her share of my said trust estate," etc.

These words, in their prima facie natural sense, from which there is nothing in the context to authorise any departure, relate to the death of a child during the interval between the death of the widow, and the time when that child's share might be actually received, or at least de jure receivable. It was decided in *Hutcheon* v. *Mannington* (3), and *Martin* v. *Martin* (2), that such a divesting clause, if it refers to the time of actual receipt, is too uncertain and indefinite to be capable of being carried into effect. Lord Loughborough said, in the former of those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or dilatoriness of the trustee to sell; that in some way the property might be sold immediately; that the court would not inquire when a real estate might have been sold with all possible diligence, but always in such a case considered it as sold the moment the testator was dead (there the trust for sale came into operation on the death of the testator); that where there is a trust that is always considered in equity as done which is ordered to be done; and that the court cannot measure the time. It might be added, that when there is an equitable title vested in possession, without any preceding interest, the possession of the trustee becomes, in the view of a court of equity, the possession of the cestui que trust; and that there is no sound distinction in principle between the extension of trust property in specie for the benefit of the cestui que trust, though directed to be converted by the will, and the actual receipt of that property, in any way consistent with the continuance of a legal estate in the trustee by the cestui que trust.

It was argued, however, that when sale was the medium by which the testator meant the cestuis que trust to be put into possession of their shares, and when

the trustees had power to sell at such time as in their discretion they might think fit, the event in which the divesting was to depend might be rendered certain by the exercise of the discretion of the trustees; and that no share was de jure receivable until that discretion had been exercised. I cannot accede to this reasoning. The event spoken of in the will is not the completion of any particular sale of particular property, or any other definite act to be done by the trustees, but is the death of a child before receiving "his or her share" of the trust estate, in which case "such share" is given over. The share is spoken of by the testator as a whole. A divesting clause of this nature ought to be construed strictly; certainly it ought not to be extended to any case not properly described by the words, according to their reasonable interpretation. There might be, and the testator takes notice of it, as many sales at different times as there were items of saleable property, according to the exercise of their discretion by the trustees. How can it be said that this testator has declared with reasonable certainty an intention, either that part of a share should go over when the whole did not, which is the conclusion of the lords justices, or that the whole share should go over in case of the death of a child while any part of his property was retained by the trustees unsold, although payments, which in that case would have to be refunded, might have been previously made on account of that share? It would, in my judgment, be more reasonable to hold, since no part of any share could rightfully be received except by virtue of a title to the whole, that the rightful receipt of any part would be equivalent, for the purposes of this clause, to the receipt of the whole, and, as the lords justices have held, that William Hobson had at the time of his death a right tantamount in equity to actual receipt to one-third share, not only of the policy moneys and other moneys then actually realised, but even of the value of the copyholds which had been only ordered to be sold, and not actually sold in his lifetime. This view would be fatal to the respondents' case, even if the divesting clause so construed could receive effect. I see no ground for holding that the conversion directed by this will was in suspense till the end of twelve months after the widow's death. On this one point I differ from the decision of HALL, V.-C.

I think it right to add, that even if in some of the questions in this case I had taken a view different from that which I have expressed, I should have been of opinion that the discretionary powers of the trustees came to an end, if not when the decree for administration was made in the suit, certainly when the order of STUART, V.-C., of Nov. 24, 1870, was made. I should have thought that from the date of that order, at all events, the court must be deemed to have carried on the business for the benefit and in the interest of those persons who would have been then entitled to the proceeds if it had been actually sold, as much as if they had then elected to take their several shares of the newspaper in specie without reversion, and had been put into possession of those shares by the order of the court. I cannot reconcile the conclusion that the operation of the divesting clause as to the newspaper property was prolonged by that order as against William Hobson, with the express declaration of the opinion of the court that it was "for the benefit of all persons interested that the business of the 'Leeds Times' should not then be sold."

Appeal allowed.

Solicitors: *Whitakers & Woolbert*; *W. A. Holcombe*, for *T. E. Jones*, Manchester; *Bell, Brodrick & Gray*, for *Hopps & Bedford*, Leeds; *H. B. Clarke & Son*, for *Dunning & Kay*, Leeds.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

ELLIS AND OTHERS *v.* EMMANUEL AND ANOTHER

[Court of Appeal (Lord Cairns, L.C., Blackburn and Brett, JJ.), November 20, 1875, February 27, 1876]

[Reported 1 Ex.D. 157; 46 L.J.Q.B. 25; 34 L.T. 553; 24 W.R. 832]

B *Guarantee—Continuing guarantee—Limit in amount—Guarantee of floating balance—Application to part of debt co-extensive with amount of guarantee—Guarantee of ascertained debt—Debt exceeding limit of guarantee—Construction of guarantee by court.*

Where a surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is, as between the surety and the creditor, to be construed, both at law and in equity, as applicable to a part only of the debt co-extensive with the amount of his guarantee. This is on the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety. But where the suretyship, limited in amount, is for a debt already ascertained which exceeds that limit it is not prima facie to be construed as a security for part of the debt only. There is no principle on which such a prima facie construction ought to be adopted. In such a case it is a question of construction on which the court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only.

C

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Notes. Referred to: *Ellesmere Brewery Co.* v. *Cooper*, [1895–9] All E.R.Rep. 1121.

As to the interpretation of guarantees and liability of sureties, see 18 Halsbury's Laws (3rd Edn.) 439–443, 463; and for cases see 26 Digest (Repl.) 54–62, 63 et seq.

Cases referred to:

F (1) *Ex parte Rushforth* (1805), 10 Ves. 409; 32 E.R. 903; 26 Digest (Repl.) 90, *627*.

(2) *Gray* v. *Seckham* (1872), 7 Ch. App. 680; 42 L.J.Ch. 127; 27 L.T. 290; sub nom. *Re Getynog Llantwit Colliery Co., Ltd., Gray* v. *Seckham*, 20 W.R. 920, L.JJ.; 26 Digest (Repl.) 91, *633*.

(3) *Re Garner, Ex parte Holmes* (1839), Mont. & Ch. 301; 4 Deac. 82; 9 L.J.Ch. G 33; 3 Jur. 1023, L.C.; 26 Digest (Repl.) 92, *637*.

(4) *Paley* v. *Field* (1806), 12 Ves. 435; 33 E.R. 164; 26 Digest (Repl.) 90, *628*.

(5) *Bardwell* v. *Lydall* (1831), 7 Bing. 489; 5 Moo. & P. 327; 9 L.J.O.S.C.P. 148; 131 E.R. 189; 26 Digest (Repl.) 90, *629*.

(6) *Raikes* v. *Todd* (1838), 8 Ad. & El. 846; 1 Per. & Dav. 138; 1 Will. Woll. & H. 619; 8 L.J.Q.B. 35; 112 E.R. 1058; 26 Digest (Repl.) 21, *95*.

H (7) *Thornton* v. *M'Kewan* (1862), 1 Hem. & M. 525; 1 New Rep. 16; 32 L.J.Ch. 69; 11 W.R. 140; 71 E.R. 230; 26 Digest (Repl.) 91, *630*.

(8) *Gee* v. *Pack* (1863), 33 L.J.Q.B. 49; 9 L.T. 290; 26 Digest (Repl.) 91, *631*.

(9) *Hobson* v. *Bass* (1871), 6 Ch. App. 792; 19 W.R. 992, L.C.; 26 Digest (Repl.) 91, *632*.

Also referred to in argument:

I *Midland Banking Co.* v. *Chambers* (1869), 4 Ch. App. 398; 38 L.J.Ch. 478; 20 L.T. 346; 17 W.R. 598, L.JJ.; 26 Digest (Repl.) 123, *862*.

Appeal by the defendants from a decision of the Court of Exchequer on a Special Case stated in an action brought by the plaintiffs to recover money which they claimed to be due from the defendants upon a bond to secure the sum of £7,000, bearing date Dec. 8, 1869.

Giffard, Q.C., and *Gould* for the defendants.

Manisty, Q.C., and *Petherham* for the plaintiffs.

Cur. adv. vult.

Feb. 27, 1876. **BLACKBURN, J.,** read the following judgment of the court.—In this case Thomas Robert Etheridge, as principal debtor, and others (seven in all, if we reckon each firm as a separate person) as sureties, executed a bond to the plaintiffs. The instrument is not in all respects artificially drawn, but in substance it is this. The eight persons bound themselves, and every two or more and each of them jointly and severally in the penal sum of £14,000. The condition of the bond was that if the eight parties, or any or either of them, paid the principal sum of £7,000, by certain instalments at times specified, the bond should be void and of no effect, but otherwise should remain in full force. Then followed a proviso that four of the sureties, including the defendants,

> "shall not, nor shall either of them, be liable under or by virtue of the said bond (whether by reason of a joint or of a several action or demand), for a sum or sums exceeding altogether in debt or damages £1,300."

There is a similarly worded proviso that two others of the sureties shall not be liable to more than £700, and another proviso that the seventh surety shall not be liable in more than £400. The aggregate of those four sums of £1,300, two of £700, and one of £400, is exactly £7,000.

I think on the construction of this instrument that the whole seven sureties jointly and severally guaranteed the whole £7,000; and, therefore, that any one of them might be forced to pay more than his just proportion of what remained due. For example, if the principal debtor paid off £6,000, leaving £1,000 only due, any one of the first four sureties might have been forced to pay the creditor the whole £1,000. But on paying more than his just proportion, he would be entitled to contribution from the other sureties, on the ground that they were all liable for the same debt. The limits put on the amounts which could be recovered from the sureties respectively, would affect the amount which each was to contribute, but would not prevent their being all liable to contribution. But if the bond had been framed, as it might have been, so that each surety did not guarantee the whole £7,000 jointly with the others, but that each of the four first named sureties should each guarantee severally £1,300 parcel of the £7,000, that each of the two next named should each guarantee severally £700, other parcel, and the last surety guarantee severally £400, the residue, the result would be different. There if £6,000 was paid off, the creditor probably would be impliedly bound to apply the payments rateably to every part of the £7,000, or at least might easily by express stipulation be bound to do so; and, if he did so apply them, he could not recover the whole £1,000 remaining due from one of the sureties in the first category, for six-sevenths of the £1,300 being paid off, the surety would only be liable for the remaining seventh, or £185 some shillings some pence, and no more; and there could be no contribution between the sureties because they were not liable for the same debt.

The practical difference between the two forms of security would be that in the first case the creditor can recover the whole from any of the sureties who are solvent, leaving to them the trouble of getting contribution from the others, and throwing on them the loss, if any, if their co-sureties became insolvent. This is an advantage which a creditor may fairly stipulate for, and which we have no right to take away from him if he has stipulated for it. In the case now before us the principal debtor made a liquidation arrangement at a time when £6,020 11s. of the £7,000 originally secured to the plaintiffs on the bond remained unpaid. They proved for that amount and received dividends amounting to 9s. 2d. in the pound on that amount; but, after giving credit for that amount, considerably more than £1,300 was due on the bond at the time when the court below were applied to to follow execution to issue. The Court of Exchequer have allowed execution to issue for £850, the difference between £450 paid into court, and £1,300, the limit of the defendants' liability. It was contended that they were wrong. It was said that the dividends are by law applied to each pound of the debt rateably, which is un-

A questionably true; and on that it was argued that the defendant was entitled to take credit for 9s. 2d. in the pound on the £1,300, just as he would have been if his contract had been not to be surety for the whole £7,000, with a proviso limiting his liability to £1,300, but to be surety for £1,300 parcel of the £7,000. If this was so, the amount for which execution has been allowed to issue is considerably too large.

B I have, however, come to the conclusion that the court below were right. The real question, I think, is whether a series of cases beginning with *Ex parte Rushforth* (1), decided by LORD ELDON in 1805, and ending with *Gray* v. *Seckham* (2), decided by the lords justices in 1872, apply to this case. These decisions are several of them in courts of appeal of co-ordinate jurisdiction with this court, and are clearly binding upon us, and I do not think we ought to make nice distinctions C or depart from these cases, unless there is a real solid distinction between those cases and the present. But I think there is a real solid distinction. I think that the class of cases referred to do not lay down any general doctrine that where there is a surety, with a limit on the amount of his liability for the whole of a debt exceeding that limit, he is entitled to the benefit of a rateable proportion of the dividends paid on the whole debt, but only that where the surety has given a con- D tinuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is, as between the surety and the creditor, to be construed, both at law and in equity, as applicable to a part only of the debt co-extensive with the amount of his guarantee. And this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase E the balance or not, to increase it at the expense of the surety.

In *Ex parte Rushforth* (1), LORD ELDON seems to me to express this very plainly. There Richard Rushforth, the petitioner, had along with the two bankrupts, entered into a joint and several bond for £10,000 to bankers, conditioned for the payment from time to time, and at all times thereafter, within two months after notice in writing, of the balance that might be then due from the bankrupts to the bankers. F At the time of the bankruptcy that balance was £20,000. The bankers proved that amount and received dividends on it. LORD ELDON considered the matter much. He first, in March, 1804, after discussing all the points, ends an elaborate judgment by saying (10 Ves. at p. 420):

> "The rule certainly has been that where a man engaged for the whole of a debt, pays only a part, he has no equity to stand in the place of the person paid. G That brings it to the question, What is this engagement, whether for the whole or a part?"

Another petition was presented, and final judgment was not given till Feb. 5, 1805, after nearly a year's consideration, and then LORD ELDON says (ibid. at p. 422):

> "The question comes round to this, whether, according to the true nature of H such an engagement between all the parties in this bond and mortgage, it was competent to these bankers to go on without giving notice to the surety; for this is a case in which they contracted to give him notice before forfeiture of the bond, whether they were at liberty to swell the demand to his prejudice beyond the sum of £10,000. The agreement was to advance all such sums as should be required; but it is limited by an express contract for an obligation to I secure all those sums, and the question is whether that limitation in the extent of the obligation is not a sufficient ground for the inference that those sums were not to be extended beyond £10,000. Take the case of two sureties, each for the separate sum of £10,000 each paying the principal creditor, would be entitled to stand in his place for the sum paid. It would be very strong to hold that, as they have taken one surety, he shall be in a worse situation. I think the bankers are not entitled in equity to say, as against the surety, that their demand is more than £10,000, the amount of the bond he has given, upon which he would be prima facie entitled to stand in their place. As to the

residue of their debt, they ought to be considered, if I may so express it, their own insurers."

He adds: "As this is a perfectly new case, I make the order with liberty to file a bill." LORD ELDON, in deciding this case attaches much weight to the stipulation for notice. Subsequent decisions—*Ex parte Holmes* (3), and *Gray* v. *Seckham* (2)—have settled that the result should have been the same had there been no such stipulation, but what seems to me important is that LORD ELDON's reasoning proceeds entirely on the ground that the surety was entitled in equity to treat this as a security for £10,000, part of the balance, because the bankers voluntarily swelled the balance beyond the £10,000—a reason not at all applicable to a security given for a sum already fixed and determined.

The next case in order of date was *Paley* v. *Field* (4), in 1806, before SIR WILLIAM GRANT. There the bond was conditioned for the payment of the floating balance due to the bankers, with a proviso that the surety should not be liable to pay "any sums of money to a larger amount than the sum of £1,500," the meaning of the parties being that the bankers should not be indemnified by the surety by virtue thereof for any loss which they should sustain by giving credit to the debtor beyond the sum of £1,500. SIR WILLIAM GRANT rests his judgment almost entirely on this proviso. He says (12 Ves. at p. 444):

"I hardly know how the parties could have more clearly provided, not merely that the plaintiff should not be called on to answer more than £1,500, but that with regard to him the creditor should be considered as limited to that sum."

The next case in order of date that I find reported is *Bardwell* v. *Lydall* (5), before the Court of Common Pleas in 1831. There the guarantee was

"of any debt which the principal may contract from time to time as a running balance of account to any amount not exceeding £400."

The decision of the court was that the same rule applied at law as in equity. The court says (7 Bing. at p. 493):

"The amount of the debt does in this case exceed the £400, and thereby the position of the creditor is so far altered that one part of his debt is guaranteed, and the remainder is not."

In coming to this conclusion that the guarantee was to be read as between the creditor and surety even at law as a guarantee for £400 parcel of the balance, and not as a guarantee of the whole balance with a limit on the amount recoverable, the court seem to have acted on *Paley* v. *Field* (4), but, perhaps, carry the doctrine one step further than either LORD ELDON or SIR WILLIAM GRANT had done. In *Raikes* v. *Todd* (6), in 1838, the Court of Queen's Bench decided the case on another ground, viz., that the guarantee was bad under the Statute of Frauds, but LORD DENMAN, during the argument, says that, if that had not been so, they should have followed *Bardwell* v. *Lydall* (5).

The next case is *Ex parte Holmes* (3), before LORD COTTENHAM, in 1839, sitting in appeal in bankruptcy. In that case the petitioner accepted three bills of exchange, amounting in all to £523 15s. 6d., for the accommodation of the bankrupt. The bankrupt deposited them with his bankers as a security for the floating balance. The petitioner was, therefore, a surety to the extent of £523 15s. 6d., to meet a floating balance, but from the manner in which the suretyship was created no such special ground as the notice in *Ex parte Rushforth* (1), or the proviso in *Paley* v. *Field* (4), could exist, nor could anything turn on special words in the guarantee. The balance greatly exceeded £523 15s. 6d., and the bankers proved and received a dividend of 2s. on the whole. Then the petitioner paid the bills. The court of review had allowed the petitioner the future dividends on the £523 15s. 6d., but refused to make the bankers account for the 2s. in the pound already received by them. LORD COTTENHAM on appeal said very truly that this was illogical, and that the petitioner was entitled to both or neither. He then refers to the fact that the bills were deposited to secure a floating balance, which in the result exceeded

A their amount. He cites *Bardwell* v. *Lydall* (5), *Paley* v. *Field* (4), and *Ex parte Rushforth* (1), and then says (Mont. & Ch. at p. 318):

> "If, then, the dividend is to be attributed to that portion of the debt which was secured by the bills of Holmes, it is immaterial that the banker had large or other demands against the bankrupts."

B It seems to me that the principle he assumes is that a security of limited amount for a floating balance, is as between surety and creditor a security for a portion of the balance only, and that the residue is unsecured. In *Thornton* v. *M'Kewan* (7), in 1862, WOOD, V.-C., followed these decisions, and had no occasion to enter into an explanation of the principle.

In *Gee* v. *Pack* (8), in 1863, an action was brought in the Court of Queen's Bench C on this guarantee:

> "£300 on demand we jointly and severally promise to pay to Messrs. Gee & Co. [bankers], £300, with interest on same, to secure an advance now or hereafter on a banking account with Messrs. Pack and Seaton."

The question raised on demurrer to a plea was whether the surety was entitled D to credit for a proportionate part of the dividends received by Gee & Co. on the balance of their banking account, which at the time the principal debtors entered into liquidation exceeded £300. The decision was in favour of the surety, on the ground that the case was undistinguishable from *Bardwell* v. *Lydall* (5). In *Hobson* v. *Bass* (9) LORD HATHERLEY, in 1871, acting upon all these cases, states the question thus (6 Ch. App. at p. 794):

E

> "If a person guarantees a limited portion of a debt all the authorities show that if he pays that portion, he has in respect of it all the rights of a creditor. The question is whether the guarantor means: 'I will be liable for the amount which A. B. shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250.' The words of this guarantee are so similar to those in some of the cases cited, that it would be splitting hairs to distin- F guish them. The words 'at any time' are material, and I think the meaning of the instrument is: 'I guarantee the payment of all goods supplied, but my liability is not to be increased by their amount exceeding £250. When it reaches that sum, I am to be a surety for it with all the rights of a surety.'"

The last case on the subject that I am aware of is *Gray* v. *Seckham* (2). There G the suretyship was by means of a promissory note deposited by the principal with his bankers as a security for the floating balance, and the case so far was identical with *Ex parte Holmes* (3). MELLISH, L.J., in delivering judgment, states the point thus (7 Ch. App. at p. 683):

> "Upon this the question arises whether there is anything to take this case out of the ordinary rule that when a surety is only surety for part of the debt, and H has paid that part of the debt he is entitled to receive the dividend which the principal debtor pays in respect of the sum which the surety has discharged."

I have now cited and examined every case of which I am aware bearing on this subject. In every one of them the limited suretyship was to secure a floating balance, and I think these decisions establish that in such a case the suretyship is, I prima facie at least, to be construed as a security for a part only of the debt, from which the consequence stated by MELLISH, L.J., follows. I agree with what is intimated by LORD HATHERLEY in *Hobson* v. *Bass* (9), that if a creditor taking a limited security for a floating balance means it to be a security for the whole of the debt, and not merely for a part, he should take care that this is clearly expressed, for the prima facie construction is the other way, and the court ought not to split hairs or make nice verbal distinctions on the words used. But there is no case that I am aware of which lays down that where the suretyship, limited in amount, is for a debt already ascertained which exceeds that limit it is prima facie

to be construed as a security for part of the debt only, and I have failed to see any principle on which such a prima facie construction ought to be adopted. I think in such a case it is a question of construction on which the court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only. I think the bond in the present case expresses an intention that the sureties should each guarantee the whole of the £7,000, though their liability respectively was limited to the stipulated amounts. It seems, therefore, to me that the court below were altogether right, and that the judgment should be affirmed.

LORD CAIRNS, L.C., and **BRETT, J.**, concur in this judgment, and in the reasons on which it is founded.

Appeal dismissed.

Solicitors: *Jones, Blaxland & Son*; *R. & E. Brabant.*

[*Reported by* G. G. KENNEDY, ESQ., *Barrister-at-Law.*]

MEYER AND OTHERS *v.* RALLI AND OTHERS

[COMMON PLEAS DIVISION (Lord Coleridge, C.J., Grove and Archibald, JJ.), May 9, 1876]

[Reported 1 C.P.D. 358; 45 L.J.Q.B. 741; 35 L.T. 838; 24 W.R. 963; 3 Asp.M.L.C. 324]

Conflict of Laws—Foreign judgment—Enforcement—Judgment manifestly wrong —Admission by parties.

There is no rule of comity, and no principle, on which the court is bound to give effect to the judgment of a foreign tribunal where it is admitted by the parties that that tribunal, either from inadvertence or for some other reason, has manifestly gone wrong in law.

Notes. Some doubt has been thrown on the decision in this case by textbook writers: see 7 HALSBURY'S LAWS (3rd Edn.) 150, n. (d). For cases see 11 DIGEST (Repl.) 519 et seq.

Cases referred to:

(1) *Rosetto* v. *Gurney* (1851), 11 C.B. 176; 20 L.J.C.P. 257; 17 L.T.O.S. 242; 15 Jur. 1177; 138 E.R. 438; 29 Digest (Repl.) 320, *2425.*

(2) *Reynolds* v. *Fenton* (1846), 3 C.B. 187; 16 L.J.C.P. 15; 7 L.T.O.S. 207; 10 Jur. 668; 136 E.R. 75; 11 Digest (Repl.) 510, *1256.*

(3) *Doe d. Christmas* v. *Oliver* (1829), 10 B. & C. 181; 2 Sm.L.C. 724, 11th Edn.; 5 Man. & Ry.K.B. 202; 8 L.J.O.S.K.B. 137; 109 E.R. 418; 21 Digest (Repl.) 363, *1068.*

(4) *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155; 40 L.J.Q.B. 73; 24 L.T. 93; 19 W.R. 587; 11 Digest (Repl.) 505, *1220.*

(5) *Godard* v. *Gray* (1870), L.R. 6 Q.B. 139; 40 L.J.Q.B. 62; 24 L.T. 89; 19 W.R. 348; 11 Digest (Repl.) 522, *1360.*

(6) *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 23 L.T. 48; 19 W.R. 1; 3 Mar.L.C. 454, H.L.; 11 Digest (Repl.) 525, *1375.*

(7) *Becquet* v. *MacCarthy* (1831), 2 B. & Ad. 951; 109 E.R. 1396; 11 Digest (Repl.) 511, *1265.*

A Also referred to in argument:

Stringer v. *English and Scottish Marine Insurance Co.* (1870), L.R. 5 Q.B. 599; 10 B. & S. 770; 39 L.J.Q.B. 214; 22 L.T. 802; 18 W.R. 1201; 3 Mar.L.C. 440, Ex. Ch.; 29 Digest (Repl.) 298, *2257*.

Cammell v. *Sewell* (1858), 3 H. & N. 617; 27 L.J.Ex. 447; 32 L.T.O.S. 196; 4 Jur.N.S. 978; 157 E.R. 615; on appeal (1860), 5 H. & N. 728; 29 L.J.Ex.
B 350; 2 L.T. 799; 6 Jur.N.S. 918; 8 W.R. 639; 157 E.R. 1371, Ex. Ch.; 11 Digest (Repl.) 524, *1372*.

Farnworth v. *Hyde* (1865), 18 C.B.N.S. 835; 5 New Rep. 488; 34 L.J.C.P. 207; 12 L.T. 231; 11 Jur.N.S. 349; 13 W.R. 613; 2 Mar.L.C. 187; 144 E.R. 674; on appeal (1866), L.R. 2 P.C. 204; 36 L.J.C.P. 33; 15 L.T. 395; 12 Jur.N.S.
997; 15 W.R. 340; 2 Mar.L.C. 429, Ex. Ch.; 29 Digest (Repl.) 307, *2325*.

C *Messina* v. *Petrococchino* (1872), L.R. 4 P.C. 144; 8 Moo.P.C.C.N.S. 375; 41 L.J.P.C. 27; 26 L.T. 561; 20 W.R. 451; 1 Asp.M.L.C. 298; 17 E.R. 352, P.C.; 11 Digest (Repl.) 516, *1306*.

Kidston v. *Empire Marine Insurance Co.* (1866), L.R. 1 C.P. 535; 35 L.J.C.P. 250; 15 L.T. 12; 15 W.R. 63; on appeal (1867), L.R. 2 C.P. 357; 36 L.J.C.P. 156; 16 L.T. 119; 15 W.R. 769; 2 Mar.L.C. 468, Ex. Ch.; 29 Digest (Repl.)
D 278, *2081*.

Dent v. *Smith* (1869), L.R. 4 Q.B. 414; 10 B. & S. 249; 38 L.J.Q.B. 144; 20 L.T. 868; 17 W.R. 646; 3 Mar.L.C. 251; 11 Digest (Repl.) 521, *1354*.

Special Case stated by an arbitrator in an action by cargo-owners on a valued policy of insurance.

E *Cohen*, *Q.C.* (*M'Leod* with him), for the plaintiffs.
Benjamin, *Q.C.* (*Norman* with him), for the defendants.

May 9, 1876. **ARCHIBALD, J.,** read the following judgment of the court.—This is a Special Case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye, valued at £2,731, includ-
F ing £150 advance, on a voyage from Enos to Schiedam, in the Austrian ship *Unico*, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of £2,731. The policy contains the usual clause that in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about the defence and safeguard and recovery of the goods, merchandise, ship,
G etc., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute.

On July 21, 1865, the defendants had entered into a charterparty with one Faltata, of Venice, for the charter of the *Unico*, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn and carry it to Amsterdam or Schiedam direct, and had on Nov. 2, 1865, shipped at Enos on board the vessel,
H of which Antonio Lucovich was the master, a cargo equal to 2,343 English quarters, or 6,800 hectolitres of rye, sound and in good order and well conditioned. The captain received at Enos £150, pursuant to the terms of the charterparty. He also signed a bill of lading. On Nov. 8 the *Unico*, then laden with the cargo in bulk, left Enos on the voyage. On Nov. 14 the plaintiffs, through their agents, Messrs. Schroder and Bonniger in London, purchased from the defendants for £2,735 8s.
I 6d., the cargo in question, including freight and insurance to Schiedam, as per charterparty, and on Nov. 21 the defendants handed to them the policy in question. During November and December, 1865, the *Unico*, on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo, and on Jan. 14, after hoisting signals of distress, she was taken by a French fishing smack into the port of La Rochelle, in France. On her arrival there, the captain placed himself in the hands of Messrs. Admyrault and Seignette. Monsieur Admyrault was the Austrian consul, and his firm made all necessary advances of cash to the captain.

Certain proceedings were, as stated in the Special Case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first a portion, and eventually the whole of the cargo was landed and warehoused by order of the court. On Feb. 10, 1866, a portion of the cargo, amounting to 5,552 kilogrammes, was, by order of the Tribunal of Commerce, sold, and realised francs 8,537.65. On Feb. 21, 1866, on the petition of the captain, the court ordered the sale of the residue of the cargo by public auction. Immediately on receiving information of this order, on Feb. 21 and 22, 1866, Messrs. Schroder and Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that in the opinion of experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept. On Mar. 5, 1866, the defendants in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for a new survey to be ordered. The Tribunal of Commerce thereupon ordered that the sale of the rye should be provisionally suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible by continuing the expedients of manipulation and ventilation to preserve it in its good condition, so as to enable it to be re-shipped without risk, and to be conveyed to Schiedam, its destination. On Mar. 14, the surveyors having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well re-shipped and conveyed without any danger to Schiedam, recommending that, if not re-shipped very speedily, it should be subject to ventilation once a month until the moment of its being put on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the court, and notice of it was given to the plaintiffs on Mar. 17, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account, and on their responsibility.

On May 11, 1866, the captain of the *Unico* applied to the Tribunal of Commerce for and obtained authority to raise a loan on the bottomry of the ship, freight, and cargo. On June 6 the captain filed a petition in the Tribunal of Commerce, stating that he had been unable to effect a loan on bottomry, and asking the tribunal to declare the ship unnavigable under arts. 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition. On June 21, 1866, Messrs. Admyrault and Seignette, who had made considerable advances to meet the several expenses caused directly and indirectly by the forced interruption of the voyage summoned the captain before the Tribunal of Commerce to show cause why in default of payment to them of 20,000 francs within a fortnight from that date, they should not be authorised to sell for account of whom it might concern the ship and the remainder of the cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded. On July 11, 1866, after service of the last mentioned summons, Captain Lucovich issued a summons to the underwriters and the then unknown holder of the bill of lading of the cargo in order to their becoming parties to the suit commenced by the summons of June 21, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties.

The summons of June 21 came on for hearing on Sept. 14, 1866, in the absence of the defendants or any person appearing on their behalf, when the tribunal ordered the sale of the ship *Unico*, and a statement of general and particular average of the ship and her cargo to be drawn up, which was accordingly done. On Oct. 22 Messrs. Michel et Fils, having on behalf of the plaintiffs, made a claim for payment of 3,780 francs for the advance freight paid to Captain Lucovich, and the captain inferring from this that the plaintiffs were the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of Sept. 14, 1866, and a summons to attend on all subsequent proceedings. The plaintiffs had not, prior

to Oct. 23, informed the master of the *Unico* that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to any of the proceedings. On Dec. 21, 1866, the Tribunal of Commerce remanded to Jan. 25 then next the decreeing respecting the statement of average; but nevertheless, on several grounds, among others that the state of the weather was unfavourable to its preservation, ordered the sale of the remainder of the cargo of the *Unico*, and the purchase-money was ordered to be paid over to Messrs. Admyrault and Seignette, to cover the advances made by them, which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required by the law—the costs to be costs of average. This last mentioned judgment was given in the absence of any person representing the defendants. On Jan. 10, 1867, under the order, the remainder of the cargo was sold by public sale at La Rochelle, and realised a net sum of francs 27,830.30. The total agreed freight of the cargo from Enos to Schiedam was francs 16,695.95. Of this, francs 3,780 (£150 sterling) was, as already stated, advanced at Enos, leaving francs 12,915.95 unpaid. On Jan. 25 the Tribunal of Commerce, by its judgment, declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that the advance to the captain on account of freight at Enos must contribute to general average, and referred back the statement to the average stater for the purpose of modifying the calculations therein, keeping in view, first the said judgment, secondly the sum realised by the sale of the rye, thirdly the various costs in the suit. The tribunal also said that the average staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum realised by the sale of the cargo.

The plaintiffs in this action were summoned through their agents, Messrs. P. Michel et Fils, to appear in these proceedings, but they made default, and the judgment of Jan. 25 was rendered without any opposition. The defendants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the Bar of the Procureur Imperial according to French procedure, but not received by the defendants. On May 24, 1867, the Tribunal of Commerce confirmed an amended statement of general and particular average which had meanwhile been made, and condemned the plaintiffs to pay the sum of francs 12,915.95 remaining due on account of freight, with interest from July 11, 1866, to the time of payment, and ordered that sum, being, as stated in the judgment, secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyrault and Soignette as consignees. The said sum, together with 1,000 francs damages and interest thereon from June 28, 1867, together with an additional sum for costs subsequent to that date, was paid at La Rochelle to Captain Lucovich after divers proceedings taken by him against the plaintiffs out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the first instance, dated August 7, 1867. It is stated in the Special Case that, by the law of France, the Tribunal of Commerce had jurisdiction to order the various surveys of the ship and cargo and statements of average, and to make the various orders, judgments, and decrees, but that it is a court of first instance of inferior jurisdiction, and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which, if made, is usually decided in four or five weeks, and that no appeal was taken on the part of the plaintiffs. It was admitted also in the Case that the damages referred to were caused by the perils insured against. It is also found that the rye which was sold on Jan. 10, 1867, was in March, 1866, and in January, 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam, a price considerably more than the total of all the extra expenses properly incurred in respect of it, and consequent upon the interruption of the voyage under the circumstances, including the extra freight of forwarding it

to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on Jan. 10, under the average statement is to be taken into account, and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March, 1866, or January, 1867.

The questions which arise in the case are: First, whether there was a constructive total loss of the cargo; secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the sue and labour clause. For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what, under the circumstances, was the duty of the captain. It is found in the Case that, by the law of France, the master under the circumstances was not entitled to full freight upon the cargo landed there, but that by art. 296 of the CODE DE COMMERCE, he was bound to hire another vessel to carry on the cargo to its destination, and if unable to hire a vessel, was entitled to pro rata freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been practicable to hire another vessel to carry on the cargo to its destination. The Case also states that the portion of the cargo that was sold by order of the Tribunal of Commerce on Jan. 10 was unmerchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination. It is quite clear, therefore, that, if the captain had done his duty, the portion of the cargo sold on Jan. 10, 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochelle (*Rosetto* v. *Gurney* (1)), as exceeded the original rate of freight.

The question is: What is the effect of the proceedings in the French courts, on this simple state of the case? In the view which we take, we do not consider it material, for the purpose of dealing with the question whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle, prior to the order of Dec. 21, 1866, by which the residue of the cargo was ordered to be sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments in rem, or in the nature of judgments in rem, and binding as against all the world, and, among others, as against both the plaintiffs and defendants. But, when we come to the order of Jan. 25, 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the shipowner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment in rem, and apart from the fact that the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it (*Reynolds* v. *Fenton* (2)), that they might have appeared and defended, there is this peculiarity in the case, which does not, so far as we are aware, seem to have occurred before, that upon the express findings in the Special Case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France on which it professes to proceed.

The remark that the defendants were no parties to the judgment equally applies to the judgment of Aug. 7, 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyrault and Seignette was confirmed and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the declaration that the residue of the cargo which was sold on Jan. 10, 1867, should bear its entire proportion to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover,

A even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the Case, we should be bound to give effect to it as against the plaintiffs.

It is a matter of nicety how far a judgment of a competent foreign court in rem, or between the same parties, is examinable here. The authorities on the subject are all collected in STORY'S CONFLICT OF LAWS, §§ 547 et seq., and in the notes to B *Doe d. Christmas* v. *Oliver* (3) in SMITH'S LEADING CASES, and need not be referred to in detail. In *Schibsby* v. *Westenholz* (4), the principle on which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a

> "court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it is a defence to the action."

C

This principle is also assumed and acted on in *Godard* v. *Gray* (5), where the majority of the court held that the judgment was binding, notwithstanding that it proceeded on a mistake as to English law, which did not appear to have been D knowingly or perversely acted on. In STORY'S CONFLICT OF LAWS, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (art. 607):

> "It is easy to understand that the defendant may be able to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law fori rei judicatæ. To such an extent the doctrine is intelligible and practicable."

E

In *Castrique* v. *Imrie* (6), the House of Lords upheld a decree in rem of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of English law, on the ground that, the foreign law being ascertained as a matter of F fact in the case, the French court, with every honest endeavour to be right, was liable without any fault to go wrong either from imperfect evidence produced before it or misapprehension of its effect. But in that case in delivering the opinion of the majority of the judges, BLACKBURN, J., speaking of the judgment on matters of French law, says (L.R. 4 H.L. at p. 430):

> "We must (at least till the contrary is clearly proved) give credit to a foreign tribunal for knowing its own law and acting within the jurisdiction conferred on it by that law."

G

In *Becquet* v. *M'Carthy* (7), LORD TENTERDEN said (2 B. & Ad. at p. 957):

> "We ought to see very plainly that the court has decided against the French law, before we say that their judgment is erroneous on that ground,"

H

implying that, if it clearly appeared to be wrong, the court would not give effect to the judgment.

Here the court expressly professes to proceed on the ground of French law, and, although the presumption would be that the court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, I and we are precluded by the findings in the case from holding that the court has rightly declared it. The contrary, to use the words of BLACKBURN, J., clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by *Castrique* v. *Imrie* (6) to have given effect to it, but it is a declaration of French law which is wrong. Under these circumstances we are of opinion that there is no rule of comity and no principle on which we are called upon to give effect to such a judgment, and that pro rata freight only was payable on the cargo at La Rochelle.

[The Court held on the facts that there was no constructive total loss of the cargo, but that under the sue and labour clause the plaintiffs were entitled to recover in respect of certain expenses, the amount to be ascertained by the arbitrator who had stated the Case.]

Order accordingly.

Solicitors: *Matthews, Markby, Tarry & Stewart.*

[*Reported by* Cyril Dodd, Esq., *Barrister-at-Law.*]

BANK OF NEW SOUTH WALES *v.* OWSTON

[Privy Council (Sir James W. Colvile, Sir Barnes Peacock, Sir Montague Smith and Sir Robert Collier), February 18, 19, 20, March 28, 1879]

[Reported 4 App. Cas. 270; 48 L.J.P.C. 25; 40 L.T. 500; 43 J.P. 14 Cox, C.C. 267, P.C.]

Master and Servant—Liability of master for act of servant—Malicious prosecution—Implied authority of servant—No general authority to prosecute—No emergency.

An authority given by an employer to his servant to institute criminal proceedings against offenders can only be implied where the duties which the servant is employed to discharge cannot be efficiently performed for the benefit of his employer unless he has such a power. The prosecution of offenders is not within the ordinary routine of banking business.

Accordingly, where the acting manager of the appellant bank instituted criminal proceedings against the respondent on a charge of stealing a bill of exchange, which proved to be groundless, and the respondent brought an action for malicious prosecution against the bank,

Held: the evidence not showing any case of emergency, any general authority to prosecute given to the acting manager by the directors of the bank, or that a power to prosecute was within the scope of the duties which the acting manager was authorised to perform, the bank were not liable for his acts, and the respondent's action failed.

Corporation—Liability in tort—Malicious prosecution—Malice.

An action will lie against a corporation for malicious prosecution even though that tort involves malice.

Notes. Applied: *Abrahams* v. *Deakin*, [1891] 1 Q.B. 516; *Ashton* v. *Spiers and Pond* (1893), 9 T.L.R. 606. Considered: *Hanson* v. *Waller*, [1901] 1 K.B. 390. Referred to: *Dyer* v. *Munday* (1895), 64 L.J.Q.B. 448; *Cornford* v. *Carlton Bank*, [1899] 1 Q.B. 392; *Poland* v. *Parr*, [1927] 1 K.B. 236.

As to the liability of a master for a malicious prosecution by his servant, see 25 Halsbury's Laws (3rd Edn.) 351; and for cases see 1 Digest (Repl.) 382–383. As to the liability in tort of a corporation, see 9 Halsbury's Laws (3rd Edn.) 87–90; and for cases see 13 Digest (Repl.) 317 et seq.

Cases referred to:

(1) *Stevens* v. *Midland Counties Rail. Co.* (1854), 10 Exch. 352; 23 L.J.Ex. 328; 18 J.P. 713; 18 Jur. 932; 2 C.L.R. 1300; 156 E.R. 480; 13 Digest (Repl.) 322, *1290*.

(2) *Eastern Counties Rail. Co.* v. *Broom* (1851), 6 Exch. 314; 6 Ry. & Can. Cas. 743; 20 L.J.Ex. 196; 16 L.T.O.S. 465, 509; 15 Jur. 297; 155 E.R. 562, Ex. Ch.; 13 Digest (Repl.) 323, *1303*.

(3) *Roe* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, (1851), 7 Exch. 36; 6 Ry. & Can. Cas. 795; 21 L.J.Ex. 9; 155 E.R. 845; 34 Digest (Repl.) 158, *1097*.

(4) *Goff* v. *Great Northern Rail. Co.* (1861), 3 E. & E. 672; 30 L.J.Q.B. 148; 3 L.T. 850; 25 J.P. 326; 7 Jur.N.S. 286; 121 E.R. 594; 13 Digest (Repl.) 323, *1305*.

(5) *Edwards* v. *London and North Western Rail. Co.*, (1870), L.R. 5 C.P. 445; 39 L.J.C.P. 241; 22 L.T. 656; 18 W.R. 834; 34 Digest (Repl.) 170, *1190*.

(6) *Moore* v. *Metropolitan Rail. Co.*, (1872), L.R. 8 Q.B. 36; 42 L.J.Q.B. 23; 27 L.T. 579; 37 J.P. 438; 21 W.R. 145; 8 Digest (Repl.) 127, *813*.

(7) *Poulton* v. *London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 8 Digest (Repl.) 127, *812*.

(8) *Allen* v. *London and South Western Rail. Co.* (1870), L.R. 6 Q.B. 65; 40 L.J.Q.B. 55; 23 L.T. 612; 35 J.P. 308; 19 W.R. 127; 11 Cox, C.C. 621; 34 Digest (Repl.) 169, *1183*.

(9) *Mackay* v. *Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394; 43 L.J.P.C. 31; 30 L.T. 180; 38 J.P. 296; 22 W.R. 473, P.C.; 34 Digest (Repl.) 161, *1119*.

Also referred to in argument:

Walker v. *South Eastern Rail. Co.* (1870), L.R. 5 C.P. 640; 39 L.J.C.P. 346; 23 L.T. 14; 18 W.R. 1032; 34 Digest (Repl.) 165, *1142*.

Green v. *London General Omnibus Co.* (1859), 7 C.B.N.S. 290; 29 L.J.C.P. 13; 1 L.T. 95; 6 Jur.N.S. 228; 8 W.R. 88; 141 E.R. 828; 13 Digest (Repl.) 322, *1297*.

Lord Bolingbroke v. *Swindon Local Board* (1874), L.R. 9 C.P. 575; 43 L.J.C.P. 287; 30 L.T. 723; 23 W.R. 47; 34 Digest (Repl.) 187, *1316*.

Giles v. *Taff Vale Rail. Co.*, (1853), 2 E. & B. 822; 22 L.T.O.S. 157; 18 Jur. 510; 118 E.R. 975; sub nom. *Taff Vale Rail. Co.* v. *Giles*, 23 L.J.Q.B. 43; 2 W.R. 57, Ex. Ch.; 13 Digest (Repl.) 325, *1319*.

Gooroopersad Khoond v. *Luggutchunder* (1860), 13 Moo.P.C.C. 472; 8 Moo. Ind. App. 166; 15 E.R. 177, P.C.; 8 Digest (Repl.) 816, *686*.

Appeal from a decision of the Supreme Court of New South Wales (HARGREAVE and MANNING, JJ., MARTIN, C.J., dissenting), discharging a rule nisi to set aside a verdict for the respondent, Owston, for £500 and costs, and to enter a non-suit, or for a new trial, in an action brought by him against the appellants, the New South Wales Bank, for malicious prosecution.

Benjamin, Q.C., and *Arbuthnot* (*J. C. Mathew* with them) for the appellants.
J. D. Wood (*McIntyre, Q.C.*, with him) for the respondent.

Mar. 28, 1879. **SIR MONTAGUE SMITH.**—This is an action for a malicious prosecution brought against the Bank of New South Wales, an incorporated company. The circumstances leading to the prosecution, which it is now admitted was groundless, are the following. In March, 1876, a bill at thirty days' sight for £1,500 was drawn by Messrs. Morgan, Connor, and Glyde, a firm trading at Adelaide, South Australia, upon the respondent Mr. Owston, a merchant trading at Sydney under the firm of Owston & Co. The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the Adelaide branch of the appellant bank to the head bank at Sydney. On Saturday, Mar. 18, the bank left the bill with the respondent for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday, Mar. 21. Meanwhile, on the afternoon of the 20th, the respondent had received the following telegram from the drawers: "*Sea Gull* put back leaky"; and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On the morning of the 21st, about eleven o'clock, a clerk from the bank called for the bill, and

the respondent showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until one o'clock for the return of the bill. About that hour, and before the respondent had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from Adelaide reached the plaintiff: "Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank. The bill, when returned to the bank by the respondent, was sent on the same afternoon by Hobbs, one of the bank's clerks, to Messrs. Allen, Bowden, and Allen, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of.

On the following day, Wednesday, Mar. 22, a clerk of Messrs. Allen and Bowden, a lad called Muir, brought the bill to the respondent for acceptance. The respondent's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in his mind the telegrams as to the alteration of the days of sight, he inquired of him how the bank wished the acceptance to be. The clerk said he knew nothing about that. The respondent then told him that he would accept the bill, and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen and Bowden, came for the bill, and demanded to have it returned. According to the respondent's evidence he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The respondent's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The respondent in fact soon after sent the bill to the bank, accepted, having first made it payable at sixty days' sight, and it appears to have reached the bank about one o'clock. Unfortunately, the fact of the return of the bill was not communicated by the bank to Messrs. Allen and Bowden, as it ought to have been, and they remained under the impression that the respondent was still keeping it in his possession. Another interview took place between Bishop and the respondent; they met in the street. The respondent declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble—that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police.

A consultation was held in Messrs. Allen and Bowden's office, and, apparently on the assumption that the respondent was improperly withholding the bill and that they as notaries were responsible to the bank for its return, it was resolved to take criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the respondent on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the respondent to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of £1,500, the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the respondent went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and complained to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the respondent being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed.

The respondent then brought the present action against the bank. On the trial Manning, J., properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and

A was, therefore, malicious. No question now arises on this part of the case. The two questions which were mainly contested at the trial and argued at their Lordships' Bar are: (i) Whether the proceedings of Messrs. Allen and Bowden were authorised by Wilkinson on behalf of the bank; and (ii) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned B judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling. A rule nisi to enter a nonsuit or for a new trial was granted on the following grounds: (i) That the special finding of the jury (that Mr. Wilkinson authorised the prosecution) was against evidence, and had C no evidence to support it. (ii) That the judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible. (iii) That there was no evidence that the prosecution was in fact or in law a prosecution by the bank. This rule, after an argument before MARTIN, C.J., HARGREAVE and MANNING, JJ., was discharged. The court was unanimous in refusing to disturb the D finding of the jury as to Wilkinson having authorised the proceedings, but on the question of the correctness of the ruling of MANNING, J., as to the responsibility of the bank for Wilkinson's acts, which that learned judge and HARGREAVE, J., sustained, the Chief Justice dissented from his colleagues.

One point argued in the court below was that the bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the E other judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of ALDERSON, B., in *Stevens* v. *Midland Counties Rail. Co. and Lander* (1) which, as reported, no doubt supports this view. The learned counsel for the appellants acknowledged that, after recent decisions, he could not support this broad proposition, and F confined his argument to the two questions above indicated. Upon the first of these questions their Lordships cannot say that there is not some evidence to support the finding of the jury; and that finding having been sustained by the judgment of the court below, they intimated to the learned counsel at the close of the argument for the appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone.

G The point remaining for consideration, viz., the liability of the bank for the acts of Wilkinson, is of more general importance. The first question which arises on this point is whether the direction of the learned judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution—thus practically withdrawing the question from the jury—was correct, and their Lordships think that upon the evidence given at the trial H it was not. No proof was offered by the plaintiff of the position, duties, and powers of the acting manager; but the defendants examined him, and also the general manager, who gave evidence on the question of his authority.

Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the Bar. They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two I earliest cases, *Eastern Counties Rail. Co.* v. *Broom* (2) and *Roe* v. *Birkenhead, Lancashire and Cheshire Junction Rail. Co.* (3), the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, PARKE, B., thought there was no proof that the servant "had ever received any general authority from

the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorised to make any arrest on their behalf." In the later cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to him.

In *Goff* v. *Great Northern Rail. Co.* (4) the plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Consolidation Act, 1845, ss. 103, 104, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such persons. There was evidence that the superintendent was the person in supreme authority at the station, and, the jury having found for the plaintiff, the court refused to set aside the verdict, on the ground that there was no evidence for their consideration. BLACKBURN, J., in delivering the judgment of the court, observes:

> "The court thought that, as from the nature of the case the question whether a particular passenger should be arrested or not must be made without delay, and as the case may not be of unfrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be apprehended."

The court held there was evidence for the jury that the persons who apprehended the plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent. That case turns, therefore, on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest, and, indeed, the only, representatives of the company on the spot who could exercise it. On these considerations it was held that the jury might infer the necessary authority.

In *Edwards* v. *London and North Western Rail. Co.* (5) it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master gave the plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The plaintiff was well known, and in fact a gateman in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in this case was not in pursuance of any special duty entrusted to the servant, to enforce laws or bylaws. The court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore* v. *Metropolitan Rail. Co.* (6), the facts of the case were held to bring it within the authority of *Goff* v. *Great Western Rail. Co.* (4).

Poulton v. *London and South Western Rail. Co.* (7) was a peculiar case. The station-master had arrested the plaintiff for non-payment, not of his own fare, but that of his horse, the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorised the arrest and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorised him to do an act which under no circumstances could be lawful, and which they had no power to do themselves.

A question in some respects similar arose in *Allen* v. *London and South Western Rail. Co.* (8). It is to be observed that although in both these cases the defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the plaintiff, who objected to one of the coins, a dispute arose, and the plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Blackburn, J., who tried the cause, left it to the jury to say whether the clerk acted for his own ends and out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the plaintiff. The court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge, however, was for the attempt only, and the decision assumed there had been no more than an attempt. Blackburn, J., put two cases, as supposed cases only, and his so putting them shows how little questions of this kind have been before the courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the authority of the person in charge of it. The learned judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the plaintiff into custody for an attempt to steal which had failed.

In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot, though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority.

The liability of the bank in the present case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency. The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business: *Mackay* v. *Commercial Bank of New Brunswick* (9). But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain

cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors.

Supposing this to be so (and if the facts were disputed, the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed, from his position alone, that the acting manager had general authority to prosecute on behalf of the bank, and, therefore, evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform. The respondent offered no evidence whatever on this point, and the testimony of the two managers directly negatives the possession of such a power by the acting manager. Their statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred. An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision, and that question raises issues beyond the mere fact that the agent acted on behalf of and in the supposed interest of the principal. Were it otherwise, the special authority would be equivalent to a general one.

What then was the situation when these unwarrantable proceedings took place? It cannot possibly be considered that it raised a case of emergency requiring immediate action by criminal proceedings against a person in the respondent's position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. The respondent was not at once given into custody, but an information was laid before a magistrate, but when the magistrate very properly refused a warrant to apprehend the respondent the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be. Their Lordships, therefore, think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action from which authority in the acting manager to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred. It is to be observed also that the bill in question was not under Wilkinson's special charge. He says "the matter was not in his department. It was a branch business; the general manager takes that." There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot

be inferred from his position alone as it appears upon the evidence, and that the direction of the learned judge was wrong. The verdict, therefore, cannot stand.

In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency, or apparent emergency from which authority could be derived, and, consequently, that the bank would not be liable for the act in question unless it is proved, or can be inferred from the evidence, that general authority to prosecute offenders for stealing the bank's property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers entrusted to him in relation thereto. The question whether Wilkinson in fact authorised the solicitors to prosecute the respondent will, of course, be open on the second trial. In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial. The respondent must pay the costs of this appeal.

Solicitors: *Waltons, Bubb & Walton*; *W. H. Gatty Jones.*

[Reported by C. E. MALDEN, ESQ., *Barrister-at-Law.*]

WRIGHT *v.* LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF APPEAL (Lord Coleridge, C.J., James and Mellish, L.JJ., Baggallay, J.A., and Cleasby, B.), January 17, 1876]

[Reported 1 Q.B.D. 252; 45 L.J.Q.B. 570; 33 L.T. 830; 40 J.P. 628]

Negligence—Volunteer—Plaintiff on defendants' premises with their consent—Common interest—Plaintiff assisting defendants' servants.

The plaintiff sent a heifer in a horse-box by the defendants' railway. On the arrival of the animal at its destination he assisted, with the station-master's assent, a porter in shunting the horse-box. While so engaged, he was injured through the negligence of the defendants' servants.

Held: the plaintiff was not a mere volunteer, but for the purpose of taking delivery of the heifer was on the defendants' premises with their consent, and, accordingly, the defendants were liable to him for the negligence of their servants.

Holmes v. *North Eastern Rail. Co.* (1) (1871), L.R. 6 Exch. 123, applied.

Notes. The duty which an occupier of premises owes to his visitors is now the common duty of care defined by s. 2 (2) of the Occupier's Liability Act, 1957: 37 HALSBURY'S STATUTES (2nd Edn.) 832. The "visitors" to whom the duty is owed are those persons who at common law would be treated as invitees or licensees (see s. 1 (2) of the Act of 1957), but not volunteers. It is on this point that the present case is included in these reports.

Considered: *Houghton* v. *Pilkington*, [1911–13] All E.R.Rep. 1135. Applied: *Williams* v. *Linotype and Machinery* (1914), 84 L.J.K.B. 1620. Followed: *Hayward* v. *Drury Lane Theatre, Ltd.*, [1916–17] All E.R.Rep. 405. Referred to: *Sutcliffe* v. *Clients Investments Co.*, [1924] 2 K.B. 746; *Howard* v. *Furness Houlder Argentine Lines, Ltd. and Brown, Ltd.*, [1936] 2 All E.R. 781; *Lomas* v. *M. Jones & Son*, [1943] 2 All E.R. 548.

As to the duty towards visitors, see 28 HALSBURY'S LAWS (3rd Edn.) 47 et seq.; and for cases see 36 DIGEST (Repl.) 48, 49.

Cases referred to:

(1) *Holmes* v. *North Eastern Rail. Co.* (1869), L.R. 4 Exch. 254; 38 L.J.Ex. 161; 20 L.T. 616; 17 W.R. 800; affirmed (1871), L.R. 6 Exch. 123; 40 L.J.Ex. 121; 24 L.T. 69, Ex. Ch.; 36 Digest (Repl.) 49, *257*.

(2) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; 26 L.J.Ex. 171; 28 L.T.O.S. 357; 3 Jur.N.S. 395; 5 W.R. 364; 156 E.R. 1413; 36 Digest (Repl.) 8, *16*.

(3) *Sharrock* v. *London and North Western Rail. Co.* (1875), 1 C.P.D. 70; 33 L.T. 341; 24 W.R. 346, C.A.; 13 Digest (Repl.) 472, *958*.

(4) *Potter* v. *Faulkner* (1861), 1 B. & S. 800; 31 L.J.Q.B. 30; 5 L.T. 455; 26 J.P. 116; 8 Jur.N.S. 259; 10 W.R. 93; 121 E.R. 911, Ex. Ch.; 36 Digest (Repl.) 81, *432*.

Appeal by the defendants from a decision of the Court of Queen's Bench, reported L.R. 10 Q.B. 298, discharging a rule to enter a verdict for the defendants.

The plaintiff brought an action to recover damages caused to him by the negligence of the servants of the defendants. The jury found a verdict for the plaintiff for £1,629 2s., leave being reserved to the defendants to enter the verdict for them, should the court be of opinion that there was no evidence of negligence on their part. The defendants obtained a rule on the ground that the plaintiff was assisting the defendants' servants and was in the same position as those servants, and that there was no evidence of the negligence of any persons for whose negligence the defendants were liable.

Aspinall, Q.C., and *Gully* for the defendants.

Herschell, Q.C., and *Crompton* for the plaintiff, were not called on to argue.

LORD COLERIDGE, C.J.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. The facts of the case, as I understand them, are that the plaintiff sent a heifer to Penrith station by the defendants' railway, he himself travelled in the same train, and, when they arrived at Penrith, the plaintiff assisted the porter in shunting the horse-box in which the heifer was being carried. It was proved by evidence that satisfied the jury, that satisfied the Court of Queen's Bench, and that satisfies us, that what he was doing was done with the assent of the stationmaster. It was also proved that there was a common practice at Penrith for persons who received cattle brought there by rail to assist in shunting the trucks and horse-boxes in which such cattle were carried. While so engaged, the plaintiff was injured through the negligence, as it is found, of the defendants' servants.

The Court of Queen's Bench have held that the case was within the principle of *Holmes* v. *North Eastern Rail. Co.* (1), and not within that of *Degg* v. *Midland Rail. Co.* (2), and I am of the same opinion. The principle of *Holmes* v. *North Eastern Rail. Co.* (1), as well as the principle of *Degg* v. *Midland Rail. Co.* (2) is simple and plain, and we must see if the facts of the present case lie under the one case or the other. *Holmes* v. *North Eastern Rail. Co.* (1) is extremely like the present. There, the plaintiff, who was consignee of a coal waggon which could not be unloaded in the usual way on account of the crowded state of the company's premises, with the permission of the stationmaster went to his wagon and assisted in unloading it. While doing so he tumbled into a hole, and it was held that, under the circumstances, the plaintiff was entitled to recover, because he was engaged with the consent and invitation of the defendants in a transaction of common interest to both parties, and was, therefore, entitled to require that the defendants' premises should be in a reasonably secure condition. CHANNELL, B., says (L.R. 4 Exch. at p. 258):

> "... in one sense the plaintiff was a licensee, but he was not a mere licensee, and the word mere has a very qualifying operation.... The plaintiff was entitled to delivery; and the stationmaster must be taken to have allowed him to take delivery, not of the whole of his coal at once, but of a part of it in that way."

A It must be taken in this case that the stationmaster authorised the plaintiff to take delivery of the heifer in this way, and, in doing so, he met with injury.

It appears to me on clear principle, and on the principle of *Holmes* v. *North Eastern Rail. Co.* (1), that the plaintiff is entitled to judgment. *Holmes* v. *North Eastern Rail. Co.* (1) is one of the greatest authority, because the Court of Exchequer first having decided it, it then came before the Court of Exchequer B Chamber, where seven judges affirmed, for the reasons given by the learned judges in the court below. It is plain, therefore, that the plaintiff was not here as a volunteer; if so, he would have been bound to take the risk. Nor is his the case of a master and servant; if so, he could not have recovered, as the master would not have been liable for the negligence of his fellow-servants. But it is a case where the defendants, who are bound to deliver certain goods, allow him to take C part in that delivery, and they are bound to see that he is not injured.

JAMES, L.J.—It would be a shocking state of the law if a person in the position of the plaintiff in this case could not recover. I am glad to find that, in *Holmes* v. *North Eastern Rail. Co.* (1), the principle has been established within which this case lies—a principle which is in accordance with common sense.

D

MELLISH, L.J.—I am of the same opinion. It is settled by *Degg* v. *Midland Rail. Co.* (2) that if a servant invites a person who is a mere volunteer to take part in a dangerous duty, the master is not liable if injury should happen to such person while so assisting. But the present case differs from that, for, in the first place, the plaintiff was not a mere volunteer, or one who assists in some work for mere E amusement, but he assisted for the purpose of getting his heifer. I do not say that every person who is entitled to receive goods from a railway company is entitled to assist the servants of the company, but there may be a case where such assistance would be reasonable; here it was manifest that there was a difficulty in getting the goods shunted, and it is found that it was the practice to allow persons who received cattle to assist in the delivery. Obviously, where a railway F company hire as few men as they can to work it is customary to allow persons who come for goods to assist, and they must be held liable if persons so assisting meet with injury through the negligence of the railway company. We decided a case a few days ago in the Court of Appeal at Lincoln's Inn somewhat similar to the present: *Sharrock* v. *London and North Western Rail. Co.* (3). It was a case on appeal from the county court, where the county court judge had been requested to G state a Case and had refused. The plaintiff, who was expecting to receive goods, was allowed, for the convenience of the defendants, to go to another side of the station to receive his goods, and in going there his horse fell over some obstacle and was injured, and we decided that the defendants were liable.

BAGGALLAY, J.A.—I am of the same opinion.

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CLEASBY, B.—As I was one of the judges who took part in the decision of *Holmes* v. *North Eastern Rail. Co.* (1), I desire to add a few words on the present occasion. That was a case rather near the line, and the question was whether there was such a relation between the plaintiff and the company as to entitle the plaintiff to redress for negligence, the plaintiff having to a certain extent had an I option of doing or not doing the work he was engaged on when the injury occurred. It seems to have established that when a man is on the premises of another for the purpose of carrying into effect a contract of carriage and delivery, and gets the assent of that other person (as indicated by the usual course of business) to assist in the work, the plaintiff is entitled to redress if the part of the premises where he is engaged is in a condition which is dangerous for the person engaged on it, and injury ensues. We have, therefore, thus established by that case that such a person is not to be regarded as a volunteer because he is assisting in carrying out a contract.

In the present case it follows that, if the injury had arisen from the condition of the premises being dangerous, the plaintiff could have recovered. But this distinction is now taken, that the negligence here is that of the servants of the defendants, and it is said that, as the plaintiff was assisting the defendants' servants, he becomes a fellow-servant. But this distinction makes no difference, for the reason that persons who engage in work with fellow-servants are said to take the chance of that sort of negligence of which they themselves or their fellow-servants may be guilty, and it is well established now that a servant cannot recover in respect of the negligence of fellow-servants. Is the plaintiff in the position of a fellow-servant? In *Degg* v. *Midland Rail. Co.* (2), and in *Potter* v. *Faulkner* (4), the plaintiff was in the position of a fellow-servant of the defendants' servants. But he is not so here; he has not agreed to be the fellow-servant of the defendants' servants, but, according to a usual practice, he has assisted in the delivery of his own goods on his own behalf, not as a servant of the company. It is an unsatisfactory way of putting the case to say "You may assist, but if you do you do so as a servant." I cannot say that the only effect of the evidence is that defendants assented to his being in the position of a fellow-servant.

Appeal dismissed.

Solicitors: *Johnston & Harrison*; *R. F. Roberts.*

[*Reported by* G. G. Kennedy, Esq., *Barrister-at-Law.*]

CESENA SULPHUR CO., LTD. *v.* NICHOLSON
CALCUTTA JUTE MILLS CO., LTD. *v.* NICHOLSON

[Exchequer Division (Kelly, C.B., and Huddleston, B.), January 31, February 1, 2, 1876]

[Reported 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 25 W.R. 71; 1 Tax Cas. 83, 88]

Income Tax—Residence—Company—Locality of effective control.

The Cesena Sulphur Co., incorporated in 1871 under the Companies Acts, 1862 and 1867, with a capital of £35,000, in £10 shares, and registered in Italy for all purposes in 1872, was formed for the purpose of developing and working the mines of sulphur at Cesena, in Italy, and the manufacture and sale of sulphur there, with power to take concessions of lands wherever sulphur was likely to be found. As regards its affairs in the United Kingdom, the company was managed by a board of directors, who held their meetings at the registered office of the company in London. An Italian delegation, consisting of two or three members of the board, resided in Italy, and carried on all the practical management of the company's properties and affairs, one of them being the managing director of the company and residing at Cesena, where all the operations connected with the manufacture and sale of sulphur were exclusively carried on and the profits were earned. The Italian members of the board were in constant correspondence with their co-directors resident in France and England, who met at the registered London office; and the working of the mines, the mode of the disposal thereof, and the general business of the company, were wholly under the order, direction, and management of the directors, subject to the control of general meetings, as provided by the articles. The original account books and all the moneys were kept at Cesena, but copies of such books were sent to London, where the register of shareholders pre-

scribed by English law was kept. The company's principal banking accounts were kept at Turin and Paris, the London banking account being kept for payment of office and administrative expenses and the dividends required for the English shareholders, which were the only part of the company's profits which were sent to England. The shares of the company were divided between English and foreign holders in the proportion of 8,924 held in England to 26,076 held abroad.

The Calcutta Jute Mills Co., incorporated in 1872, under the Companies Acts, 1862 and 1867, with a capital of £120,000, in £20 shares, was formed for the purpose of taking over the business, goodwill, and plant of jute mills near Calcutta, then belonging to and carried on by a firm of merchants resident there. The affairs of the company in the United Kingdom were managed by a board of not less than five directors, by whom one of the shareholders residing in Calcutta was appointed to be the managing agent and resident director of the company in India, and by whom and under whose entire control the buying of the raw material and its manufacture and sale, as well as all the operations connected with the company's business in all its branches, were wholly and exclusively carried on in India, where alone the profits of the company were earned, the company neither buying, manufacturing, nor selling in the United Kingdom. There was both an Indian and an English share register, and rather more than half the capital and shares were owned by residents in India. The company had no office or place of business in England, but, for purposes of registration, its address was at a merchant's office in London, where, by leave of the occupier, the meetings of the company were held. The books of accounts, documents, and moneys were kept, received, and dealt with by the manager in India, and the company had no property in the United Kingdom. Nothing whatever came into the hands of the English directors, except periodical remittances from Calcutta to defray necessary expenses, and such portion of the profits realised in India as were divisible as dividends among the shareholders in the United Kingdom. All that took place in England after receiving such proportion of the profits was the calling by the directors of a meeting of shareholders, and a declaration by the directors of the amount to be distributed by way of dividend among the English shareholders for the current year.

The companies having been assessed to income tax in respect of the entire gains or profits of their business carried on by them in Italy and India respectively, appealed, and contended that they were only liable to be assessed on the portion of their profits remitted to England for distribution in the way of dividends among the shareholders resident in the United Kingdom.

Held: it was clear from the constitution of both companies, as shown by their articles of association, that the entire and absolute control of their affairs and business was vested in and exercised by a board of directors in London, which place was, therefore, in each case, the seat of business of the company at which it must be deemed to "reside," and each of the companies, therefore, was rightly assessed as a "person residing within the United Kingdom," on the whole of the annual profits or gains of its business carried on in Italy or India.

Notes. Applied: *Imperial Continental Gas Association* v. *Nicholson* (1877), 37 L.T. 717. Considered: *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; *London Bank of Mexico and South America* v. *Apthorpe*, [1891] 1 Q.B. 383; *St. Louis Breweries* v. *Apthorpe* (1898), 79 L.T. 551. Explained: *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (1899), 80 L.T. 395. Considered: *A.-G.* v. *Jewish Colonization Association*, [1900] 2 Q.B. 556; *De Beers Consolidated Mines* v. *Howe*, [1906] A.C. 455; *Swedish Central Rail. Co., Ltd.* v. *Thompson*, [1924] All E.R.Rep. 710. Approved: *Egyptian Delta Land and Investment Co.* v. *Todd*, [1929] A.C. 1. Referred to: *Bartholomay Brewing Co.* (*of Rochester*) v. *Wyatt*, *Nobel Dynamite*

Trust Co. v. *Wyatt*, [1893] 2 Q.B. 499; *San Paula (Brazilian) Rail. Co.* v. *Carter*, [1896] A.C. 31; *Kodak* v. *Clark* (1903), 4 Tax Cas. 549; *Goerz* v. *Bell*, [1904] 2 K.B. 136; *New Zealand Shipping Co.* v. *Stephen* (1907), 5 Tax Cas. 553; *American Thread Co.* v. *Joyce* (1912), 6 Tax Cas. 1; *New Zealand Shipping Co.* v. *Threw* (1922), 8 Tax Cas. 208; *Bradbury* v. *English Sewing Cotton Co.*, [1923] All E.R.Rep. 427; *Baelz* v. *Public Trustee*, [1926] Ch. 863; *Re Canadian Eagle Oil Co., Petition of Right*, [1944] 1 All E.R. 734; *Union Corpn., Ltd.* v. *I.R.Comrs.*, *Johannesburg Consolidated Investment Co.* v. *I.R.Comrs.*, *Trinidad Leaseholds, Ltd.* v. *I.R.Comrs.*, [1952] 1 All E.R. 646; *Davies* v. *British Geon, Ltd.*, [1956] 3 All E.R. 389; *Unit Construction Co., Ltd.* v. *Bullock* (*I. of T.*), [1959] 3 All E.R. 831.

As to residence of body corporate, see 20 HALSBURY'S LAWS (3rd Edn.) 302; and for cases see 28 DIGEST (Repl.) 251 et seq.

Cases referred to:

(1) *Sulley* v. *A.-G.* (1860), 5 H. & N. 711; 29 L.J.Ex. 464; 2 L.T. 439; 24 J.P. 676; 6 Jur.N.S. 1018; 8 W.R. 472; 2 Tax Cas. 149, n.; 157 E.R. 1364, Ex. Ch.; 28 Digest (Repl.) 274, *1218*.

(2) *Keynsham Blue Lias Lime Co.* v. *Baker* (1863), 2 H. & C. 729; 33 L.J.Ex. 41; 9 L.T. 418; 9 Jur.N.S. 1346; 12 W.R. 156; 159 E.R. 302; 13 Digest (Repl.) 418, *454*.

(3) *Taylor* v. *Crowland Gas and Coke Co.* (1855), 11 Exch. 1; 24 L.J.Ex. 233; 25 L.T.O.S. 55; 19 J.P. 295; 1 Jur.N.S. 358; 3 W.R. 368; 3 C.L.R. 865; 156 E.R. 720; 13 Digest (Repl.) 418, *447*.

(4) *Adams* v. *Great Western Rail. Co.* (1861), 6 H. & N. 404; 30 L.J.Ex. 124; 3 L.T. 631; 9 W.R. 254; 158 E.R. 166; 13 Digest (Repl.) 418, *446*.

(5) *Brown* v. *London and North Western Rail. Co.* (1863), 4 B. & S. 326; 2 New Rep. 447; 32 L.J.Q.B. 318; 8 L.T. 695; 27 J.P. 711; 10 Jur.N.S. 234; 11 W.R. 884; 122 E.R. 481; 13 Digest (Repl.) 417, *435*.

(6) *Shiels* v. *Great Northern Rail. Co.* (1861), 30 L.J.Q.B. 331; 4 L.T. 479; 7 Jur.N.S. 631; 9 W.R. 739; 13 Digest (Repl.) 418, *448*.

(7) *Aberystwith Promenade Pier Co., Ltd.* v. *Cooper* (1865), 35 L.J.Q.B. 44; 13 L.T. 273; 30 J.P. 791; 12 Jur.N.S. 995; 14 W.R. 28; 13 Digest (Repl.) 418, *455*.

(8) *Kilkenny and Great Southern and Western Rail. Co.* v. *Feilden* (1851), 6 Exch. 81; 2 L.M. & P. 124; 6 Ry. & Can. Cas. 785; 20 L.J.Ex. 141; 16 L.T.O.S. 418; 15 Jur. 191; 155 E.R. 462; 13 Digest (Repl.) 354, *1617*.

(9) *A.-G.* v. *Alexander* (1874), L.R. 10 Exch. 20; 44 L.J.Ex. 3; 31 L.T. 694; 23 W.R. 255; 28 Digest (Repl.) 258, *1140*.

(10) *Bank of United States* v. *Mackenzie*, 2 Brockenbrough's Rep. 393.

(11) *Newby* v. *Van Oppen and Colt's Patent Fire Arms Manufacturing Co.* (1872), L.R. 7 Q.B. 293; 41 L.J.Q.B. 148; 26 L.T. 164; 20 W.R. 383; 13 Digest (Repl.) 349, *1581*.

Also referred to in argument:

Carron Iron Co. v. *Maclaren* (1855), 5 H.L.Cas. 416; 24 L.J.Ch. 620; 26 L.T.O.S. 42; 3 W.R. 597; 10 E.R. 961, H.L.; 9 Digest (Repl.) 33, *31*.

Bank of Augusta v. *Earle*, Curtis' Rep. 282; 13 Peters Rep. 569.

Blackstone Manufacturing Co. v. *Inhabitants of Blackstone*, 13 Gray's Rep. (Massachusetts) 488.

United States v. *Arnesley*, 11 Wheat. 412.

Beatson v. *Farmers Bank of Delamare*, 12 Peters 135.

Ohio and Mississippi Rail. Co. v. *Wheeler*, 1 Black's Rep. 286.

Baltimore and Ohio Rail. Co. v. *Glenn*, 28 Maryland Reps. 287.

Oldham Building and Manufacturing Co., Ltd. v. *Heald* (1864), 3 H. & C. 132; 4 New Rep. 252; 23 L.J.Ex. 236; 10 L.T. 534; 159 E.R. 478; 13 Digest (Repl.) 418, *453*.

Cases Stated for the opinion of the court.

The Commissioners of Income Tax for the city of London assessed the above first-named company, the Cesena Sulphur Co., in the sum of £5,834, under Sched. D, in respect of their entire profits in their business of sulphur miners, etc., at Cesena, in Italy. They also assessed the other company, the Calcutta Jute Mills Co., under the same schedule, in respect of their profits in the sum of £25,000, being their entire or aggregate gains for the year 1874, as spinners and manufacturers of jute in India. The company in each case appealed, and contended that the assessment should be restricted to the portion of the profits distributed among the shareholders resident in the United Kingdom, and thereupon the Commissioners of Inland Revenue, in conformity with the provisions of the Customs and Inland Revenue Act, 1874, s. 9, stated two Cases for the opinion of the court.

The question raised and the point involved in these two cases being very similar, the court decided to hear the arguments in each of them in succession before delivering their judgment in either.

The following are the material portions of the Cases that were so stated:

THE CESENA SULPHUR CO., LTD.

1, 2. The Cesena Sulphur Co., Ltd., hereinafter called the company, was formed to carry on the trade or business of sulphur miners, manufacturers, or merchants, at Cesena, in the province of Firli, in Italy. It was incorporated under the Companies Acts, 1862 and 1867, on Oct. 27, 1871, with a capital of £350,000, divided into 35,000 shares of £10 each, and was subsequently registered in Italy, for all purposes, in the following year, viz., on Nov. 1, 1872.

3. By the articles of association (forming part of the Case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board of eight directors, holding their meetings at the registered office of the company in England. There is an Italian delegation, consisting of two or three members of the board, resident in Italy, by whom all the practical management of the company's properties and affairs is carried on. One of the Italian directors is managing director of the company, and resides at Cesena.

4. All the operations connected with the manufacture and sale of sulphur are wholly and exclusively carried on at Cesena, where the profits of the company (if any) are earned, but the Italian members of the board are in constant correspondence with their co-directors resident in France and England, who meet at the English registered office, No. 84, King William Street, in the City of London.

5. Transcripts and copies of the company's books of accounts are sent to London, where the register of the shareholders, prescribed by the English law, is kept, but all the original books of accounts of the company, and all its moneys, are kept in Italy, the dividends required for the English shareholders being the only part of its profits which are sent to this country. The principal banking accounts of the company are kept at Turin and at Paris; the London banking accounts being kept for the payment of offices and administrative expenses and of dividends here.

6. The shares of the company are divided between the English and foreign shareholders in the proportion of 8,924 held in England to 26,076 held abroad.

7. The tax is leviable under Sched. D of the Income Tax Acts, 1842 and 1853; under the former of those Acts (see s. 1, Sched. D) certain duties are granted to Her Majesty on the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere . . . and on the annual profits or gains arising or accruing to any person residing in Great Britain from any profession, trade, employment, or occupation, whether the same shall be respectively carried on in Great Britain or elsewhere.

8. By s. 40 of the Act of 1842 it is enacted that all bodies politic, corporate, or collegiate, companies, fraternities, etc., whether corporate or not corporate,

shall be chargeable with such and the like duties, as any person would, under and by virtue of the said Act, be chargeable with.

9. By the Act of 1853, the like duties as are referred to in para. 7, are granted to Her Majesty on profits arising from property, profession, trade, and offices (inter alia) s. 2.

SCHEDULE D

For and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere.

10. By the Income Tax (Foreign Dividends) Act, 1842, s. 2, persons entrusted with the payment of foreign dividends or annuities are required to deliver, for the use of the Commissioners of Taxes, true and perfect accounts of the amount of the annuities and shares payable by them respectively, and the said commissioners are empowered to make an assessment thereon under Sched. C.

By s. 10 of Income Tax Act, 1853, the provision so made by the last recited Act is extended to the assessing and charging of the duties granted by the Act,

> "as well on such dividends and shares of annuities aforesaid, as on all interest, dividends, and other annual payments payable out of or in respect of the funds or shares of any foreign company, society, adventure, or concern, and which said interest, dividends, or other annual payments, have been or shall be entrusted to any person in the United Kingdom for payment to any persons, corporations, companies, or societies in the United Kingdom";

and all persons entrusted with the payment of any such interest, dividends, or other annual payments as aforesaid in the United Kingdom, or acting therein as agents, or in any other character, are required to perform all such acts and things in order to the assessing of the duties on such interest, dividends, and other annual payments as are required to be done by persons entrusted with the payment of annuities or any dividends under the Income Tax (Foreign Dividends) Act, 1842, above referred to. And the assessment of the duties on all such interest, dividends, and other annual payments as aforesaid, shall be made by the Commissioners for Special Purposes under Sched. D.

11. By s. 5 of Income Tax Act, 1853, the duties thereby imposed are directed to be assessed under the regulations of the Income Tax Act, 1842.

12. The duties granted by Income Tax Act, 1853, have been continued at various rates by a series of subsequent Acts, and the Act imposing the duty for the year 1874 is the Customs and Inland Revenue Act, 1874.

13. The commissioners, having regard to the articles of association accompanying the Case, and to the certificate of incorporation signed by the Registrar of Joint Stock Companies, and also to the fact that the registered office of the company is in England, where the directors meet, and direct, and control the main operations of the company, were of opinion that the company is an English company, formed under the Joint Stock Companies Acts, for carrying on an undertaking abroad, and is, by virtue of ss. 40 and 192 of the Income Tax Act, 1842, in the same position as a "person" residing within the United Kingdom, and liable under the provisions of s. 1 of that Act, and s. 2 of the 1853 Act, to make a return of the whole of the profits of any trade, whether the same shall be carried on in the United Kingdom or elsewhere.

The commissioners were further of opinion that the decision of the Court of Exchequer in *A.-G.* v. *Alexander* (9) was not adverse to but confirmatory of the contention of the Crown in the present case; the Court of Exchequer having there decided that the residence of a corporation must be regarded as the place of its incorporation, which, in the case of the Cesena Sulphur Co., is within the United Kingdom. That s. 2 of the Income Tax (Foreign Dividends) Act, 1842, and s. 10 of the Income Tax Act, 1853, referred to by the

company in the present case, do not bear on the question at issue, and apply only to agents or other persons entrusted with the payment of dividends or other annual payments payable out of or in respect of stocks, funds, or shares of any foreign company, society, or concern.

14. The assessment was accordingly confirmed on the whole of the profits of the company.

15. The question for the opinion of the court is whether the company is bound to make a return in respect of all annual profits wholly made by its business in Italy, including the portion paid to the Italian shareholders, and is chargeable to income tax thereon; or whether, as is contended on the part of the company, the London directors are bound only to make a return and to pay income tax in respect of so much of the profits made abroad as actually pass through their hands for distribution among the shareholders residing in the United Kingdom.

Points for argument on behalf of the appellants.—First, that the company is not a person residing within the United Kingdom, within the meaning of Sched. D to the Acts Income Tax Act, 1842 and 1853, respectively. Secondly, that residence in the United Kingdom cannot be predicated of a company within the meaning of the said Acts. Thirdly, that there is no one within the United Kingdom who receives any profits in respect of the said company's business, other than the amount of dividends required for the shareholders in this country. Fourthly, that the profits, other than the aforesaid amount of dividends, accrue outside the United Kingdom, and are received by persons not resident within the United Kingdom. Fifthly, that no part of the profits of the said company is liable to income tax except the amount of dividends distributed among shareholders in the United Kingdom.

Points for the Crown.—That the Cesena Sulphur Co., being an English company, registered in England under the Companies Acts, 1862 and 1867, and having also the registered office of the company in England, is in the same position as a person residing in the United Kingdom, and is liable to income tax under Sched. D of the Acts Income Tax Acts, 1842 and 1853, in respect of the annual profits and gains of the company, whether made in England or elsewhere. Secondly, that on the facts of this case the company resides in the United Kingdom, and not in India. Thirdly, that the provisions of s. 10 of the 1853 Act, relied on by the appellants, apply to the case of dividends payable by or for a company or concern to shareholders residing in the United Kingdom, and have no application to the present case. Fourthly, that the return made by the secretary of the company is bad in law.

The Calcutta Jute Mills Co., Ltd., Case

1. The Calcutta Jute Mills Co., Ltd. (hereinunder called "the company") was formed for the purpose of taking over the business, goodwill, and plant of certain jute mills at Ishera, near Calcutta, in India, belonging to and then carried on by a firm of merchants, Messrs. Borradaile, Schiller & Co., resident there.

2. The company was incorporated under the Companies Acts, 1862 and 1867, on April 16, 1872, with a capital consisting of £120,000, in 6,000 shares of £20 each.

3. By the articles of association (a copy of which forms part of the Case) the company, so far as its affairs in the United Kingdom are concerned, is managed by a board consisting of not less than five directors. The directors have (inter alia) power to appoint one or more persons resident in Calcutta as "the Calcutta directors." As a matter of fact, there is at the present time one Calcutta director, Mr. George Muirhead Struthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller & Co., of Calcutta, the former proprietors of the mills.

4. On or about May 1, 1872, the company commenced business as spinners and manufacturers of jute at Ishera, in Calcutta, aforesaid, and not elsewhere.

5. The buying of the raw material and the manufacture and sale of the same, as well as all the operations connected with the business of the company in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned.

6. At the time of the purchase of the said mills the company adopted an agreement whereby Messrs. Borradaile, Schiller & Co., of Calcutta aforesaid, were constituted the managing agents in India, and they have had the entire control of its business and works at Ishera. At the same time they guarantee the solvency of those with whom they deal, and receive a del credere commission from the company in return.

7. There is an Indian as well as an English share register, and the larger amount of capital, as well as the greatest number of shares, are owned by persons residing in India.

8. On Dec. 31 last the share register stood as follows: 3,843 shares, representing a capital of £76,860, were held in India, and entered on the Indian share register; while only 2,157 shares, representing a capital of £43,140, were held by persons residing in this country, and entered in the English share register.

9. The company has no office or other place of business in the United Kingdom, although, for the purpose of registration, its address here is No. 4, St. Helen's Place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there, it is entirely by his leave and favour.

10. All the company's books of accounts, papers, and other documents, as well as its moneys, are kept, received, and dealt with by the management in India.

11. As a matter of fact, the company has no property whatever in this country. Nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time, to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible among the shareholders in the United Kingdom by way of dividend, passes through their hands.

12. After receiving such proportion of the profits as is mentioned in para. 11, all that takes place in England is that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend amongst them for the current year.

13. For the year 1874 the sums received by the directors in this country as the proportion of the profits wholly made and acquired by the business of the company in India, and payable to the shareholders in the United Kingdom, amounted to £8,497.

14. In the said year the secretary of the company duly made a return of that amount to the commissioners for putting into execution the Income Tax Acts for the City of London, as the true and proper amount on which the company was ready and willing to be assessed to income tax. To the said return there is appended a statement of the manner in which the same was made or estimated, as follows:

"This return is made by me as secretary of the Calcutta Jute Mills Company (Limited). It includes the whole amount of the dividends or profits paid or payable to the shareholders residing in the United Kingdom for one whole year, on a fair computation or average, from the commencement of the business of the company on May 1, 1872, but not the dividends or profits paid or payable to shareholders resident in the East Indies, and whose names are

entered on the company's Indian share register. The trade of the company is that of jute spinners and manufacturers. The only place of manufacture as well as the place of sale is at Ishera, Calcutta. The company neither buys, manufactures, nor sells in the United Kingdom. The raw material is all purchased in India, manufactured there, and sold there, where also the entire profits are made."

Paragraphs 15 to 20 inclusive (setting forth the several sections of the Income Tax Acts applicable to the present question) were similar to paras. 7 to 12 inclusive in the previous case; and paras. 21, 22, 23, stating the opinion and decision of the commissioners, and the appeal of the company therefrom, and the question for the opinion of the court, were similar to paras. 13, 14, 15, in the previous case.

Points for argument on behalf of the appellants:—First, that under the circumstances stated, the Calcutta Jute Mills Co. is not a company resident within the United Kingdom, within the meaning and for the purposes of the Income Tax Acts; secondly, that the trade of the said company is not exercised or carried on within the United Kingdom within the meaning and for the purposes aforesaid; thirdly, that under the said Acts the appellants are liable to pay income tax only upon so much of the profits as are received by them for distribution amongst the shareholders in this country.

The points for the Crown were similar to those in the previous case of the Sulphur Company.

The articles of association in each case, so far as they are material on the present occasion, are fully stated in the judgments of the court.

Sir Henry James, *Q.C.*, and *R. S. Wright* (with them *R. T. Reid*) for the Cesena Sulphur Co., Ltd.

H. Matthews, *Q.C.*, *Sir H. Jackson*, *Q.C.*, and *Rolland* for the Calcutta Jute Mills Co., Ltd.

The Attorney-General (*Sir J. Holker*, *Q.C.*), *the Solicitor-General* (*Sir Hardinge Giffard*, *Q.C.*) and *Pinder* for the Crown in both appeals.

KELLY, C.B.—In both these cases I think that the Crown is entitled to the judgment of the court. I will first deal with the Case of the Calcutta Jute Mills Co., which has been most admirably argued on both sides, and especially—if I may say so without being invidious—by counsel for the Calcutta Jute Mills Co., who in his zeal has certainly said and done all that was possible to overcome the difficulties by which he was environed. We have carefully considered both the cases, and the great principles of the law on which they ought to be decided. Both are cases raising, I believe for the first time, a question of great importance both in its nature and the extent of its operations, and involving important principles of great weight as affecting the law of this country, and, I may almost say, the international law of the world. I should be glad if we felt it possible, consistently with our duty and the view which we take of the law, to decide the question otherwise than we are about to do; for it is in vain to deny that the result of our decision is to declare that the legislature taxes foreigners who are neither natives nor inhabitants of this country, and, with the exception of India, are not within the jurisdiction of its laws.

The question in the case of the Calcutta Jute Mills Co. is whether they can be held liable to income tax on the entirety of their profits. It is a company incorporated in England under the Joint Stock Companies Acts, having a local position in this country, and occupying, or rather being permitted to occupy, an office within the City of London, where it transacts its business and exercises the very large and extensive powers with which it is invested by the Act of Parliament. On the other hand, it is equally true that the whole property in which the entire capital of the company is invested is not in this country, but in India, and that the mills are worked and the whole profits of the company earned in that country alone.

It likewise appears (and it is here that the question arises) that out of the whole of its profits, amounting for the year in question to £25,000, about two-thirds of the dividends are payable, not to inhabitants of England, nor to persons having any connection with England, except that they happen to dwell under the same Crown and the same rule, but to persons residing out of England, and chiefly, if not entirely, in India.

Again, the actual trading business of the company is transacted in India and not in England. But then, on the other hand, on looking to the constitution of the company and its articles of association, under and by virtue of which it exists, we find that it is entirely under the control and in the actual possession of the governing body in England. It is stated in the Case that

> "the company, so far as its affairs in the United Kingdom are concerned, is managed by a board, consisting of not less than five directors. The directors have power (inter alia) to appoint one or more persons resident in Calcutta as 'the Calcutta directors.' As a matter of fact, there is at the present time one 'Calcutta director,' Mr George Muirhead Struthers, who is a large shareholder in the company, and the acting partner of the firm of Messrs. Borradaile, Schiller & Co., of Calcutta, the former proprietors of the mills."

We begin, then, with this, that the company is incorporated in and under the law of England, and, therefore, its origin and first existence is in England, and England alone; that the governing body, the directors, are in England, and that they have power to appoint—not that there exists by virtue of the company's constitution a director having power himself to act and conduct the company's affairs in India—but that the governing body in England have power to appoint one or more persons resident in Calcutta as the Calcutta directors, and that they accordingly appointed a resident director at Calcutta, who controls the whole conduct of the business there. But he is merely the appointee or agent of the governing body of directors in England.

Then we see that

> "the buying of the raw material, and the manufacture and sale of the same, as well as all the operations connected with the business of the company, in all its branches, are wholly and exclusively carried on in India, where alone the gains and profits of the concern (if any) are earned";

and further on in the Case, without going at more length into what relates to the property itself, we find (and these are the passages chiefly relied on by the appellants) that the company has no office or other place of business in the United Kingdom, although for the purpose of registration its address here is No. 4, St. Helen's Place, in the City of London. This is, in fact, the office of Mr. Ferdinand Schiller, one of the directors of the company, and when meetings of the English members of the company are held there it is entirely by his leave and favour. It really signifies little, and makes no difference whether the office, in which the very important business of holding meetings at which everything, that is, may, or can be done by the company, is determined, is an office hired at a rent, or is a place lent for that purpose by one of the directors of the company for the use of the company and at their disposition, and for that purpose alone. There is their location, their "residence," to apply the term of the Act of Parliament; and there it is that the directors accordingly meet, and there the company, the great body of shareholders, hold their general and extraordinary meetings. It is, therefore, for all the purposes of this case, the office of the corporation.

The Case then states that,

> "as a matter of fact, the company has no property whatever in this country. Nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time to defray their necessary expenses. In addition to this, such proportion of the profits realised in India as is divisible

A amongst the shareholders in the United Kingdom, by way of dividend, passes through their hands."

It may be convenient here to refer to what must be the basis of our decision, namely, the words of the Act of Parliament. By s. 5 of Income Tax Act, 1853, it is enacted that

B "The said duties hereby granted shall be assessed, raised, levied, and collected under the regulations and provisions of the Act of [1842] and of the several Acts therein mentioned or referred to, and also of any Act or Acts subsequently passed, explaining, altering, amending, or continuing the said first mentioned Act";

C and by Sched. D there is the provision that the companies or persons are to be assessed

"for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the
D United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere,"

and to be charged for every 20s. of the annual amount of such profits and gains.

The first thing important to be noticed here is that the tax is imposed on "any person residing in the United Kingdom." By other Acts of Parliament for the
E word "person" may be substituted a "corporation" or "joint stock company"; so that we may read this word "person" here as if the words were for and in respect of the annual profits or gains arising or accruing to any "joint stock company." Then follow the words "residing in the United Kingdom," and so forth. A great deal has been said as to how an individual entitled in his own right to property of this description would be assessed; but I think it leads only to
F complication and confusion to enter into all the cases which might well be applied to the tax as imposed on a single individual, and to attempt to apply them to the tax as imposed on a joint stock company. I, therefore, pass away from that, and will consider the matter as if the words "joint stock company" had been here used in place of the word "person."

In order to come within the Act, it must be a joint stock company "residing in
G the United Kingdom," and on that a question of law arises, independently of the particular terms and provisions of this company's articles of association. Where does a joint stock company "reside," and what is the meaning of the term "residing" as applicable to such a company? The answer to that question, without expressing any opinion at the present moment whether there may or not be two places at which a joint stock company or corporation can reside, is that it resides
H where its place of incorporation is, and where its general body exercises the powers conferred on it by the Act of Parliament and its articles of association, and where it meets, and is in bodily and personal presence for the purposes of the concern. Where, then, is that place in the present case? I deny that the whole case presents a single act which is done in Calcutta otherwise than in England or elsewhere than in this very office, which can truly be called the act of the company. That acts of
I the highest importance as affecting the well-being of the company, the operation of its business, and the realising and disposing of its funds, are done in India, is perfectly true, but they are all done by mere agents, whether they be directors or not, appointed under the sole authority of the general body of, and represented by, the corporation in this country, and so making their acts the acts of the corporation; therefore, within these words, if a company can be said to "reside" anywhere, as we must suppose that it can, in order to give effect to the Act of Parliament touching joint stock companies, this company undoubtedly resides at the office or place where the directors meet—meetings of the whole company are held—

and where they transact their business and exercise the powers conferred upon them by the law and their articles of association.

I need not go into the cases about "residing." The question has arisen, as it did in *Sulley* v. *A.-G.* (1), whether the acts of a single member of a firm consisting of several partners, carrying on business in New York, and which single member happened to reside in Nottingham and represented the firm there, and purchased goods which were afterwards sent to America and purchased and paid for by the firm, their commencing the operations and performing a part of them in the name of the firm in this country, made the firm liable; and it was held that this one individual did not represent the firm, and that the firm were not liable to be assessed to the income tax in his person by reason of his carrying on a portion of the business, viz., that of buying goods and consigning or transmitting them to America; because, in the first place, no one complete transaction of business was ever effected by him; and also because the principal seat of business and the place at which alone the great bulk of the business of the firm was carried on was in New York.

There are a variety of other cases arising under the County Court Acts, where the question has arisen where the corporations constituting the great railway companies of this kingdom reside. Where, for instance, do the Great Western and the London and North Western Railway companies reside? Everybody who knows anything of these affairs would say, directly the question was asked, why, at Paddington and at Euston. And it has been held that the railway companies do reside there, because there is the principal seat of their business, and there their directors meet and exercise their powers; there their books are kept, and there or thence all their lines of railway emanate, and either begin or end. I need refer to no other authority. There is none, nor the shadow of any quoted, which goes to show that the place in which the directors or governing body meet and the shareholders hold their general and special or extraordinary meetings and the power of transacting the business is exercised, is not the principal seat of business, and the place in which, in the language of the Act of Parliament, the company may be said to "reside." I am, therefore, clearly of opinion in this case, on these principles, and for these reasons, that this joint stock company resides at No. 4, St. Helen's Place, in the City of London.

It is said that the whole business is transacted in India, and that

> "nothing comes into the hands of the English directors excepting what is remitted from Calcutta from time to time to defray their necessary expenses; in addition to which, such proportion of the profits realised in India as is divisible amongst the shareholders in the United Kingdom by way of dividend, passes through their hands."

All that is true; but every act which is done, the working of the mills, the realising of the profits, the transmission of the proportion of them to England, and the distribution of them in the form of dividends to the different shareholders, all that, if not done by the company directly in India is done by them indirectly, because it is done by the person whom they appoint and may recall at their pleasure, and who has no power to do a single act or any authority to interfere in any degree in the affairs of the company except the authority conferred on him by the governing body at home.

Then comes the other statement,

> "after receiving such proportion of the profits as is mentioned in para. 11, all that then takes place in England is that the directors call a meeting of the shareholders, and declare the amount that is to be distributed by way of dividend among them for the then current year."

And then the Case gives a statement of the amount of the profits payable to the shareholders in the United Kingdom. It is quite true that all that they actually do in England with respect to the dividend is that, having received a certain propor-

A tion, about one-third, of the profits, they apportion it among the shareholders who are in England, and distribute and pay over to each of those shareholders the dividend to which he is entitled. But the payment of the dividends to the shareholders who are in India or elsewhere, though not actually done by the hands of the governing body, is done under their authority; and, undoubtedly, at any time on learning that £25,000 was in the hands of their representative in India, and, B therefore, to be distributed in dividends, they might direct that sum to be at once remitted to England, and if it was withheld by any person or banker into whose hands it had been paid, they might maintain an action against that banker for money had and received, and recover it against him. It is their money, and they are the persons who, in contemplation of law, are the possessors of it as of right; and it is only because it would be a very expensive and useless, and it might be, C through the failure of agents and banks, sometimes a very hazardous proceeding to desire the acting director in India to remit the whole amount to the governing body in London for them to remit two-thirds of it back again to India for payment to the shareholders there, that that course is not adopted; they clearly have and might exercise that power if they chose so to do.

I do not propose to refer particularly to any other of the statements in the Case, D because they will all be found to fall within the same principle and to be open to the same observation. Though the property is in India, and the whole capital invested there, and though the produce of the property is in India, and the whole of the money which the company are ever entitled to receive, whether as profits or in any other shape or way, or for any other purpose, is earned in India, yet it all belongs to the company, who might at any moment virtually take possession of it, E and might bring ejectment against anybody in India who against their will and without their consent had taken possession of one of these mills, and to such an action there would be no defence. Everything, therefore, is the property of the company, and it is the company thus located in England that alone can deal or authorise the dealing with the property in any way whatever.

That this is so appears clear also from the terms of the memorandum and F articles of association. The memorandum of association, after stating the name of the company, and that its registered office will be situate in England, goes on to state:

> "The objects for which the company is established are, first, the purchasing of the jute mills, land, business works, machinery, plant, and stock-in-trade of the present proprietors of the Ishera Jute Mills, Bengal, with all the rights, G privileges, and appurtenances thereto belonging, the carrying on there of the trade or business of buying, selling, and manufacturing jute in all its branches, and the extending of the said business and works or either of them."

Who is that purchaser? Not the director who has been over there, nor the shareholders who are resident in India, but the company themselves in this country. Then what is to be done? Why, the carrying on in all branches of the trades or H businesses of dealers in jute and other similar materials including their purchase, preparation, pressing, and so forth, and all this to be done, not by people in India, though it must be done of course by the hands chiefly of labourers in that country, but by the company or by persons authorised by them to do the acts in question in India. So with regard to

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> "the purchasing or otherwise acquiring of any total or partial or contingent interest in, or the taking out in Great Britain, British India, or elsewhere, and the working of letters patent or inventions which may be conducive to the advancement of the businesses aforesaid."

No one but the company can do that. Indeed, it will be found that every single act which is to be done, from the beginning to the end, from the coming into existence down to the ultimate dissolution of the company, is to be done by the company, and by them alone, viz., by the governing body or by meetings of the shareholders, all in England and nowhere else.

Then we come to this object,

"the establishing of agencies for the purposes of the company either in the United Kingdom, British India, or elsewhere."

Now there is the key to the whole of the proceedings on behalf of the company on which the appellants rely. The learned counsel contended that all that is done in India is done by a director there, who may do as he pleases, and by certain persons under him who alone carry on the business of the company. How is that? It is under the last-mentioned article that the company authorised Mr. Struthers to go to India and to do this very act of establishing an agency in his person for carrying on the entire business of the company. But, as I have before said, his act is theirs, and it is they alone who do the acts which constitute the entire carrying on of the company's business.

There is, then, a power to amalgamate the company, and so forth; and, finally, "the doing all such other things as are incidental or conducive to the attainment of the above objects." All this, as before said, is done by the company alone.

The first article I will refer to is the third:

"The directors may, with the sanction of a resolution of the company previously given in general meeting, increase its capital by the issue of new shares,"

and then there is provision made for that. That is one of the most important powers which can be conferred on a company. If their capital be a million, they may increase it to two millions. Could they do that, or take any step towards such an act, in India? Clearly not, even by their authorised agent there. It could only be done by the directors here with the authority of a general meeting.

Then comes the last of the series of provisions to which it is necessary to call attention, viz., as to the creation of shares; the company being constituted and having come into existence under the Joint Stock Companies Acts, and the articles of association being the constitution of the company, the questions come, How is it to be set going, what is to be done, and who is to do it? Here, again, we find that the company and they alone, are to do it. By art. 5

"The directors may allot and issue shares in the capital of the company to such persons, upon such terms, and at such times, as they may think fit; and any shares which may be allotted in payment or part payment for property transferred, goods or machinery supplied, or for services rendered to the company, may be issued and, if so issued, shall be deemed to be fully paid-up shares."

Here, again, is what we may call really the creation of the entire company. The creation of shares which may pass into the hands of Indians, Frenchmen, Italians, and Englishmen also, is entirely and exclusively the act and under the sole authority of the company. Before a single share is issued or allotted to anyone they belong to the company, who may by such machinery or system as they think convenient allot them to as many people, whether Englishmen or the natives of any other country, as they think fit.

I need go no further into the articles of association. Suffice it to say that there are provisions for general meetings and powers given as to the forfeiture of shares and for a great variety of other purposes, all of which powers are vested solely in the company. The only remaining question, therefore, is this. It is the case that every power which has to be exercised touching the property of the company or the carrying on of their business must be exercised by the directors, the general body of the company, with or without the authority of a general meeting; the governing body, and these shareholders' meetings all being in England, where the "residing" is locally situated. Reliance was, no doubt, justly placed on the fact that the whole carrying on of the business took place in India, but the carrying on of the business, the manufacture of the jute and the realisation of the funds, and the immediate and ultimate disposition of the funds, is wholly and exclusively

A under the authority of the general body in this country. And the language of the Act of Parliament is conclusive that the assessment shall be on the company, "for and in respect of the annual profits or gains arising or accruing," and so forth,

> "from any kind of property whatever, whether it be in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing from any profession, trade, employment, or occupation, whether the same shall respectively be carried on in the United Kingdom or elsewhere."

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Is not this an assessment on the company in relation to their property, although the property happens to be situated, in the language of the Act of Parliament, not in this country but in India, and in respect of profits which are earned and acquired, not in this country but in India? It appears to me, therefore, that the C case is clearly and directly within the terms and meaning of the Act of Parliament, and that on this ground the Crown is, without any doubt, entitled to judgment.

Before I conclude my observations on this case, I might say that in the first place the great principle of the law of England in relation to taxation is, that the tax shall only be imposed on persons or things actually within this country. Here, undoubtedly, the question must be determined. Is this company, who are the D persons, and is this property, which, under the Act of Parliament, is included in the same category as property actually in this country, are they or not, under the express terms of the statute, to be treated in the same way, with respect to the application of the principle of law, as if the property had been situated in an English county? It appears to me that the true principle of the law is that they are. Although it may seem to be an infringement of one of the principles on E which taxation is levied in any country that two-thirds of the earnings of this company made or arising from a business carried on out of England, and belonging to persons not resident in the United Kingdom, should be subject to taxation, yet the answer to that (and it is not for me to say whether or not it is a sufficient one) is that if a foreigner residing abroad, and having no property or interest in and no connection with this country, thinks fit to invest his money here, and so F to obtain the broad shield and protection of English law for his property, he must take the benefit with the burdens belonging to it. It may seem to be hard on a foreigner, who may be never in his life set his foot on English ground, and never intends to do so, to tax him on his whole income, but nevertheless the law is so, and he must submit to it. On these grounds, therefore, I think that this assessment was well made.

G I might deal with the argument so ably urged by counsel for the Calcutta Jute Mills Co., which held that there may be cases in which persons in this country may be taxed in relation to property abroad, and that therefore there is something like a reciprocity of injustice, if injustice it be. I will not, however, dwell on those cases, or on that argument, because it is founded on clauses in the Act which have no relation to the matter now before the court, which is as to the property and H the gains or income of a joint stock company. If the words "joint stock company" had been introduced into those clauses which counsel lastly referred to, his argument would have been entitled to much consideration; but I find nothing in the Act of Parliament, or in any one of the numerous authorities which have been cited, which interferes with the plain and direct operation of the clause to which I have called attention, and under which I hold that this company is liable to be I assessed in respect of the whole amount of its annual profits.

I will now proceed to deal with the case of the Cesena Sulphur Co. It is not necessary to repeat the observations which I have already made as to the general principles of the law and their operation on the cases now before the court. Like the Calcutta Jute Co, this company also was brought into existence under the Joint Stock Companies Acts. It appears that certain persons being possessed of some sulphur mines and plant and other property of considerable value at Cesena, in Italy, which they were desirous of parting with, sold the whole of it to a body of persons, seven in number, who were the first subscribers, and through whom the

company was constituted and came into existence under the Joint Stock Companies Acts. They became the purchasers of the whole of this property and, like the company in the previous case, they were stationed (I will not use the word "resided") in England, where they had an office, their whole property being within the kingdom of Italy.

Again, on looking at their memorandum and articles of association, we find that the company was

> "formed for the purpose of developing and working the mines of sulphur at Cesena, and carrying on the business mentioned or included in the memorandum of association."

Then comes a description of the business, as follows:

> "The business of the company shall include all the business mentioned in the memorandum of association, and all incidental matters; and the working of the mines will be commenced as soon as the board shall think fit, after Jan. 1, 1872, and whether a part only or the whole of the capital of the company is subscribed."

The very origin and commencement, and the first step taken in the creation of this business, which is clearly the act of the company, is "the working of the mines as soon as the board shall think fit." Then,

> "the working of the company's mines, the mode of the disposal thereof, and the general business of the company shall be wholly under the order, direction, and management of the directors."

Everything that is done, whether in England, in France, or in Italy, at Cesena itself, is to be done wholly under the order and management of the directors, subject only to the control of general meetings, as thereafter provided for. The general meetings are in England; the location or residence, as I may now call it, is in England, and the directors exercise their powers and authorities at their office in this country; and, except under their order, control, and management, not a single act of any kind whatever, in relation to the business or proceedings of the company, is or can be done.

Again,

> "the company may undertake any operation or business mentioned or included in the memorandum of association, either singly or in connection with any other firm, corporation, or company in England or Italy, upon such terms as the directors may think fit. The directors shall have full power to register the company in Italy as a 'Société Anonyme,' and to do all necessary acts for that purpose."

Although it is a registered company in Italy, that does not in the least degree injure its power, character, or nature in this country. And, as in the present case,

> "the directors may from time to time appoint and send any number, not exceeding three, of their board, to superintend or examine into the working and state of the company's mines and business at Cesena, and to remain there or in that locality for any period of time not exceeding one calendar month, and shall defray, out of the funds of the company, the travelling and hotel expenses of the director or directors who shall undertake such superintendence or examination";

and such director or directors shall make a written report of their proceedings and the state of the mines, their produce and prospects, with remarks and suggestions relative to the company's business as they shall consider proper.

Then comes a provision that

> "no person except the directors shall have any authority to make, accept, or endorse any promissory note or bill of exchange on behalf of the company or otherwise to pledge the credit of the company. No person, except the directors

A and persons thereunto expressly mentioned by the board, and acting within the limits of the authority conferred on them by the board, shall have any authority to enter into any contract or engagement so as to impose thereby any liability on the company."

And then comes a very important article (art. 12), which seems to me alone sufficient to dispose of this case in substance. It is as follows:

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"All moneys payable to the company shall be received by the directors, or the bankers, or by some person authorised by the board, and shall be paid to the account of the company with the bankers."

When, therefore, the money constituting the annual profits or gains of the company, and in respect of which the present assessment was made, comes to be C received, whose was that money, and to whom did it come? It came to the company, it was received by the directors, or the general body of the company, and came into their hands as constituting the profits of the company, and they, and they alone, have the power to dispose of it; and they alone are liable to the assessment.

I have disposed of the question of residence, and, therefore, refer only to art. 14, D because it is very short. It may not be immaterial, and it is as follows:

"The office shall be at such place in London as the Board shall from time to time appoint."

Then the first officers are mentioned, and there are also many clauses relating to the capital and its disposition; but in every case it is to be the capital of the com- E pany, and not a fraction of it can be touched or dealt with except under the company's authority. It is identical in that respect with the previous case. It is, indeed, open to the same complaint, and perhaps in a stronger form, because in the Calcutta case the shareholders in India are subjects of the Queen, and India itself is subject to the exercise of the legislatorial powers of this country. But that cannot be said of these Italian shareholders, whose case, therefore, if it be a hard F one at all, is harder than that of the Indian shareholders. But it is open, as that case was, to the same observation, that if Italian investors think fit for any reason to come to this country, or by their agents who represent them, to become shareholders in a joint stock company here, and receive a considerable income under the protection of English laws, I do not know why they should not be subject to the obligation of paying a tax on the incomes so received by them.

G Howsoever that may be, as a matter of opinion, it is clear that these gains are the gains of the company. A company cannot, as counsel for the Calcutta Jute Mills Co. suggested might be done, be divided into two or three portions as a partnership consisting of two or three individuals can; and it cannot be said that "so much of this money belongs to the Italian, so much to the French, and so much to the English shareholders; let them, therefore, be assessed only in respect of H the portion belonging to the English shareholders." That cannot be done, and there is no instance of such a thing being attempted.

The result consequently is that the whole of these gains, being the property of the company, and coming into the hands of the company, have to be divided in certain proportions among all the shareholders, both English and foreign; but until they are so divided they are the property of the company, and only pass into the hands I of the shareholders when the dividends have been declared by and under the company's authority and according to the articles of their constitution. Under these circumstances I think that, in both these cases, our judgment must be for the Crown.

HUDDLESTON, B.—I am of the same opinion. The whole question turns, as has been agreed on all sides, on the interpretation of the word "residence," as applicable to a company. The income tax is only imposed on a "person who is resident in the United Kingdom," in respect of property which he has there, or which

he receives from foreign sources. A corporation, for the purpose of paying income tax, is a "person," and then we have to see what interpretation we should give to the word "residence," as applied to a corporation.

The definition of the word "residence" is founded on the habits and relations of a natural man, and is, therefore, inapplicable to the artificial and legal "person" which we call a "corporation." But for the purpose of giving effect to the words of the legislature, an artificial "residence" must be assigned to this artificial "person," and one formed on the analogy of natural "persons." No great difficulty is found in defining what is the "residence" of an individual. It is where he sleeps and lives. What is the residence of a natural person we understand perfectly well. Then what is the "residence" of this artificial "person"?

All the learned counsel I think agreed here, the residence of an artificial person, such as a trading corporation, must be taken to be where his real trade and business is carried on. I adopt the powerful suggestion of counsel for the Calcutta Jute Mills Co., that the Income Tax Act, 1853, when it speaks of a "residence" does not mean an artificial residence; and counsel argued, therefore, that when dealing with a corporation the Act did not mean the place where they carry on the form or shadow of business, but the place where they really carry it on; and that seems to be a definition almost conceded by all the learned counsel. It is one perfectly understood by foreign jurists. There is a German word which is applicable to it, which means "the middle point" of the business carried on. The French term, adopted from SAVIGNY, is "le centre de l'entreprise," the central point of the business, that is to say, the real place where it is carried on.

All the cases which have been cited support that view. In *Keynsham Blue Lias Lime Co.* v. *Baker* (2), although the court held that Keynsham was the place of business, they did so because the real substantial business was carried on there, although the company had no office in London. In *Taylor* v. *Crowland Gas and Coke Co.* (3) the judgment of the court was put on the question of the place where the corporation carried on its business. In *Adams* v. *Great Western Rail. Co.* (4), for a similar reason it was held that the place where the company carried on its business was Paddington, and in *Brown* v. *London and North Western Rail. Co.* (5) that it was in London, and not in Chester. The same rule is applied in *Shiels* v. *Great Northern Rail. Co.* (6). Then there is a very strong authority, *Aberystwith Promenade Pier Co., Ltd.* v. *Cooper* (7), in which the place of the company's business was held to be in London, although the pier was built in Wales, and the tolls were there taken.

Counsel for the Calcutta Jute Mills Co., I think, satisfactorily distinguished *Kilkenny and Great Southern and Western Rail. Co.* v. *Feilden* (8), which was cited by counsel for the Cesena Sulphur Co. The decision in *Sully* v. *A.-G.* (1) was to the same effect. And in the last case in this court, *A.-G.* v. *Alexander* (9), the judgment of two at least of the learned judges (KELLY, C.B., and AMPHLETT, B.), pointed out that Constantinople, where the company was incorporated (there being no charter of incorporation in England in that case) was the seat of business, that is to say, the place where it was carried on.

The learned Attorney-General put a proposition which, with deference, I for one cannot assent to. He suggested that the registration of a company was conclusive of its "residence," and if a company were registered in England that it must be held to reside there. I think counsel for the Cesena Sulphur Co. gave a good answer to that when he said that "registration," like the birth of an individual, is a fact to be taken into consideration on the question of "residence," because, if we find that a man was born in a place, and eats and drinks and lives in that place, it is a strong circumstance to show that it is his place of "residence"; but it is only a circumstance. The birth is not conclusive of "residence." Taking the analogy between a natural and an artificial person, in the case of a corporation we would say that its place of registration is its place of birth, but it is not because it is the place of its birth that its "residence" must be there. It is a fact to be taken into consideration with all the other facts, and if it be found to be registered

A in a particular country, and acting and having its office and receiving dividends in that country, those are all acts, coupled with the registration, leading to the conclusion that that country is the seat of its business.

Counsel for the Calcutta Jute Mills Co., when counsel in *A.-G.* v. *Alexander* (9), cited many American authorities to support his argument that a corporation resides only in the country under whose laws it was created and constituted. In B his argument in the present case he mentioned a case in BROCKENBROUGH'S REPORTS, *Bank of the United States* v. *Mackenzie* (10), as to the difference between a corporation created merely by the act of a State and one created by an Act of Congress. He pointed out also that it is not at all consistent with the English view of the subject, that a corporation cannot be a corporation except in a particular State, and he founded that on the authority of *Newby* v. *Van Oppen and Colt's Patent* C *Fire Arms Manufacturing Co.* (11).

The principle of law, therefore, is not, I think, in dispute, and we may take it for granted that the place of business is the sort of artificial residence which one would give to this artificial person to make him a "person resident" in this country, within the meaning of the Income Tax Act. And now comes the great difficulty which I have felt all along, and that is, in applying the facts of each individual D case to the principle. I quite agree that the onus of proving the "residence" lies upon the Crown, as put by CLEASBY, B., in his judgment in *A.-G.* v. *Alexander* (9), and that if the Crown fails to satisfy the court that the place of residence is within the jurisdiction, or within the area of taxation, it cannot be said that the company should be taxed. Admitting that, I have to ask myself where, in both these cases, was really the centre of the operations, the substantial and real place of business, E "le centre de l'entreprise," or the middle point? I am afraid that I must answer that question, looking at the facts in both these cases, by saying that it was in England.

It is not necessary to go at any length into the facts, because they have in both cases been so minutely and elaborately examined and commented on by my Lord, but counsel's argument with reference to the Cesena Sulphur Co. was put in so F captivating a form that until my attention had been carefully called by the Attorney-General to the articles of association, I confess I was, if I may use the expression, caught by it. I am not going through the various clauses of the case, but in substance, as was said by counsel, they amount to this: The trading of the company is in Italy, their unrealised and their fixed property is in that country, and everything that is sold is sold there; no goods are ever sent to England, the majority G of the shareholders are in either Italy or France and the small minority of them only in England, the original books are kept in Italy, the managing director is in Italy, where he resides; and therefore, said the learned counsel, we have almost everything—books, profits, manufactures, etc., in Italy. At first I thought it appeared that the centre of business was in Italy, but when I looked at the articles of association, and found that the object of the memorandum was no doubt to purchase H sulphur from a company or firm established at Cesena, but that they contemplated "taking concessions of any lands wherever sulphur is likely to be obtained," and that it is not confined to Italy, and that the general powers of the company are for "the selling, leasing, letting and disposing of any of the lands, mines, and property acquired by the company," it seemed clear, by the memorandum, at all events, that the operations of the company were not to be confined to Italy.

I The very first article of association is that

> "the company is formed for the purpose of developing and working the mines of sulphur at Cesena aforesaid, and carrying on the business mentioned or included in the memorandum of association";

that is, carrying on the business of a sulphur company wherever sulphur may be found. Then, on looking to see where the power is which is exercised by the directors, by the office in London, we find that the "board" is "a meeting of the directors duly called and constituted," and that

"the working of the company's mines, the mode of disposal, working, and the general business of the company shall be wholly under the order, direction and management of the directors, subject only to such control of general meetings as is hereafter provided for."

Then the directors have power (which they have exercised) to register the company in Italy, and to make promissory notes, and so on. "The office shall be at such place in London as the board shall from time to time appoint." A London bank is to be their "first and present bankers." True it is that they had a banker at Turin and one at Paris. They may invest their money in a reserve fund. General meetings are to be held, and those meetings which are described as ordinary or extraordinary, are to be held in London. There is the power given of adjourning from place to place no doubt. It is true that it is not said anywhere that the board meetings must be held in London; but it is obvious from the facts in the case, and from all the requirements of the articles of association, that the books must be kept at the office, and the office, according to the articles of association, must be in London, and thus, inferentially, we arrive at the conclusion, from the facts, and from the case, that the directors are to meet in London.

Without going through the other different clauses of the articles, it appears that almost every act of the Cesena company connected with the administrative part of its business is to be done in London. No doubt the manufacturing part may be and was done in Italy; and so, supposing they found sulphur in some other part of the world, and carried on their business there, the manufacturing part of it would be carried on in that other place; but the administrative part of the business would be carried on at the place from which all the orders came, all the directions flowed, and where the appointments of the various officers were made and revoked, where agents were nominated and recalled, where the money was received and dividends were declared and were payable. We find all these acts performed in London, and I cannot help thinking that the main place of the company's business is in England, and that at Cesena is merely an agency as it were of the principal house, that agency being confined to the manufacture and sale of sulphur, but under the direction of the principal house.

With regard to the other case of the Calcutta jute mills, which also has been so fully and elaborately gone into by my Lord, I am bound to say that at one time I thought this case also a strong one in favour of the appellants. The learned counsel put it very strongly, and summed up his arguments as to the result of the case in very clear and terse language. He said in fact this: The only transactions in England are the receipts of the amount transmitted for the payment of the English expenses and dividends, and the declaration of their amount and its division among the English shareholders. Again, I look at the articles of association and the Case. The office was no doubt lent to the company, or allowed to be used by them for the purpose; from that office would issue all the orders to the managing director in Calcutta, and no doubt until he received orders to the contrary he would have full power and discretion to do what he liked there; but at any moment they might from their head office have revoked his authority or altered any arrangement which he had made connected with the working of the company. The meetings were held in London. The operation of the company in London was, not to divide the money sent among the shareholders, but it was to "declare the dividend." And I apprehend that within the meaning of that clause the directors in London, who had full power, might disapprove of the system on which the division had been made, and require a different dividend for the future, thus showing that they exercise the authority and are the principal body, while the Calcutta director is only their agent for the purpose of the manufacture and sale of the jute, as the Cesena Company is the agent of the London company for the purpose of the manufacture of the sulphur.

Counsel argued with great ingenuity that, assuming the place of business to be in England, still the only division of the profits here is to be a division of the profits

earned by the English shareholders; and he argued that if this were a partnership, then, on the authority of *Sully* v. *A.-G.* (1), the English portion of the partnership only would be liable to pay on the profits received by them, whereas the Indian portion would not have to pay on their profits. If this artificial being, a corporation, could be made a partnership, and every shareholder a partner, that argument would be in accordance with, as he said, natural justice, and would be very striking. But I fear the simple answer is this, that a corporation is not a partnership, and the shareholders are not partners.

For these reasons I cannot avoid coming to the conclusion that the place of business of both these companies is in London, and that, therefore, they are within the provisions of the Income Tax Act.

Judgment for Crown in each case, without costs.

Solicitors: *Nash, Field & Matthews*; *Solicitor of Inland Revenue.*

[*Reported by* H. LEIGH, ESQ., *Barrister-at-Law.*]

SMITH *v.* ANDERSON

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), July 13, 16, 1880]

[Reported 15 Ch.D. 247; 50 L.J.Ch. 39; 43 L.T. 329; 29 W.R. 21]

Company—Registration—Association of more than twenty persons—Trust—Trustees holding shares—Subscribers purchasing interests—Relationship regulated by deed—Legality—Companies Act, 1862 (25 *&* 26 *Vict.*, *c.* 89), *s.* 4.

To render an unregistered company, association, or partnership illegal, within the Companies Act, 1862, s. 4, **held** that there must be a joint relation of more than twenty persons for the common purpose of performing, jointly, a succession or series of acts such as to constitute a business, other than banking, which had for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof.

"Business" in the section was to be understood in the practical sense of the word as ordinarily used, and did not include an arrangement, the parties to which were not directly or indirectly to be parties to any contract. A mere subsidiary minor transaction, provided for under a trust deed, although it might result in gain, did not become a part of the object so as to bring the case within the section.

By a deed, reciting that divers persons had subscribed to purchase the scheduled securities (which were stock and shares of submarine telegraph companies of the nominal value of £420,000), and that 4,200 certificates were to be issued to subscribers, each certificate being in respect of £90 subscribed, and providing that the holder was entitled to £100, part of the £420,000 scheduled securities, and to the benefits under the deed, and reciting that, as part of the certificates, coupons of reversion, each providing that the holder would on the final division of the fund, after satisfaction of certificates and interest, be entitled to one four-thousand-two-hundredth part of the net profits of the trust, four persons, called "the trustees," covenanted with a fifth person, called the "covenantee" (on behalf of all the holders for the time being of the certificates), to hold the scheduled securities on the trusts of the deed. The annual produce was to be applied in payment of (i) expenses, including a limited remuneration to the trustees; (ii) interest at £6 per cent., or, if an insufficient amount was available, proportionate division; (iii) in redemption of as many certificates as possible by purchase in the open market at not less than £120 per certificate

or by tender from the certificate holders at not more than £120 per certificate; (iv) in redemption of certificates to be selected by lot at £120 per certificate. No certificate was to bear interest after withdrawal for payment or redemption. After redemption of all certificates, the securities remaining were to be divided among the coupon holders. The trustees might sell scheduled securities at a certain premium (but not otherwise unless expedient), the produce to be applied in the same manner as surplus income of annual produce (redemption by lot), or, with the consent of a special meeting of certificate holders, in re-investment in other securities to be held on the same trusts. Annual meetings of certificate holders were also to be held, and conducted according to Table A. of the Companies Act, 1862, at which trustees' reports were to be considered, and auditors and new trustees appointed. Each new trustee might be required to enter into a new deed of covenant; and the deed contained the usual indemnity and other trust deed clauses.

Held: the arrangement was a trust, and there was not thereby created an illegal company, association, or partnership within the Companies Act, 1862, s. 4.

Sykes v. *Beadon* (1) (1879), 11 Ch.D. 170, and *Re Arthur Average Association for British, Foreign and Colonial Ships* (2) (1875), 10 Ch. App. 542, overruled.

R. v. *Whitmarsh* (3) (1850), 15 Q.B. 600, approved.

Notes. The Companies Act, 1862, s. 4, has been replaced by the Companies Act, 1948, s. 434 (3 HALSBURY'S STATUTES (2nd Edn.) 778).

Followed: *Wigfield* v. *Potter* (1881), 45 L.T. 612; *Crowther* v. *Thorley* (1884), 50 L.T. 43. Considered: *Re Siddall* (1885), 29 Ch.D. 1. Referred to: *Re Padstow Total Loss and Collision Assurance Association*, [1881–5] All E.R.Rep. 422; *Re Faure Electric Accumulator Co.*, [1886–90] All E.R.Rep. 607; *Re Jones, Clegg* v. *Ellison*, [1898] 2 Ch. 83; *Re Macfadyen, Ex parte Vizianagaram Mining Co.*, [1908] 2 K.B. 817; *I.R.Comrs.* v. *Cornish Mutual Assurance* (1924), 41 T.L.R. 70; *South Behar Rail. Co.* v. *I.R.Comrs.*, [1925] A.C. 476; *Barclays Bank, Ltd.* v. *A.-G.*, [1944] 2 All E.R. 208.

As to companies which must register, see 6 HALSBURY'S LAWS (3rd Edn.) 83 et seq.; and for cases see 9 DIGEST (Repl.) 69 et seq.

Cases referred to:

(1) *Sykes* v. *Beadon* (1879), 11 Ch.D. 170; 48 L.J.Ch. 522; 40 L.T. 243; 27 W.R. 464; 9 Digest (Repl.) 72, *283.*

(2) *Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co.* (1875), 10 Ch. App. 542; sub nom. *Re Arthur Average Association, Ex parte Cory and Hawksley*, 44 L.J.Ch. 569; 32 L.T. 713; 23 W.R. 939; 2 Asp.M.L.C. 570, L.JJ.; 9 Digest (Repl.) 71, *281.*

(3) *R.* v. *Whitmarsh* (1850), 15 Q.B. 600; 16 L.T.O.S. 108; 117 E.R. 586; sub nom. *R.* v. *Whitmarsh, Re National Land Co.*, 19 L.J.Q.B. 469; sub nom. *R.* v. *Joint Stock Companies Registrar, Re National Land Co.*, 15 Jur. 7; 9 Digest (Repl.) 71, *277.*

(4) *Cox* v. *Hickman* (1860), 8 H.L.Cas. 268; 11 E.R. 431; sub nom. *Wheatcroft* v. *Hickman*, 9 C.B.N.S. 47; sub nom. *Cox* v. *Hickman, Wheatcroft* v. *Hickman*, 30 L.J.C.P. 125; 3 L.T. 185; 7 Jur.N.S. 105; 8 W.R. 754, H.L.; 36 Digest (Repl.) 435, *91.*

Also referred to in argument:

Wallingford v. *Mutual Society* (1880), 5 App. Cas. 685; 50 L.J.Q.B. 49; 43 L.T. 258; 29 W.R. 81, H.L.; 10 Digest (Repl.) 1176, *8193.*

Bear v. *Bromley* (1852), 18 Q.B. 271; 7 Ry. & Can. Cas. 507; 21 L.J.Q.B. 354; 19 L.T.O.S. 60; 16 J.P. 710; 16 Jur. 450; 118 E.R. 101; 9 Digest (Repl.) 71, *279.*

Moore v. *Rawlins* (1859), 6 C.B.N.S. 289; 28 L.J.C.P. 247; 33 L.T.O.S. 205; 23 J.P. 566; 5 Jur.N.S. 941; 141 E.R. 467; 9 Digest (Repl.) 71, *278.*

Duvergier v. *Fellows* (1828), 5 Bing. 248; 2 Moo. & P. 384; 7 L.J.O.S.C.P. 15; 130 E.R. 1056; affirmed (1830), 10 B. & C. 826; (1832), 1 Cl. & Fin. 39, H.L.; 10 Digest (Repl.) 1175, *8184*.

Appeal by the defendants from a decision of Sir George Jessel, M.R.

By an indenture, dated Sept. 6, 1871, made between the defendants, Sir James Anderson, Sir Daniel Gooch, Bart., Marquis of Tweeddale (by his then name of Lord William Hay), Rear-Admiral (then Capt.) Sherard Osborn, since deceased, and John Pender (therein called "the said trustees"), of the one part, and the defendant Sir Philip Rose (therein called "the covenantee") for and on behalf of all the holders for the time being of the certificates thereinafter mentioned, of the other part, after reciting that divers persons had subscribed in or for the purchase by the said trustees of the stock, shares, and debentures of certain submarine telegraph companies, the particulars of which were set forth in the first schedule thereto, and that the said stocks, shares, and debentures had been transferred to, and then stood registered in the books of, the said companies respectively, and that it was intended to issue to the said subscribers 4,200 certificates in the form set forth in the second schedule thereto, a certificate of the nominal amount of £100 being delivered in respect of every subscription for £90, and reciting that it was also intended to issue, as part of the said certificates, documents in the form set forth in the third schedule thereto, and thereinafter called "coupons of reversion," one of such coupons being delivered in respect of every subscription for £90, in addition to the said certificate of £100, it was witnessed that, for divers good considerations the said trustees thereunto moving, they, the said trustees and every combination and single one of them, for themselves and himself, did thereby covenant with the covenantee, his executors, administrators, and assigns, for and on behalf of all the holders for the time being of the said certificates:

1. That the said trustees, or the survivors or survivor of them, or the executors, or administrators of such survivor, and all new trustees to be appointed as thereinafter provided (thereinafter called the trustees) should hold the said stock, shares, and debentures so transferred (and thereinafter called the scheduled securities), and all annual produce thereof, on trust to give effect to the provisions of the deed.

2. That the annual produce of the scheduled securities should be applied—first, in payment of all expenses during the preceding year, but so that the ordinary expenses of the year 1871, or in any subsequent year, including all remuneration to the trustees and auditors, and the bankers' commission for payment of dividends and redemptions, should not exceed £2,000; secondly, in payment of interest at 6 per cent. per annum on the nominal amount of the certificates to the holders thereof for the time being; thirdly, in the redemption, as thereinafter provided, of so many of the certificates as the surplus income arising from the said securities should be competent to redeem.

3. That the trustees should make their payments of interest half-yearly, on April 15 and Oct. 15 in every year, the first payment of interest to be for three months, and to fall due on Oct. 15, 1871.

4. That if in any year the annual produce of the scheduled securities should, after payment of all expenses, be insufficient for payment of interest at 6 per cent. per annum as aforesaid on the nominal amount of the certificates, the available moneys should be divided amongst the holders of the certificates pari passu, and the deficiency of such interest should form a first charge on all subsequent receipts, subject only to the annual allowance for expenses.

5. That the trustees should, as soon as conveniently might be after April 15, 1872, and thenceforward after April 15 and Oct. 15 in every year, apply any surplus income remaining in their hands, after payment of such expenses and interest as aforesaid, in redeeming as many of the certificates as they should be able by either of the following methods, or partly by one method and partly by the other, to redeem: (i) by purchase of the said certificates in the open market, provided that

the price paid for each of the said certificates should be less than £120; (ii) by tender from the certificate holders for the redemption of the certificates held by them, provided that no tender should be accepted at a higher price than £120.

6. That notice of the intention of the trustees to receive tenders for the redemption of certificates should be given by advertisements in such newspapers as the trustees should select.

7. That if, at the expiration of any year after the redemption of as many certificates as possible by either or both of the methods, the trustees should have surplus funds applicable to the redemption of certificates, they should redeem, as hereinafter mentioned, as many certificates as such surplus funds should be competent to redeem, at the price of £120 for each certificate.

8. That the certificates to be redeemed (as in the last clause mentioned) should be selected by lot in the presence of a notary public, the selection to be made on such day and at such place as the trustees should appoint, notice thereof being given in some London daily paper at least one week previously, and that any holder of a certificate might attend.

9. That the trustees or trustee present on each such selection should superintend the selection by lot, and the result of each meeting for selection should be recorded in a book which should be open for the inspection of the holders of certificates, and should be advertised in some London daily paper within three days following the actual selection.

10. That if any holder of a certificate shall so require, the notary public present at such selection shall make a statutory declaration of the result of such selection by lot.

11. That no certificate should carry interest after it had been drawn for payment, or after the acceptance of a tender for the redemption of such certificate had been notified to the holders thereof, whether its amount had been demanded and received by its holder or not.

12. That if any holder of a certificate drawn for payment should not demand and receive the amount thereof within six months from the date of such drawing, it should thereupon be advertised twice in a London daily paper, and, if not then demanded within six months from the date of such advertisement, the amount should not be payable till the final division of the fund.

13. That so soon as all the certificates should have been so redeemed, the securities then remaining subject to the trusts of the deed should be realised under the direction of the trustees, and the net proceeds thereof divided between the holders for the time being of the coupons of reversion in the proportion of the nominal value of the said coupons held by them respectively.

14. That if the undertakings of the submarine telegraph companies, or any of them, should during the continuance of the trust be purchased by or on behalf of Her Majesty the Queen, her heirs or successors, or any foreign government, the scheduled securities, or any of them, should be redeemed, and it should thereupon be decided by a unanimous resolution of the trustees at a special meeting that it was expedient to terminate the trust, such resolution should be confirmed at a meeting of the certificate holders, the trust should thereupon be terminated, and the securities remaining subject to the trusts should be realised under the direction of the trustees, and the net proceeds thereof, after satisfying interest, should be employed in the redemption of the certificates, and the remainder should be divided between the holders of coupons of reversion as above mentioned.

15. That all moneys received on account of the trust might, if the trustees thought fit, until the next time of distribution, be invested in the purchase of Exchequer bills, or be placed at a deposit account in the names of the trustees in the bank, and that any interest arising from such interim investment should be dealt with as part of the annual produce of the scheduled securities.

16. That the scheduled securities should be deposited in the names of the trustees and kept at the bank, and that the dividends and all other moneys paid on account of the securities should be collected and received by the bank.

17. That the trustees should keep proper accounts of all receipts and payments made by them, and of all other matters proper to show the position of the trust securities, and the manner in which the trustees performed their duties.

18. That the trustees, at their discretion, might sell any of the scheduled securities, if and when capable of being sold in the market, and that they should be sold by the trustees at a premium of not less than 30 per cent. over the price at which the same were purchased or taken over by the trustees, and that the proceeds of such sale should be applied by the trustees as thereinafter provided.

19. That, except as in cl. 18 provided, none of the scheduled securities should be sold or otherwise converted into money, unless at a meeting of the trustees called with express notice of the object, at which there should be present not less than four trustees, it should be unanimously resolved by the trustees present that it was expedient for the interest of the certificate holders that certain of the securities (to be specified in the resolution) should be sold and converted into money or otherwise dealt with or disposed of.

20. That the produce of every sale or conversion as aforesaid should be applied in the same manner as the surplus income arising from the annual produce of the scheduled securities; provided always, that it should be lawful for the trustees, if it should be so decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object, at which all the trustees were present in person or by proxy (such resolution to be confirmed at a meeting of the certificate holders summoned for that purpose by advertisement), to invest the produce of any such sale or conversion, or any part of the same, in the purchase of such securities, of the same character as the scheduled securities, as they should select for that purpose, and that all securities so purchased should be held subject to the trusts of the deed as if they had formed part of the original scheduled securities.

21. That the trustees might appoint a secretary and delegate to him such duties in connection with the trusts as they might think fit, including a power to sign documents on their behalf, and might pay to him such salary or other remuneration as, having regard to the total amount allowed for expenses, they might think fit.

22. That the trustees might deduct for the year 1871, and in every subsequent year, by way of remuneration to them for the trouble and responsibility undertaken by them, any sum not exceeding in the aggregate £1,200 per annum.

23. That the trustees should once in a year, by advertisement in some two public daily newspapers published in London, call together a meeting of the certificate holders.

24. That at such meeting no person should be present who did not produce his certificate, and that persons should vote in proportion to the value of the certificates produced by them.

25. That the proceedings of the meeting should, so far as might be, be conducted in the manner prescribed in Table A. to the Companies Act, 1862.

26. That the business of the meeting should be (a) To receive and consider a report from the trustees on the condition and affairs of the trust; (b) to appoint auditors to audit accounts, and report to the next meeting of certificate holders; (c) To elect new trustees to supply vacancies.

27. That each of the auditors should receive such annual payment, not exceeding £50, as the meeting appointing them should direct.

28. That if it should be unanimously decided by the trustees at a meeting called with express notice of the object, at which not less than four trustees should be present in person or by proxy, that any extraordinary expenses should be incurred, they might incur the same accordingly, subject to the same being confirmed by resolution of the certificate holders at any general meeting.

29. That trustees might vote by proxy.

30. That on death, incapacity, or retirement of a trustee the general meeting of the certificate holders by resolution might appoint a new trustee, and thereupon the securities, subject to the trusts, should be delivered into the custody as aforesaid of such new trustee jointly with the continuing trustees.

31. That every new trustee should, at the cost of the trust fund as one of its ordinary expenses, enter into a covenant with a covenantee to be named by the remaining trustees for the time being, for the acts of himself and his co-trustees, in the same manner and to the same effect as the covenant therein contained, and that on the delivery of such deed of covenant to the covenantee all liability of the preceding trustee or his estate should thenceforth cease.

32. That in the event of the general meeting of certificate holders so requiring, the trustees for the time being would, at the cost and expense of the trust fund as one of its ordinary expenses, enter into a deed similar to the present one with a new covenantee or covenantees, to be named by such general meeting.

33. That the trustee should not be under any obligation in any circumstances to sell, call in, or convert into money any of the securities, or to take any proceedings for the purpose of recovering or enforcing payment of any securities, or of the dividends or interest payable thereon, that they should be indemnified, etc. (as in an ordinary trust deed), and that they might retain out of the trust funds all expenses sustained or properly incurred by them, and not thereinbefore expressly provided for, in carrying into effect the trusts.

The first schedule comprised a list of stock and shares in various telegraph companies, the nominal amount of the whole of which was £400,036.

The certificates were signed by the trustees, and were in the following form:

> "The Submarine Cables Trusts. Certificate for £100. This is to certify that the holder of this certificate is entitled to the sum of £100, part of the nominal amount of £420,000 forming the Submarine Cables Trusts, and to all the benefits secured to the holders of certificates by the deed of trust of which a copy is hereon endorsed."

The coupons of reversion were signed by the trustees, and were in the following form:

> "The Submarine Cables Trusts. Coupon of Reversion. This is to certify that the holder of this coupon will, on the final division of the funds of the above-mentioned trust, after satisfaction of certificates and interest, be entitled to one equal four-thousand-two-hundredth part of the net proceeds of such funds in accordance with the terms of the deed of trust a copy of which is endorsed on the certificate to which the coupon is annexed."

The trustees issued a prospectus, inviting the public to subscribe money to purchase shares in the Submarine Cable Company. The plaintiff was a certificate holder, and in March, 1879, he (on behalf of himself and all other holders of certificates) commenced the present action against the surviving trustees, alleging the sale and purchase of stock, shares, and debentures under the deed; that drawing by lot had taken place; that the Submarine Cables Trust was, and the defendants and the certificate holders were, contrary to law, an association consisting of more than twenty persons formed after the passing of the Companies Act, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association, or by the individual members thereof, without being registered as a company under the said Act, or in pursuance of any other Act of Parliament, or of any letters patent, and without being a company engaged in working mines within and subject to the jurisdiction of the Stannaries; and that the drawing by lot of certificates was illegal, and constituted the association an illegal association; and the plaintiff claimed that the trusts, or such of them as were not contrary to law, might be carried into execution under the direction of the court; that the stocks, shares, debentures, and other property of the trust might be divided between the plaintiff and the other certificate holders in proportion to the amount subscribed or paid by them, or otherwise according to their interests; and that the trustees might be restrained from drawing by lot for the purpose of purchasing certificates.

The action came on for hearing before SIR GEORGE JESSEL, M.R., who gave judgment for the plaintiff.

Chitty, Q.C., and *Speed* for the defendants.
Ince, Q.C., and *C. B. McLaren* for the plaintiff.

JAMES, L.J.—With all deference to the very clear opinion to the contrary, often repeated, of the Master of the Rolls, he has not put a construction on this Act of Parliament which I find it possible to concur in. The Companies Act, 1862, was no doubt intended to prevent mischief of some kind, the mischief being, as was very well put by counsel for the defendants, that arising from persons having contracts with fluctuating bodies, and not knowing who the persons comprised in such bodies were. Large trading undertakings carried on by large bodies of persons—fluctuating bodies—put persons dealing with them to very great difficulty and expense, and were a public mischief which required to be repressed.

That being the sort of mischief aimed at, what is it that the enactment has done? It enacts by s. 4 that

> "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any business [other than banking] that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof."

It is very difficult to my mind to understand what the difference is between a company and an association. My intellect is not capable of comprehending the difference. The word "association" in effect, though it is now commonly used, is, speaking etymologically, an inaccurate word. "Association" does not describe the thing formed; but, properly and etymologically, describes the act of associating together, from which act of associating there is formed a company or partnership, or a body of what counsel for the plaintiff called socii. But I believe the difference, or what was meant as the difference, according to the vernacular we use in these things, between a company or an association and an ordinary partnership is this: an ordinary partnership is a partnership composed of definite individuals, bound together by contract between themselves, to continue for some joint object either during pleasure or during a limited time, the partnership being essentially composed of the persons originally entering into the contract with one another. A "company" or "an association," which words I take to be synonymous, is an arrangement by which parties intend to have a partnership which would be constantly changing, that is to say, to have what I may call a succession of partnerships—a partnership today consisting of certain members, a partnership tomorrow consisting of some of those members only and some others who have come in, there being a constant shifting of the partnership, a determination of the old, and a creation of a new partnership—formed with a view, and always formed with the intention, so far as the contracting parties can by agreement between themselves, that the new partnership shall take on itself the assets of the old partnership; an object which could not be effected in point of law by any arrangement between the persons themselves, unless the persons contracting with them, by a novatio, authorised the change, or unless the change was authorised by special provisions in Acts of Parliament, which have given sanction to such arrangements, and, to a certain extent and under certain circumstances, have allowed the change to be effected.

That is the sole distinction between a "company" or "association" and a "partnership." But the Companies Act, 1862, s. 4, provides that

> "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any business."

The trust deed before us is said to constitute an association of more than twenty persons formed after the commencement of this Act "for the purpose of carrying

on any other business." I am unable to agree with the Master of the Rolls in the conclusion that the present case comes within any part of that section. I cannot find in this arrangement any association whatever between the persons who are supposed to be socii. I cannot conceive how anything can be a company or association unless there are persons of whom that company or association is formed. Here one man goes with £100 in his hands and buys from the trustees who have got the property in them a £100 certificate with all the chance of profit attaching to it. Another man goes the next day and takes his £100 to the same people, and gets from them another certificate, by which he gets from them a right to share in the funds which they have got in their hands. The first man knows nothing of the second, and the second knows nothing of the first; they have never come into any arrangement whatever as between themselves. There never has been anything amounting to any mutual right or obligation as between them. The man who takes it today, or who may have it today, and the man who took it yesterday, and who may be selling to somebody else a week hence, are, from the first, entire strangers, who have entered into no contract whatever with each other, and have not entered into any contract with the trustees, or with any trustee on behalf of the other, there being nothing pointing to any mandate or delegation of authority to anybody to act for the shareholders between themselves, and nothing, as it appears to me, by which any liability could ever be cast on the shareholders, either as between themselves, or as between themselves and anybody else.

This is no more an association within the meaning of the Companies Act, 1862, s. 4, than the persons who subscribe for railway debentures, or the Bolivian bondholders, whom we have recently had before us, or creditors in *Cox* v. *Hickman* (4), were an association. Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest, or an interest generally, in something which is to be divided between them. But going beyond that, it does not appear to me that it can, in any practical sense of the word, in any sense in which any man of business would use it in dealing with this thing in the city or anywhere else, be said that the persons in this case were formed for the purpose of carrying on any business. The association, that is to say, the body of subscribers, or the body of certificate holders, do not, as it appears to me, carry on any business by themselves or by any agent. I am unable to conceive any state of circumstances in which the law would give any right to the body of shareholders as such, or fix any liability on them as such. I cannot conceive any state of circumstances in which it could be averred that any contract had been made by or on behalf of the body of certificate holders, either by any member of themselves or by any agent or manager for them. I cannot conceive how people can be said to carry on business when they cannot enter into contracts. They can hardly be said to carry on business when it is utterly inconsistent with what they have done, with what they have said, and with the whole arrangement, that they should be parties directly or indirectly, either themselves or through any agent for them, to any contract, or be liable for any act of misfeasance or neglect of any manager, agent, or servant.

They could not employ a servant. What is the business? If there is any business at all it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees. The Master of the Rolls considered that these trustees were, in substance and in law, shareholders. With all deference to the Master of the Rolls, I cannot help thinking that the whole fallacy of his judgment arises from that fallacy. To my mind the distinction between a director and a trustee is an essential distinction. It lies in the very nature of things. A trustee is a man who is the owner of the property—the principal who deals with the property as principal, as owner, and as master—subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his cestuis que trust. The same individual may fill the office of director, and of trustee having property, but that is a rare, exceptional, and casual circumstance. The office of director is that of a servant. He may be called a director, but, as

between himself and the company, he is a paid servant. He never enters into a contract for himself; he cannot sue; he cannot be sued unless he exceeds his authority, when he may be sued as any other agent might, but he enters into contracts for his principal, and that principal is the company of which he is a director, and for which he is acting. That seems to me to be the broad distinction between the two.

Then, supposing that what is to be done here is to be done by trustees, is what the trustees are to do under the deed a business? In my opinion it is not. There is nothing to be done which comes within the ordinary meaning of "business," and nothing more than what is done by trustees under a marriage settlement who have large properties vested in them, and who have very extensive powers of disposing of and changing investments, selling them, and re-investing the money, according to their discretion and judgment, with or without the consent of their cestuis que trust. There is here over £400,000 worth of stock of a particular kind, and I can easily conceive that a millionaire or some other rich person in this country might have £400,000 of similar securities, and might vest them in his trustees with every trust which is contained in this instrument, with every power and every control. Everything would be as applicable to that trust as it is applicable to the trust contained and expressed in the instrument before us. No doubt there is power in cll. 18, 19 and 20 of disposing of the investments, and of selling and re-investing in some security with the assent of the certificate holders. It is no more than a power to be exercised with the consent of a general meeting (which would be quite as well expressed in an ordinary trust deed) of the cestuis que trust themselves. This seems to be a trust deed of property for a good investment spread over a great number of things in order that the one may equalise the other, so that persons who choose to invest their money in this way may avail themselves of that, which I believe is one of the most certain things in this world of all uncertain things, and which is called "the doctrine of averages." Out of a certain number of things of this kind some will lose and some will gain, some will pay large dividends and some will pay small dividends; and it appears to me that the object, and the legitimate object, of the persons who were invited to join in this company was to have an investment of their money under such circumstances that they might look for a high dividend with a very considerable security for the capital which they were investing.

I can see nothing like an attempt at evading the Act, or avoiding it, of creating anything but what the deed, on the face of it, purports to be—a mode by which people are to make their investments with security, and so as to produce a high rate of dividend. Under those circumstances, I am of opinion that the judgment of the Master of the Rolls must be reversed.

BRETT, L.J.—In this case it is necessary to construe the Act of Parliament carefully, and in so doing one is obliged to consider almost every word, and almost every phrase, in it, and, as one has often to do, to translate, if possible, into the most accurately scientific form, idiomatic English which is not, even in an Act of Parliament, used in its strictly grammatical sense, but in a business sense.

The Companies Act, 1862, s. 4, is in a negative form, and it begins by saying that

> "no company, association, or partnership, consisting of more than twenty persons shall be formed."

To bring a case within these words there must be a joint relation of more than twenty persons for a common purpose, which common purpose must be the performing jointly of a succession of acts. It will not be sufficient if the relation existed for a purpose which is to be completed by the performance of one act. The persons must also be so related as to form a company, or a partnership, or an association. I have some difficulty in seeing at this moment what would be an association for the purpose of carrying on a business which would be neither a company nor a partnership, but I should be sorry to say that, by the ingenuity of men of business,

there may not some day be formed a relation among twenty persons which may not be strictly either a company or a partnership, but still be an association. It must, however, according to all ordinary rules of construction, if not, strictly speaking, a company or a partnership, be an association of a similar kind. It must be a relation established between twenty persons for the purpose of carrying on business. It is well known that the phrase "for the purpose" is an English idiom, but here it means "in order that" such company, association, or partnership, shall carry on a business. The business is to be carried on by those twenty persons, or by more than twenty persons, whatever may be the meaning of that word "business." The words "for the purpose of carrying on a business" exclude the case of an association for doing one particular act which is never to be repeated. "Carrying on" implies a repetition of acts, or a series of acts, and the series of acts must be such as to constitute a business.

There are many things which everybody understands to be a business. There may be new businesses which at the present time are not known. But the word "business" might, in a grammatical sense, have been made to include something which no ordinary person would call a business, and inasmuch as the legislature did not desire to use the word in so large a sense, and did not wish to recapitulate in terms every kind of business, they used words confining the meaning of that large word, "business" to a certain style of business, viz., that which has for its object the acquisition of gain. Gain is to be the result of the business—not of one particular act, but of a series of acts which forms a business. When the gain is acquired, it is either a gain by the company, association, or partnership, or a gain by the individual members thereof. Where the gain is to be distributed with reference to the former description of the congregation of persons, as where there is a company (which is a joint-stock company, a corporation, or a quasi corporation), and the individuals are mere shareholders, the gain acquired by the business carried on by such a company is a gain by the company, and is not by the individual shareholders. But where there is an ordinary partnership, or an association which, not being a joint stock company, or a corporation, is like a partnership, the gain is not by the whole body as distinct from the individuals, but by each individual partner.

The point to be considered, however, is, whether there is any association of persons for the purpose of carrying on a business at all within the meaning of the section; i.e., whether the persons are carrying on a business which, if successful, is to result in the acquisition of gain. If any set of persons here can be said to be within the category described, who are those persons? I cannot agree with the statement of the question which was laid down by the Master of the Rolls in *Sykes* v. *Beadon* (1). He said that the point which he had to consider was, whether the thing was an association or company formed for the purpose of gain either by the association or by the individual members thereof—whether it was an association or company formed for the purpose of gain. But he omitted to state that the question was whether there was an association or company formed for the purpose of carrying on a business, because, according to his view, it would be immaterial whether the gain was to be a gain which was to be the result of a business, or whether it was not. He seems to me to have left out those words which I think were purposely put into the statute for a definite object, viz., to deal not with people who were associated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business.

If there were in the present case any persons at all who were associated for the purpose of carrying on any business such as is described in this section, they must have been either the trustees or the certificate holders. I will first consider the case of the trustees. They were not, as I construe the deed, to enter on a series of acts, which acts, if successful, would obtain a gain. They were joined together for the purpose of, once for all, investing certain money which was delivered into their hands, and not by a repetition of successful investments to obtain gain. They were not associated together for the purpose of speculating in shares. That was not their business. There was no reason why, when they had once made an

investment, it should ever be changed. Therefore, it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain. It is true that, under a very subsidiary state of circumstances, which is described in cl. 20, it might be said that what they would have to do would result in a gain. But even if that be so with regard to the transactions under cl. 20, which I doubt, yet that is a subsidiary, and not a substantial part of what the trustees had to do. If what they have to do, as the substantial object of the deed, is not a business, the subsidiary part is not a part of their business.

In several cases, including *R.* v. *Whitmarsh* (3), it was decided that a mere subsidiary, minor transaction, described in the deed, does not become a part of the object, so as to bring the case within the statute. If the trustees themselves were formed for the purpose of carrying on a business within the meaning of the section, they were not acting illegally within the meaning of the section, because they are not of the number of twenty.

Now, I come to the case of the certificate holders. Even if what had to be done was to be done by their agents, they were not associated for the purpose of carrying on such a business as here described, and for the reason that, even if what had to be done was done by agents of theirs, what had to be done was not to be a series of acts by which, if successful, they would obtain gain. Even supposing there was a business, the certificate holders were not the persons who were to carry on that business, or by that business to obtain gain.

That again raises the question whether the persons here carrying on the business were carrying it on for the certificate holders, or were carrying it on otherwise than for them. I take it that the persons who are called trustees are clearly such, and not agents, and therefore are not directors in the ordinary sense of the term. The distinction has been pointed out by JAMES, L.J., and I entirely agree with it. If one could see that the persons were merely called trustees, but that the duties which, under the deed, they had to perform were really the duties of directors, then, although called trustees, the legal effect of the deed would be to make them directors. If these so-called trustees were trustees, the certificate holders, if associated, were not associated for carrying on the business, or what is said to be a business, producing gain. They could not have been made liable for any contract made by these trustees. It was of course urged, and very naturally urged, that they would be liable as undisclosed principals. But that is assuming that the persons who made the contracts are their agents authorised to bind them by their contracts, which is obviously incorrect. The business is not carried on by those persons, and it never can be where those who are to carry on the business are bona fide trustees, and not agents or directors. If there is a business which, if carried on by anybody, would be within the section, it is not carried on by the certificate holders, the cestuis que trust, who are the people who are said to be of a larger number than twenty, but by the trustees, who are not of the number of twenty. The case therefore is not within the statute according to either view.

That being so, I venture, with great deference, to differ from the Master of the Rolls. It seems to me that the view which I have taken of the statute carries with it also the implication that one does not agree with the decision of the Master of the Rolls in *Sykes* v. *Beadon* (1).

Another case which has been mentioned is *Re Arthur Average Association for British, Foreign and Colonial Ships* (2). It is not, perhaps, absolutely necessary to determine whether that case, which related to a mutual assurance association, is within the statute, but I cannot help saying that it appears to me that the reasoning which brings me to the conclusion that the present case is not within the statute would bring me, as at present advised, to the same conclusion with regard to the case of a mutual assurance association. I cannot think that there is any business which is a business carried on in order to obtain a gain either for the association or for the individual members of it, within the meaning of the Companies Act, 1862. I am inclined to think that this is a true proposition, that no

transaction within the association or company, between the members of it, can be taken into consideration in order to determine whether the company or association was one formed to carry on a business within the meaning of the section.

COTTON, L.J.—What we have to determine is, whether this is an association, company, or partnership within the meaning of the Companies Act, 1862. In my opinion, subject of course to one's general knowledge of the Act, it turns on s. 4 of that Act. Section 21 has been referred to, but I do not think that has any material bearing on the question which we have to consider, because the companies which are referred to in s. 21 might register under s. 6 of the Act. What we have to consider is, not whether the persons under this trust deed, as I call it for the sake of shortness, could register under the Act, but whether they are bound to do so, and in default are an illegal association.

In arriving at the construction of the particular portion of the section on which the question turns, it is well to observe that the section begins with a restriction as to companies carrying on a well-known business, viz., the business of banking. Then comes a clause on which the question turns, which is to apply to companies other than banking companies, with certain exceptions; and that is material, because we have, without any reference to gain or anything else, a description of the business which companies mentioned in the first part of the section are formed to carry on.

In the second part of the section which we have to consider, we have in substance reference to companies carrying on any "other" business, with this qualification, that the business must be one for the acquisition of gain by the company, association, or partnership, or by its members; and that, in my opinion, shows that those words of this section, "for the purpose of carrying on any other business," or, if you like to leave out "other," "for the purpose of carrying on business which has for its object the acquisition of gain," are material and not to be disregarded, and that you cannot properly read this section as a section saying simply "any other association having for its object the acquisition of gain." In my opinion, to bring the case within the section, there must be a company, association, or partnership, which, by itself or its agents, is carrying on a business. The company, association, or partnership must be formed for that purpose. If it is formed for that purpose, before it carries on any business it must register, if within the Act. It is the forming of an association for a purpose which is struck at by the Act, and the purpose is in the first instance that of carrying on a business. Then the nature of that business is defined. It is not banking. Banking business is excluded. It must be a business having for its object the acquisition of gain by the company.

I do not think it is very material to consider that much vexed and contested word "association," and how it differs from "company" or "partnership"; but I think one may say that "association," if it is here intended to differ from "company" or "partnership," must be judged by the two companions between which it stands, that it must be something where the associates are in the nature of partners. It might have been intended to hit the case, which one has frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it, as is very common; as for instance, where firms, one in London, another in Liverpool, and another in the East Indies, join together, the one to carry on the one part of the business, and the other to carry on the other—one partnership to get the orders, or to order and see what goods shall be selected, and the other to manufacture them, and the third when they are imported to India to sell them.

Is this "conglomeration," as I will call it, of the persons who subscribe their money under this trust deed, an association formed to carry on any business within the meaning of the section having for its object the acquisition of gain? The effect of the deed, as I understand it, is a provision enabling a large sum of money, found by various persons, to be invested on a large aggregate of securities of a particular class, and of so large an amount as to give a fair average in that particular class

of security. It was obvious, on the doctrine of averages referred to by JAMES, L.J., that the investments being securities which, as a whole, produce large profits, though some may not produce profit, by taking a large number as investments just as any private individual might have done if he had a large fortune and liked to invest it in that way, in the result there would be a large sum to be divided, arising, not from any particular investment, but from the whole of the investments, and when the parties liked to sell, having this large aggregate including so many of the particular class giving a general average, their money would be returned to them with a profit, as those things, when once successful, do go up in price. But there is something more. The investments were made in the names of trustees for a large number. It was necessary to make provision for their conduct, as to how decisions were to be come to by the body of certificate holders, as to what was to be done with respect to the general business of the trust. Moreover, it was incident to this trust that there should be sometimes a change of investment. That is incidental to every trust, and provided for in ordinary trusts. Here we have, no doubt, a provision which at first sight is one which appears like carrying on a business. I refer to cll. 18 and 20. But, as regards the transactions carried on by somebody, if it appeared that the real object was that the trustees should speculate even in this particular class of investments, the case would have stood in a very different position. There is nothing of that sort. The deed is not a provision that the trustees shall make a profit by selling and buying again securities of this class whenever, in their opinion, the turn of the market makes it advisable so to do. But it is in substance a trust deed, a deed providing how they are to hold, as trustees, securities of a large amount, with incidental provisions, enabling them, in certain events, to sell some of the securities, and enabling them, when that is done, but only under special circumstances, not to speculate, but to reinvest.

In my opinion, that is not carrying on a business within the meaning of the Companies Act, 1862. It is a trust, a holding of trust property with certain provisions, and with such provisions only as are necessary, as a matter of practical business, in order to enable that to be done. But we have to consider not only that, but whether there is any association of persons more than twenty in number who are carrying on business by themselves or their agents. It was argued by counsel for the plaintiff that the mere fact of these persons putting money, without any contract or communication with each other, into a bank to a common account, to be invested by the trustees under the trusts of the deed, was an association carrying on business for the purpose of gain, that would not be carrying on business. They may do it for the purpose of profit, but most persons, when they invest their money, do it for the purpose of profit; that is to say, they expect they will get a profit either in the shape of dividends, or probably that it is an investment which will go up, and will produce a profit when, hereafter, they wish to realise.

How can it be said that the association, by themselves or by their agents, carry on a business? That they do it by themselves, I think, can hardly be contended. It was, however, and I will deal with the contention. All the power which the subscribers of this money had, was to attend sometimes at the meetings, and the meetings which were held most usually are provided for in cl. 26. The only business was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts, and to elect new trustees to fill any vacancy in their body. It is impossible, in my opinion, to say that the certificate holders are by themselves in any way carrying on any business. That is simply receiving the accounts of the trustees, which ordinary cestuis que trust do without being supposed to carry on any business. It is exercising a power contained in every well-drawn trust deed—the power of appointing new trustees. How can it be said that, if there was a business to be carried on by the trustees in any way, the certificate holders are, by themselves, at those meetings, carrying on a business? All that cl. 20 gives to the certificate holders is the power to assent, as cestuis que trust usually assent, when competent to do so, and not incapacitated

by infancy or otherwise, to a change of investment. Of course the number of cestuis que trust makes it necessary that those who are actually present may bind those who are absent, otherwise the assent of the cestuis que trust could never be effectually obtained or given; and therefore the deed takes a form which we find no doubt in a trust deed or articles of association of trading companies with reference to the meetings of the partners or socii. But here that is only the form. Here they are cestuis que trust meeting to give their assent, not members of the partnership joining to carry on and control the business of the partnership, even if this were a business carried on by the trustees.

Can it be said that the certificate holders carry on a business by their agents? In my opinion that cannot be maintained. The trustees here are the only persons who are dealing, and they are dealing, not as agents for some principal behind, but as trustees in whom the management of the property is vested, and who have the power of changing the investments and securities. It is just like the case, which often occurs, where executors or trustees under a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting with outsiders; that is to say, those who deal and contract with them hold the trustees or executors as personally liable. The outside dealers have no right whatever, as against the persons beneficially interested, the cestuis que trust, to make them directly liable, or, possibly with the excepted case of a testator having directed a part of his assets to be employed in the trade, any claim whatever against the assets of the testator. Those dealing with executors so carrying on a business deal with them as persons ordinarily carrying on business. They look to no one else. But they do look to the executors, and even although the executors have a right of indemnity if they act properly, that in no way affects or enlarges the contracts which they enter into with third parties in carrying on a business. So far as there is any contract here to be entered into by the trustees, it is only a change of investments. So far as there is any business to be carried on, it is the business of the trustees, not as agents for principals behind, but their own business; that is to say, the business in which they contract as solely liable to outsiders, whatever may be their rights as against those for whom they are trustees.

In my opinion, therefore, in this case the only alleged association of more than twenty persons being the persons who have contributed their money, they are not by themselves or their agents carrying on any business whatever. That cannot be said to be in any way an association hit by this Act. Of course, if the trustees are carrying on a business for the purpose of profit, there could be no objection under the Act to their doing so, as they are under the number of twenty. In my opinion, the view which the Master of the Rolls took cannot be maintained.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Baxters & Co.*

[*Reported by* Frank Evans, Esq., *Barrister-at-Law.*]

BRITISH WAGGON CO. AND ANOTHER *v.* LEA AND CO.

[Queen's Bench Division (Sir Alexander Cockburn, C.J., and Manisty, J.), November 25, 1879, January 13, 1880]

[Reported 5 Q.B.D. 149; 49 L.J.Q.B. 321; 42 L.T. 437; 44 J.P. 440; 28 W.R. 349]

Company—Winding-up—Liquidator—Power to carry on company's business—Performance of company's contracts.

Chose in Action—Assignment—Contract—Contract to repair—Performance—Repairs by assignee.

By two agreements in writing, dated respectively Feb. 10 and June 13, 1874, the P. company let to the defendants 100 railway waggons for a term of years at a yearly rent, each agreement containing a clause that the owners, their executors or administrators, would, at all times during the term for which they were let, keep the waggons in good and substantial repair, and that upon receiving notice they would cause the same to be repaired and put into good working order. On Oct. 24, 1874, the P. company passed a resolution for a voluntary winding-up and the winding-up was continued subject to the supervision of the court. On April 1, 1878, the P. company assigned to the B. company all sums of money due to them, or thereafter to become due to them under the above-mentioned contracts, the B. company covenanting with the P. company to observe and perform all the stipulations and provisions of the contracts. At the same time the repairing stations of the P. company were taken over by the B. company. The defendants refused to pay rent for the waggons on the grounds that, the P. company having gone into liquidation and disposed of their repairing sheds, were unable to perform their part of the contracts. In an action by the B. company to recover the rent,

Held: (i) the P. company, pending the winding-up, was by ss. 95 and 131 of the Companies Act, 1862, kept alive, the liquidator having power to carry on the business so far as might be necessary for the benefit of the company; (ii) the repair of the waggons undertaken by the B. company under their contract with the P. company was a sufficient performance by the latter of their agreement with the defendants; and the plaintiffs were entitled to recover.

Robson v. *Drummond* (1) (1831), 2 B. & Ad. 303, distinguished.

Notes. Sections 95 and 131 of the Companies Act, 1862, have been repealed. See now s. 245 (1) (b) of the Companies Act, 1948, 3 Halsbury's Statutes (2nd Edn.) 655.

Considered: *Jaegar's Sanitary Woollen System Co.* v. *Walker* (1897), 77 L.T. 180. Approved: *Tolhurst* v. *Associated Cement Manufacturers (1900), Ltd.*, [1900–3] All E.R.Rep. 386. Followed: *Fratelli Sorrentino* v. *Buerger*, [1915] 1 K.B. 307; *Whiteley* v. *Hilt*, [1918] 2 K.B. 808. Considered: *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; *Edwards* v. *Newland*, [1950] 1 All E.R. 1072. Referred to: *Fratelli Sorrentino* v. *Buerger*, [1915] 3 K.B. 367; *Davies* v. *Collins*, [1945] 1 All E.R. 247.

As to the assignment of contractual rights and liabilities, see 8 Halsbury's Laws (3rd Edn.) 257 et seq.; and for cases see 12 Digest (Repl.) 660 et seq., 8 Digest (Repl.) 556, 557. As to carrying on the company's business on a winding-up by the court, see 6 Halsbury's Laws (3rd Edn.) 651–652; and for cases see 10 Digest (Repl.) 969, 970.

Cases referred to:

(1) *Robson* v. *Drummond* (1831), 2 B. & Ad. 303; 9 L.J.O.S.K.B. 187; 109 E.R. 1156; 3 Digest (Repl.) 113, *342*.

(2) *Humble* v. *Hunter* (1848), 12 Q.B. 310; 17 L.J.Q.B. 350; 11 L.T.O.S. 265; 12 Jur. 1021; 116 E.R. 885; 41 Digest 317, *1768*.

(3) *Boulton* v. *Jones* (1857), 2 H. & N. 564; 27 L.J.Ex. 117; 157 E.R. 232; sub nom. *Bolton* v. *Jones*, 30 L.T.O.S. 188; 3 Jur.N.S. 1156; 6 W.R. 107; 12 Digest (Repl.) 671, *5186*.

(4) *Brice* v. *Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 7 Digest (Repl.) 436, *385*.

Also referred to in argument:

Inchbald v. *Western Neilgherry Coffee, Tea and Cinnamon Plantation Co., Ltd.* (1864), 17 C.B.N.S. 733; 5 New Rep. 52; 34 L.J.C.P. 15; 11 L.T. 345; 10 Jur.N.S. 1129; 13 W.R. 95; 144 E.R. 293; 1 Digest (Repl.) 632, *2118*.

Action brought by the plaintiffs to recover from the defendants rent for the hire of certain railway waggons in accordance with the terms of two agreements dated respectively Feb. 10 and Oct. 24, 1874.

By an agreement in writing of Feb. 10, 1874, the Parkgate Waggon Co., let to the defendants, coal merchants, fifty railway waggons for a term of seven years, at a yearly rent of £600, payable by equal quarterly payments. By a second agreement of June 13, 1874, the company in like manner let to the defendants fifty other waggons, at a yearly rent of £625, payable quarterly like the former. Each of these agreements contained the following clause:

> "The owners, their executors or administrators, will at all times during the said term, except as herein provided, keep the said waggons in good and substantial repair and working order, and on receiving notice from the tenant of any want of repairs, and the number or numbers of the waggons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On Oct. 24, 1874, the Parkgate Co. passed a resolution for the voluntary winding-up of the company; liquidators were appointed, and by an order of the Chancery Division it was ordered that the winding-up of the company should be continued under the supervision of the court.

By an indenture of April 1, 1878, the Parkgate Co. assigned and transferred, and the liquidators confirmed to the British Co. and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage then due, or thereafter to become due, to the Parkgate Co. by virtue of the two contracts with the defendants, together with the benefit of the two contracts and all the interest of the Parkgate Co. and the said liquidators therein; the British Co., on the other hand, covenanting with the Parkgate Co. to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts, as, according to the terms thereof, were stipulated to be observed and performed by the Parkgate Co. On the execution of this assignment the British Co. took over from the Parkgate Co. the repairing stations which had previously been used by the Parkgate Co. for the repair of the waggons let to the defendants, and also the staff of workmen employed by the latter company in executing such repairs.

It was expressly found that the British Co. had ever since been ready and willing to execute, and had with all due diligence executed, all necessary repairs to the said waggons. This, however, they had done under a special agreement come to between the parties since the present dispute had arisen, without prejudice to their respective rights.

The defendants asserted their right to treat the contracts as at an end on the ground that the Parkgate Co. had incapacitated themselves from performing the contract, first, by going into voluntary liquidation, secondly, by assigning the contracts and giving up the repairing stations to the British Co., between whom and the defendants there was no privity of contract, and whose services in substitution

for those to be performed by the Parkgate Co under the contract they, the defendants, were not bound to accept. The Parkgate Co. agreed that the facts should be stated in a Special Case for the opinion of this court, the use of the waggons by the defendants being in the meanwhile continued at a rate agreed on between the parties without prejudice to either with reference to their respective rights.

Wills, *Q.C.* (*Forbes* and *Ellis* with him), for the plaintiffs.
A. L. Smith (*A. Charles*, *Q.C.*, with him) for the defendants.

Cur. adv. vult.

Jan. 13, 1880. **SIR ALEXANDER COCKBURN, C.J.**, read the judgment of the court in which he stated the facts, and continued: The first ground taken by the defendants is, in our opinion, altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound-up, and the company itself shall have been dissolved under s. 111 of the Act. Pending the winding-up, the company is, by the effect of ss. 95 and 131, kept alive, the liquidator having power to carry on the business "so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these waggons and the receipt of the rent payable in respect of them would, we presume, be. What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Co. had, by assigning the contracts, and by making over their repairing stations to the British Co.. incapacitated themselves from fulfilling their obligations to keep the waggons in repair, that company had no right as between themselves and the defendants to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract. The contract was, therefore, at an end. The authority principally relied on in support of this contention was *Robson* v. *Drummond* (1), approved of by this court in *Humble* v. *Hunter* (2).

In *Robson* v. *Drummond* (1) a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent payable in advance each year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired and making over all interest in the business and property in the goods to Robson, it was held by LORD TENTERDEN that the defendant could not be sued on the contract on the ground that

> "the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person;

and by LITTLEDALE and PARKE, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste to the end of the contract. In like manner where goods are ordered of a particular manufacturer, another who has succeeded to his business cannot execute the order so as to bind the customer who has not been made aware of the transfer of the business to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this *Boulton* v. *Jones* (3) is a sufficient authority. *Robson* v. *Drummond* (1) comes nearer to the present case, but is, we think, distinguishable from it.

We entirely concur in the principle on which the decision in *Robson* v. *Drummond* (1) rests, namely, that where a person contracts with another to do work, or perform a service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger

to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which consequently cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these waggons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by anyone with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was, that the waggons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus, if without going into liquidation or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the waggons in repair.

While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits, and we cannot but think that in applying the principle the Court of Queen's Bench in *Robson* v. *Drummond* (1) went to the utmost length to which it can be carried, as it is difficult to see how, in repairing a carriage when necessary or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract or by someone on his behalf. In all these cases the maxim qui facit per alium facit per se applies.

In the view we take of the case, therefore, the repair of the waggons undertaken and done by the British Co. under their contract with the Parkgate Co. is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Co. continues to exist and through the British Co. continues to fulfil its obligation to keep the waggons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them on the ground that the company have incapacitated themselves from performing their obligations under it, or that by transferring the performance thereof to others they have absolved the defendants from further performance on their part. That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as in equity cannot, since the decision in *Brice* v. *Bannister* (4), be disputed. We are, therefore, of opinion that our judgment must be for the plaintiffs for the amount claimed.

Judgment for the plaintiffs.

Solicitors: *Bell, Brodrick & Gray*, for *Harrop & Harrop*, Rotherham; *Mark Shephard.*

[*Reported by* A. H. Poyser, Esq., *Barrister-at-Law.*]

BEER *v.* WALKER

[Common Pleas Division (Grove and Lopes, JJ.), June 22, 1877]

[Reported 46 L.J.Q.B. 677; 37 L.T. 278; 41 J.P. 728; 25 W.R. 880]

Sale of Goods—Implied condition of fitness—Food—Goods dispatched in good condition—Unfit for consumption at destination.

The plaintiff, an importer of Ostend rabbits carrying on business in London, had a contract with the defendant in Brighton under which he sent weekly by rail to the defendant a number of rabbits, the cost of carriage being paid by the defendant. In November, 1876, the plaintiff dispatched to the defendant, in the ordinary course of business and in accordance with previous dealings between them, two half casks of rabbits. The rabbits were in good condition when they arrived in London from Ostend and were dispatched the same day to the defendant. They arrived at Brighton the following day, when the defendant accepted the casks without examination and paid the carriage on them. Subsequently, one cask was found to contain rabbits which were unfit for human consumption. In an action by the plaintiff for the price of this half cask.

Held: there was an implied warranty that the rabbits should be of merchantable quality, not only upon their arrival at the place of destination, but also for a reasonable time thereafter, and, therefore, the plaintiff was liable for the price of the half cask.

Notes. The Sale of Goods Act, 1893, by s. 14 (22 Halsbury's Statutes (2nd Edn.) 993), provides for certain implied warranties as to the quality of goods and their fitness for the purpose for which they are required.

Distinguished: *Smith* v. *Baker and Death* (1878), 40 L.T. 261. Considered: *Ollett* v. *Jordon*, [1918–19] All E.R.Rep. 1069; *Broome* v. *Pardess Co-operative Society of Orange Growers (Established 1900), Ltd.*, [1939] 3 All E.R. 978. Followed: *Mash and Murrell, Ltd.* v. *Joseph I. Emanuel, Ltd.*, [1961] 1 All E.R. 485. Referred to: *Burrows* v. *Smith* (1894), 10 T.L.R. 246.

As to implied terms as to quality or fitness, see 34 Halsbury's Laws (3rd Edn.) 51 et seq.; and for cases see 39 Digest 438 et seq.

Case referred to:

(1) *Bigge* v. *Parkinson* (1862), 7 H. & N. 955; 31 L.J.Ex. 301; 8 Jur.N.S. 1014; 10 W.R. 349; sub nom. *Smith* v. *Parkinson*, 7 L.T. 92, Ex. Ch.; 39 Digest 465, *908*.

Also referred to in argument:

Emmerton v. *Mathews* (1862), 7 H. & N. 586; 31 L.J.Ex. 139; 5 L.T. 681; 26 J.P. 566; 8 Jur.N.S. 61; 10 W.R. 346; 158 E.R. 604; 39 Digest 442, *712*.

Appeal from a decision of the deputy judge of Southwark County Court in an action brought to recover £35 6s. 11d. balance of an account for the sale of rabbits, the defendant paying into court £27 17s. 6d., and claiming to be entitled to deduct from the amount of the plaintiff's claim £7 9s. 10d., being £7 4s. 8d. for the value of one half cask of rabbits supplied by the plaintiff to the defendant, and 5s. 2d. which the defendant paid to the London, Brighton, and South-Coast Railway for the carriage of the said rabbits.

The plaintiff was a wholesale provision dealer and importer of Ostend rabbits, carrying on business in the Southwark Bridge Road. The defendant was a retail cheesemonger carrying on business in Brighton. Before and at the time of the happening of the matters which gave rise to the action, there was a continuing contract made and entered into between the plaintiff and the defendant, under which the plaintiff was to send weekly from London by railway to the defendant at Brighton a certain number of rabbits. The cost of carriage by rail from London

to Brighton was to be paid and was paid by the defendant. Under and in accordance with this contract, the plaintiff, on Nov. 17, 1876, consigned and sent two half casks of rabbits by the London, Brighton, and South-Coast Railway to the defendant. These two half casks of rabbits were (among others) consigned in the usual course of business to the plaintiff by his correspondents at Ostend, and arrived at the plaintiff's premises at or about 6 p.m. on Nov. 17. The casks were then opened, and the rabbits examined by the plaintiff and his assistants. At about 8 p.m. on the same day they were sent to London Bridge Station, to be forwarded to the defendant, at whose premises they arrived at about 9 the next morning, when they were accepted by the defendant and the carriage paid by him. The transaction took place in the ordinary way of business and in accordance with the usual previous course of dealing between the plaintiff and the defendant. The rabbits were in good order and condition and merchantable when delivered to the said railway company, at their station in London, and upon or shortly after their arrival at the defendant's premises at Brighton, one of the half casks was at once opened and the rabbits therein found to be good; but upon opening the other cask shortly afterwards, the rabbits therein were found not to be in good order, or condition, or merchantable, or fit for human food.

The deputy judge, upon the above facts, took time to consider, and afterwards delivered a written judgment holding that there was a continuing contract between the plaintiff and defendant and there was an implied warranty that the rabbits would be merchantable. He was of opinion that that condition would be satisfied if they had been delivered in good order and condition to the railway in London. In the circumstances there was, therefore, no breach of warranty, and the plaintiff was entitled to be paid the contract price for the rabbits. He, therefore, gave judgment for the plaintiff with costs. The defendant appealed.

Cooper Wyld for the defendant.
Holmes Poulter and *Vivian* for the plaintiff.

GROVE, J.—The facts of this case are very short. The plaintiff was in the habit of supplying the defendant at Brighton with rabbits, he getting them from Ostend, and sending them on weekly in half casks from London. The two half casks, for the price of which this action is brought, were sent as usual to the terminus of the railway in London, to be forwarded to Brighton, and were then in good condition, but upon arrival one of the cases contained rabbits in good condition, the other putrid rabbits. The Case finds that

> "upon or shortly after their said arrival at the plaintiff's premises in Brighton, one of the said half casks was at once opened, and the rabbits therein found to be good, but upon opening the other cask shortly afterwards the rabbits therein were found not to be in a good order or condition, or merchantable, or fit for human food."

The sole questions left to us are: (i) whether there was, under the said circumstances, such an implied warranty; (ii) whether such implied warranty (if any), was satisfied by the delivery of the said rabbits to the railway company in the order and state so warranted?

One difficulty arises from the Case finding that the defendant accepted the rabbits; and there was a question whether the defence set up should not have taken the form of a counterclaim. However, all that has been very properly got rid of by consent of counsel, in order that the court might not be embarrassed by any point of pleading.

Paragraph 6 of the Case seems to me to be the important one. That paragraph states that the transaction took place in the ordinary way of business and in accordance with the usual and previous course of dealing between the plaintiff and the defendant. That finding, fairly interpreted, means that there was nothing unusual in the transit to cause damage to the rabbits; and, therefore, that the putrefaction must have been in the ordinary course of nature. It appears to me that

A that finding of the county court judge would discharge the onus, if it is on the defendant. That being so, is there here any implied warranty?

It has been decided that in the case of a sale of goods, where the vendor selects the specific goods sold, there is an implied warranty that such goods are fit for the purpose for which they are intended: in the case of human food, that is, of course, fit to be eaten. In *Bigge* v. *Parkinson* (1), there was an express guarantee to pass B survey in the contract to supply, but the case was not decided on that, but on the implied warranty of fitness on such a contract. There the plaintiffs, who had contracted with the East India Co. to carry out some troops for them in their ship to Bombay, and to supply the troops with provisions and stores to be used and consumed during the voyage, entered into a contract with the defendant, a provision dealer, by which the defendant engaged to supply the plaintiff's ship C with troop stores "guaranteed to pass survey of the East India Co.'s officers"; and it was held, that this express guarantee did not exclude the guarantee which, in the absence of an express stipulation, would have been implied by law on a contract to supply, that the stores should be reasonably fit for the purpose of being used and consumed by the troops during the voyage. So here there is an implied guarantee that the rabbits would be reasonably fit for the purpose of being consumed D at Brighton.

Then, secondly, was that implied warranty satisfied by delivery to the railway company in sound condition? Or does the person sending the rabbits impliedly warrant that, in the absence of anything exceptional, they should reach the purchaser in a good state? It appears to me that a person selling human food does warrant that the food shall be good on arrival. To take the case of fishmongers E supplying customers in the country, the fish must be good on arrival. Say a man in Gloucestershire or Cornwall has fish sent down to him, he does not want the fish to be in a good state at Paddington station, but when they reach him. I should say further, not only when they reach him, but within a reasonable time after, whether he wants to sell them or eat them. I can entertain no doubt upon this point.

F I, therefore, answer the first question in the affirmative, and, in answer to the second question, say that the implied warranty was not satisfied by delivery to the railway company in good condition, but extended to a reasonable time after the rabbits reached the defendant. If the defendant had examined the goods and then accepted them, that might make a difference. Here there is no such fact in the case. The goods were accepted by the defendant without examination.

G **LOPES, J.**—I am of the same opinion, and desire to add nothing.

Appeal allowed.

Solicitors: *Berry & Hutchinson*; *Finch.*

[*Reported by* A. H. BITTLESON, ESQ., *Barrister-at-Law.*]

HARRIS *v.* JAMES AND ANOTHER

[QUEEN'S BENCH DIVISION (Blackburn and Lush, JJ.), May 12, 1876]

[Reported 45 L.J.Q.B. 545; 35 L.T. 240; 40 J.P. 663]

Nuisance—Landlord and tenant—Land let for express purpose—Liability of landlord for nuisance by tenant.

A landlord demised a field for the express purpose of being worked as a lime quarry, and the tenant erected limekilns on the field for the purpose of burning limestone taken from the field.

Held: the land having been let for a definite purpose, the landlord was liable for any nuisance which arose as the natural and necessary result of such use.

Rich v. *Basterfield* (1) (1847), 4 C.B. 783, distinguished.

Notes. Referred to: *Phillips* v. *Thomas* (1890), 62 L.T. 793; *A.-G.* v. *Cory*, *Kennard* v. *Cory* (1919), 83 J.P. 221; *Rainham Chemical Works, Ltd.* v. *Belvedere Fish Guano Co., Ltd.*, [1921] All E.R.Rep. 48; *Cornford* v. *Havant and Waterloo Urban District Council* (1932), 97 J.P. 137.

As to who may be sued for a nuisance, see 28 HALSBURY'S LAWS (3rd Edn.) 155 et seq.; and for cases see 36 DIGEST (Repl.) 313 et seq.

Case referred to:

(1) *Rich* v. *Basterfield* (1847), 4 C.B. 783; 16 L.J.C.P. 273; 9 L.T.O.S. 77, 356; 11 Jur. 696; 136 E.R. 715; 36 Digest (Repl.) 319, *643*.

Also referred to in argument:

Gandy v. *Jubber* (1864), 5 B. & S. 78; 3 New Rep. 569; 33 L.J.Q.B. 151; 9 L.T. 800; 28 J.P. 517; 10 Jur.N.S. 652; 12 W.R. 526; 122 E.R. 762; on appeal (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911, Ex. Ch.; 31 Digest (Repl.) 382, *5102*.

R. v. *Pedly* (1834), 1 Ad. & El. 822; 3 Nev. & M.K.B. 627; 3 L.J.M.C. 119; 110 E.R. 1422; 36 Digest (Repl.) 318, *641*.

Demurrer to two paragraphs in the statement of claim.

The second defendant, William Senhouse, was the owner of a field called Kirkcross, in the parish of Brigham, in Cumberland, which was full of limestone, and had been let to the first defendant, Ferdinand James, by the second defendant to be worked as a lime quarry. The second defendant had erected limekilns on the field for the purpose of burning limestone taken from the field. Paragraphs 5 and 6 of the statement of claim which were demurred to by the second defendant were as follows.

"5. The smoke and vapours arising from this kiln spread over the lands of the plaintiff, and have injured the herbage and lessened the value of the land. This injury is partly the natural and necessary result of limekilns being used in the said field called Kirkcross, and partly the result of the improper manner in which the kiln has been worked. 6. The said quarry is worked by means of blasting, and in the process of blasting quantities of dirt and stone are from time to time thrown on the plaintiff's lands, whereby it is unsafe for the plaintiff or his men to work on the said lands. This is partly the necessary result of working a quarry in the said field, and partly of the negligent and improper manner in which the quarry has been worked by the said defendant Ferdinand James."

Crompton in support of the demurrer.

Bompas for the plaintiff.

BLACKBURN, J.—The question we have to decide is raised by para. 5 of the statement of claim. Where one person authorises and requests a person to do certain things, he is liable for any consequences that arise therefrom. If the authority is given in a lease, the person who gives that authority is no less liable

on that account. I do not think that the lessor can be said to require everything the occupier may do; for example, if a man devises certain land on an agricultural lease, and requires that it should be cultivated in the best manner possible, and the tenant, exercising his discretion, brings on to the farm an enormous quantity of most odiferous manure so as to create a nuisance to the neighbourhood, I do not think in a case of that kind that the landlord would be liable, because I do not think that he could be said in any way to request or authorise what had been done. So, too, in the case of a lease of building land, the lessee might so build as to obstruct a neighbour's lights, but the lessor would not be liable, for, although he may have enabled the lessee so to build, he did not request him to do it. But in the case before us the lime field was let for the very purpose of burning lime. No doubt, for any mischief arising from a careless or negligent use of the field, the landlord would not be liable, but for any mischief that arises from the natural and necessary result of what the landlord authorised and required, or even authorised and did not require, I think that the landlord must be held liable.

In *Rich* v. *Basterfield* (1), the Court of Common Pleas came to a conclusion of fact which, if true, justifies their decision. It was an action for alleged nuisance arising from a certain chimney, and it appeared that when the fires were lighted, as the tenant did light them, then the nuisance arose, but evidence was given that a previous tenant made the fires of coke, and when that was the case there was no nuisance, and in their judgment the court proceed to say (4 C.B. at p. 801):

> "It being, therefore, quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance —it seems impossible to say that the tenant was, in any sense, the servant or agent of the defendant, in doing the acts complained of. The utmost that can be imputed to the defendant is, that he enabled the tenant to make fires, if he pleased."

Assuming that that evidence was correct, the nuisance there was not the necessary result of the tenancy. But in this case there is a demise for the express purpose of burning lime, and the natural result of that burning lime is the nuisance complained of. On this point the demurrer cannot be upheld.

As to para. 6, I do not think that the landlord is responsible for what has been negligently and improperly done. If the demise of the quarry is on such terms that the tenant must work it by blasting, that should be stated. The plaintiff may amend that paragraph, and we give him leave so to do.

LUSH, J.—I am of the same opinion. I have always looked on the judgment in *Rich* v. *Basterfield* (1) as one of great refinement. There the premises were let to be used as a coffee shop. I, therefore, think that it must have been contemplated that the tenant should burn ordinary fuel, and that, I think, would have rendered the landlord liable. This case is different, however, for here the second defendant lets land for the erection of limekilns, from which smoke must of necessity rise; so the act of the tenant is clearly that of the landlord.

Solicitors: *Bischoff, Bompas & Bischoff*, for *E. & E. L. Waugh*, Cockermouth; *Speechly & Co.*

[*Reported by* R. H. AMPHLETT, ESQ., *Barrister-at-Law.*]

A

DREW *v.* NUNN

[Court of Appeal (Bramwell, Brett and Cotton, L.JJ.), November 22, 1878, May 30, 1879]

[Reported 4 Q.B.D. 661; 48 L.J.Q.B. 591; 40 L.T. 671; 43 J.P. 541; 27 W.R. 810] B

Agent—Termination of agency—Insanity of principal—Revocation of agent's authority—Rights of third parties dealt with by agent.

The insanity of a principal, if so great as to render him incapable of contracting for himself, puts an end to an authority to contract for him previously given to an agent; but where a principal has held out an agent as having authority to C contract for him, and afterwards becomes insane, he is liable on contracts made by the agent after the insanity with a person to whom the authority has been so held out, and who had no knowledge of the insanity.

Notes. Applied: *Chili Republic* v. *London and River Plate Bank* (1894), 10 T.L.R. 658; *Willis, Faber & Co.* v. *Joyce* (1911), 104 L.T. 576. Referred to: *Burke* v. *Amalgamated Society of Dyers*, [1904] 2 K.B. 583; *Edwards* v. *Porter*, *McNeall* v. *Hawes*, [1923] 2 K.B. 538. D

As to termination of agency by unsoundness of mind of principal, see 1 Halsbury's Laws (3rd Edn.) 244; and for cases see 1 Digest (Repl.) 797, 798.

Cases referred to in argument:

Jolly v. *Rees* (1864), 15 C.B.N.S. 628; 3 New Rep. 473; 33 L.J.C.P. 177; 10 L.T. 298; 28 J.P. 534; 10 Jur.N.S. 319; 12 W.R. 473; 143 E.R. 931; 27 Digest (Repl.) 184, *1390*. E

Molton v. *Camroux* (1848), 2 Exch. 487; 18 L.J.Ex. 68; on appeal (1849), 4 Exch. 17; 18 L.J.Ex. 356; 13 L.T.O.S. 305; 154 E.R. 1107, Ex. Ch.; 33 Digest (Repl.) 589, *51*.

Baxter v. *Earl of Portsmouth* (1826), 5 B. & C. 170; 2 C. & P. 178; 108 E.R. 63; sub nom. *Bagster* v. *Earl of Portsmouth*, 7 Dow. & Ry.K.B. 614; 33 Digest (Repl.) 590, *55*. F

Brown v. *Jodrell* (1827), 3 C. & P. 30; Mood. & M. 105, N.P.; 33 Digest (Repl.) 590, *60*.

Dane v. *Viscountess Kirkwall* (1838), 8 C. & P. 679, N.P.; 33 Digest (Repl.) 590, *61*. G

Niell v. *Morley* (1804), 9 Ves. 478; 32 E.R. 687; 33 Digest (Repl.) 589, *50*.

Stead v. *Thornton* (1832), 3 B. & Ad. 357n.; 1 L.J.K.B. 74; 110 E.R. 134; 1 Digest (Repl.) 509, *1456*.

Stephens v. *Badcock* (1832), 3 B. & Ad. 354; 1 L.J.K.B. 75; 110 E.R. 133; 1 Digest (Repl.) 776, *3064*.

Tarbuck v. *Bispham* (1836), 2 M. & W. 2; 6 L.J.Ex. 49; 150 E.R. 643; 3 Digest (Repl.) 272, *794*. H

Read v. *Legard* (1851), 6 Exch. 636; 20 L.J.Ex. 309; 17 L.T.O.S. 145; 15 Jur. 494; 155 E.R. 698; 27 Digest (Repl.) 81, *613*.

Re Wood's Estate, *Davidson* v. *Wood* (1863), 1 De G.J. & Sm. 465; 32 L.J.Ch. 400; 8 L.T. 476; 27 J.P. 628; 9 Jur.N.S. 589; 11 W.R. 791; 46 E.R. 185, L.JJ.; 27 Digest (Repl.) 194, *1535*. I

Richardson v. *Du Bois* (1869), L.R. 5 Q.B. 51; 10 B. & S. 830; 39 L.J.Q.B. 69; 21 L.T. 635; 18 W.R. 62; 27 Digest (Repl.) 194, *1536*.

Manby v. *Scot* (1663), 1 Keb. 482; 1 Lev. 4; 1 Mod. Rep. 124; O. Bridg. 229; 1 Sid. 109; 83 E.R. 1065, Exch.; 27 Digest (Repl.) 192, *1509*.

Browning v. *Reane* (1812), 2 Phillim. 69; 161 E.R. 1080; 33 Digest (Repl.) 598, *149*.

Howard v. *Digby* (1834), 2 Cl. & Fin. 634; 8 Bli.N.S. 224; 6 E.R. 1293, H.L.; 33 Digest (Repl.) 593, *99*.

Blades v. *Free* (1829), 9 B. & C. 167; 4 Man. & Ry.K.B. 282; 7 L.J.O.S.K.B. 211; 109 E.R. 63; 27 Digest (Repl.) 205, *1626*.
Smout v. *Ilberry* (1842), 10 M. & W. 1; 12 L.J.Ex. 357; 152 E.R. 357; 27 Digest (Repl.) 179, *1333*.

Order Nisi obtained by the defendant for a new trial on the ground of misdirection in an action for the price of goods supplied by the plaintiff to the defendant on the order of the defendant's wife, the defendant being insane at the time.

The claim was for a sum of £99 4s. 4d., the price of boots and shoes supplied by the plaintiff to the defendant on the order of the defendant's wife. The action was tried before MELLOR, J., and a jury at Westminster, and the following facts were proved in evidence or admitted: The defendant with his wife and family came to live in London early in the year 1872. From that time until December, 1873, the defendant at different times dealt with the plaintiff on credit. In August, 1872, the defendant paid by cheque a bill then owing to the plaintiff for goods supplied on his wife's order. In November, 1873, the defendant being in a weak state of health, authorised the agent of his property, which was chiefly in Ireland, to pay the whole of the defendant's income to his wife, and he also authorised and allowed her to draw cheques at discretion. In December, 1873, the defendant became insane, and was placed in a private asylum, where he remained until April, 1877.

Between April 3, 1876, and June 27, 1877, the defendant's wife ordered the goods from the plaintiff, the price of which was claimed in this action, and the plaintiff supplied the goods to her on credit. The plaintiff was ignorant when the goods were so supplied that the defendant had become insane, or that he had given his wife authority to receive his income.

The defendant later recovered his reason, and the plaintiff brought this action. In June, 1877, the defendant revoked the authority he had given to his wife to draw cheques, and he had before that time prohibited his agent from paying any income to her.

On these facts MELLOR, J., refused to leave to the jury the question whether or not, when the goods were supplied, the income received by the wife was sufficient for the maintenance of herself and her family, and directed the jury to find for the plaintiff for the amount claimed. The Court of Appeal, on the application of counsel for the defendant, made an order nisi for a new trial on the ground of misdirection.

Willis, Q.C. (*R. O. B. Lane* with him), for the plaintiff showed cause.
Horne Payne for the defendant.

Cur. adv. vult.

May 30, 1879. The following judgments were read.

BRETT, L.J.—This appeal has stood over for a very long time, and principally on my account, in order to enable me to make every effort to decide the question involved upon some satisfactory principle. But, speaking only for myself, I have found the doctrine applicable the most difficult and least to be satisfactorily explained doctrine I have ever met with in the English law.

The facts, which are beyond dispute in the case, are that the defendant when sane gave to his wife an absolute authority to act for him, and held out to the plaintiff that he had given his wife that authority. I think it must be taken as a fact, also, that afterwards the defendant became, not merely insane, but so insane that he could not have contracted with anyone on his own behalf, and so insane that if he had attempted to make a contract with anyone it would have been seen at once by the other person that he was too insane to do so. Under these circumstances, the wife ordered the goods from the plaintiff, who had no knowledge of the lunacy, and was supplied with them by him. The husband was confined for a time in a lunatic asylum, but afterwards recovered his reason. After his recovery the present action is brought against him, and he defends it on the ground that the mandate or authority which he gave to his wife was put an end to

by his subsequent insanity, and therefore that he is not liable for the price of the goods, and the plaintiff cannot recover it from him. MELLOR, J., left no question to the jury as to the extent or amount of the defendant's insanity, but directed them that the plaintiff was entitled to recover. It must be taken, therefore, I think, that insanity existed to the extent I have stated.

Two questions arise on these facts. First, does the insanity of the principal put an end to the mandate or authority given to the agent? i.e., does it cause that mandate or authority to cease? One would have thought that question would have been found to have been decided on clear principles. But when authorities are looked into—and I have looked into STORY ON AGENCY, Scottish authorities, POTHIER and other French authorities—no satisfactory conclusion can be arrived at. If it is held that such insanity as existed here did not put an end to the agent's authority, then clearly the plaintiff is entitled to recover upon that ground. But, in my opinion, such insanity does put an end to the agent's authority. It is admitted that there are certain changes of status which do put an end to it. For instance, the bankruptcy or death of a principal puts an end to it. The reason why the authority is then put an end to is stated to be because the person who otherwise would be liable has became a different person from the giver of the authority. In bankruptcy the assignee, in death the heir or executor, would be substituted for the person who gave the authority. If the change of the person who gave the authority were the real ground upon which we had to proceed, then the lunacy of the principal would not put an end to the authority until that lunacy was established by a commission having been held, so that the committee would be liable instead of the lunatic. But I do not think that is a satisfactory principle upon which to base the rule. In bankruptcy the assignee, although he is a different person, is bound to carry out some contracts made by the bankrupt. In the case of death the executors are the representatives of the dead person for many purposes. I, therefore, think the true ground is that the agent, being a person appointed when the principal could act for himself to act for him, when the principal, according to law, cannot act for himself, the person who represents him ceases to be able to act for him. If that is so, where there is lunacy like that in the present case—lunacy so great that the person who suffers from it has no contracting mind, and cannot contract or do any legal act for himself for want of mind—then, as the principal at law is incapable of doing the act for himself, his agent cannot do it for him. Such lunacy, therefore, puts an end to the authority of the agent, and if any agent acts for his principal after such lunacy is brought to his knowledge, that agent would be doing a wrongful act both to the principal and the person with whom he dealt, and he would be liable to any person with whom he so acted for the principal.

If, therefore, the defendant's wife, who must be taken to have known of her husband's lunacy, had acted with anybody to whom her previous authority had not been held out, I should say she would be acting as her husband's agent wrongfully, although being a married woman it would be difficult to make her liable. I should say the contract would be void as against the supposed principal, and the agent in such a case would himself be liable for misleading an innocent person.

But then comes the question, Who is liable where the authority of the agent has been held out to a person dealt with who had no notice of the principal's lunacy? An agent may be held out as having authority in one of two ways. Where some instrument such as a power of attorney asserts that he has the authority, then the fact of the power of attorney having been previously given is an assertion that the person holding it may act for the principal, and if the agent is acted with within that authority the principal is bound. The other way in which an agent may be held out as having authority is where something has been done as in the present case, where the principal while sane has held out that his agent had authority to act for him in particular cases, and then the principal having become insane, and the agent knowing of the lunacy, nevertheless acts with a third person as though the authority continued. What is the consequence? It seems to me that a person who deals with the agent without knowledge of the principal's lunacy

A has a right so to deal, and that the lunatic is bound by having held out the authority of the agent.

It is difficult to state what are the grounds upon which this principle rests. It is sometimes said that the right depends on contract. I cannot see it. It is also put on the ground of estoppel. It is somewhat difficult to see how in strictness there can be an estoppel. It is also said that the right depends upon representations B made by the principal upon which a person with no notice to the contrary is entitled to act. There is an elaborate note in STORY ON AGENCY (7th Edn.), ch. 18, para. 481, p. 610, in which they say the principle is to be defended on the ground of public policy. It is said by others to be in aid of rendering effectual business transactions. To my mind the better way of stating the ground is, that it is because of a representation, made by the principal when he was sane and could C make it, to an innocent party upon which the latter has a right to act until he knows of the lunacy.

Supposing there is no lunacy, but a principal holds out a person to be his agent and then of his own accord withdraws the agency. As between the principal and the agent the right to bind the principal has ceased, and then the agent does a wrongful act by acting with a third person as though the authority continued; D nevertheless if the agent has been held out as having authority to the third person, and the latter acts with the agent before he has received any notice of the authority having ceased, the principal is still bound upon the ground that he made representations upon which the third person had a right to act, and cannot retract from the consequences of those representations. It is true that if the principal becomes lunatic he cannot himself give notice to the third person of the agency having E ceased, and he may be an innocent sufferer from the wrongful act of the agent. But so is the other; and it is a principle of law that where it is a question which of two innocent parties shall suffer, that one must suffer who caused the state of things upon which the other has acted. Therefore, in my opinion, although the lunatic recovers his reason, he cannot, after his recovery, any more than if he had never been a lunatic, say that an innocent person who acted on representations F made before lunacy had not a right to do so.

A difficulty, no doubt, arises in stating a general principle applicable to such cases as these; but, for my own part, although it is not necessary to decide the question, I should think that the same rule would apply in the case of the principal's death as of his lunacy; and that, if representations made by a person during life were acted upon after his death by an innocent party without any knowledge G of the death, the principal's executors would be bound. On these grounds, therefore, although the authority was put an end to by the defendant's lunacy, and the agent had no authority to deal with the plaintiff, I nevertheless think that the plaintiff can recover, because representations were made by the defendant while sane to the plaintiff, upon which the plaintiff was entitled to act until he had notice of the lunacy, and no such notice was given to him.

H

BRAMWELL, L.J.—I am of the same opinion. I desire to add a few words to what has been said by BRETT, L.J., in whose judgment I entirely agree.

The defendant in this case must be taken to have told the plaintiff, or represented to him that the defendant's wife was his agent to contract debts with the plaintiff in the way of his trade, and that the plaintiff might continue to deal with her on I the responsibility of the defendant. That is the effect of what has been found in this case. It is quite clear when such an authority as this is given that it continues until it is revoked, and notice of the revocation is given to the person who has been told that he may deal with the agent. That is the general rule, but then it is said that it does not apply where the revocation is not intentional but arises by reason of the principal's insanity. Why? It may be a hardship on the person who gives the authority, but it is much harder on the person who acts on that authority without notice of the revocation. Insanity is not a privilege so as to give the person who suffers from it a benefit at the expense of the other; it is a

disability which no doubt ought not to be allowed to affect the insane person more than is necessary. I, therefore, think that there is no reason why a case like this should be taken out of the general rule to which I have referred, and indeed it would be most alarming if it were. The person who had been told that he was the agent might continue so to act most innocently—with the utmost bona fides; he might not know of the lunacy, or, if he did know, might think the best thing for the lunatic was to continue the agency: yet in all these cases, if the argument for the plaintiff was rightly founded, he would be liable to pay over again for the goods to the principal, or to make good any mischief which had happened to the person with whom the agent had acted.

With respect to what the reason of the rule is, I do not like to lay it down with much peremptoriness. It seems to me like the case of a guarantee where a person says, "Supply goods to A. B., and I will pay for them until I revoke the authority." It seems to me that the thing is in the nature either of an agreement between the parties, or of a licence to the person supplying the goods. The agreement or licence continues in force until revocation. BRETT, L.J.'s judgment has proceeded on the ground that the defendant was in such a state of insanity that the insanity itself was a revocation. I am not prepared to say every case of insanity would be sufficient to revoke the authority. I should think the insanity must be something approaching dementia in order to do so. If the defendant, for instance, had known that his wife was pledging his credit, I do not think that because he was insane he would have ceased to be liable. Where a man has no mind at all, of course he is incapable of contracting; he is like a dead man, he has no contracting intelligence. If that was the case here, I think the judgment of the court below may be well supported on the ground relied on by BRETT, L.J., and should be affirmed.

BRETT, L.J.—COTTON, L.J., agrees with the conclusion to which we have come. He does not wish to pledge himself to any opinion whether or not the authority was in fact put an end to in this case, or whether or not it can be put an end to in like cases until there has been a commission of lunacy. As to the holding out of authority he thinks that there is a contract between the person making the representation of authority, and the person to whom it is made; that that contract exists until notice of revocation, and that the principal is bound by the acts of the agent until such notice has been given. He wishes his judgment to be put on the ground that in this case the former contract had not been put an end to, and that the defendant is therefore bound. I wish for myself to add that if there was any question as to the extent of the defendant's insanity it should have been left to the jury. In argument, however, it was admitted that in fact the defendant was in such a state of lunacy that he could not contract himself. Mere weakness of mind would not bring the case within the rule I have laid down.

Order discharged.

Solicitors: *A. E. Copp*; *Blake.*

[*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

A

CUNDY *v.* LINDSAY

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord Penzance and Lord Gordon), March 1, 4, 1878]

B [Reported 3 App. Cas. 459; 47 L.J.Q.B. 481; 38 L.T. 573; 42 J.P. 483; 26 W.R. 406; 14 Cox, C.C. 93]

Sale of Goods—Passing of property—Sale induced by fraud—Goods sold to third party acting bona fide without notice and for value.

A person named Blenkarn ordered goods in writing from the respondents. He gave his address as "Blenkarn & Co., 37, Wood Street, and 5, Little Love C Lane, Cheapside," and signed the letter in such a way that the name appeared to be "Blenkiron & Co." A very respectable firm known as Blenkiron & Sons which carried on business at 123, Wood Street was well known to the respondents who did not ascertain their correct address but dispatched the goods to "Blenkiron & Co., 37 Wood Street, Cheapside." Blenkarn was convicted of obtaining goods by false pretences, but before his conviction he had sold some D of the goods to the appellants in the ordinary course of business and the appellants re-sold them before the fraud was discovered.

Held: as the respondents knew nothing of Blenkarn and intended to deal only with Blenkiron & Sons, a fact which was known to Blenkarn, there was no common intention which could lead to any contract between the parties, and, therefore, the property in the goods remained in the respondents and the E appellants had no title to them.

Hardman v. *Booth* (1) (1863), 1 H. & C. 803, and *Higgons* v. *Burton* (2) (1857), 26 L.J.Ex. 342, applied.

Notes. Distinguished: *Attenborough* v. *London and St. Katherine's Dock Co.* (1878), 3 C.P.D. 450. Considered: *Babcock* v. *Lawson* (1879), 4 Q.B.D. 394; F *Bentley* v. *Vilmont* (1887), 12 App. Cas. 471. Distinguished: *King's Norton Metal Co.* v. *Edridge, Merrett & Co., King's Norton Metal Co.* v. *Roberts* (1897), 14 T.L.R. 98. Applied: *Re International Society of Auctioneers and Valuers, Baillie's Case*, [1898] 1 Ch. 110. Distinguished: *Whitehorn Bros.* v. *Davison*, [1908–10] All E.R.Rep. 885. Considered: *Phillips* v. *Brooks*, [1918–19] All E.R.Rep. 246; *Folkes* v. *King*, [1922] All E.R.Rep. 658. Applied: *Nanka-Bruce* G v. *Commonwealth Trust*, [1926] A.C. 77. Considered: *London Jewellers, Ltd.* v. *Attenborough*, [1934] All E.R.Rep. 270. Referred to: *Re Reed, Ex parte Barnett* (1876), 3 Ch.D. 123; *Moyce* v. *Newington* (1878), 4 Q.B.D. 32; *R.* v. *Central Criminal Court Justices* (1886), 18 Q.B.D. 314; *Henderson* v. *Williams*, [1895] 1 Q.B. 521; *Great Western Rail. Co.* v. *London and County Banking Co.*, [1900–3] All E.R.Rep. 1004; *Greer* v. *Downs Supply Co.*, [1926] All E.R.Rep. 675; *Lake* v. H *Simmons*, [1927] All E.R.Rep. 49; *Solle* v. *Butcher*, [1949] 2 All E.R. 1107; *Ingram* v. *Little*, [1960] 3 All E.R. 332; *Commercial Banking Co. of Sydney, Ltd.* v. *Mann*, [1960] 3 All E.R. 482.

As to misrepresentation, see 26 Halsbury's Laws (3rd Edn.) 817 et seq.; and for cases see 35 Digest (Repl.) 103 et seq.

Cases referred to:

I (1) *Hardman* v. *Booth* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L.J.Ex. 105; 7 L.T. 638; 9 Jur.N.S. 81; 11 W.R. 239; 158 E.R. 1107; 39 Digest 534, *1453*.

(2) *Higgons* v. *Burton* (1857), 26 L.J.Ex. 342; 29 L.T.O.S. 165; 5 W.R. 683; 39 Digest 533, *1452*.

Also referred to in argument:

R. v. *Middleton* (1873), L.R. 2 C.C.R. 38; 42 L.J.M.C. 73; 28 L.T. 777; 37 J.P. 629; 12 Cox, C.C. 417, C.C.R.; 15 Digest (Repl.) 1044, *10,282*.

Horwood v. *Smith* (1788), 2 Term Rep. 750; 100 E.R. 404; 14 Digest (Repl.) 595, *5925*.

Pease v. *Gloahec*, *The Marie Joseph* (1866), L.R. 1 P.C. 219; Brown. & Lush. 449; 3 Moo.P.C.C.N.S. 556; 35 L.J.P.C. 66; 15 L.T. 6; 12 Jur.N.S. 677; 15 W.R. 201; 2 Mar.L.C. 394, P.C.; 39 Digest 634, *2307*.

Kingsford v. *Merry* (1856), 11 Exch. 577; 25 L.J.Ex. 166; on appeal, 1 H. & N. 503; 26 L.J.Ex. 83; 28 L.T.O.S. 236; 3 Jur.N.S. 68; 5 W.R. 151; 156 E.R. 1299, Ex. Ch.; 37 Digest (Repl.) 17, *146*.

Appeal from a decision of the Court of Appeal (MELLISH, BRETT and AMPHLETT, L.JJ.), in favour of the respondents, the plaintiffs below, reported 2 Q.B.D. 96, reversing a decision of the Queen's Bench Division (BLACKBURN, MELLOR and LUSH, JJ.), reported 1 Q.B.D. 348, in favour of the appellants, who were the defendants below.

The respondents were linen manufacturers at Belfast, and the appellants carried on business in London. The action was brought for the conversion of 250 dozen cambric handkerchiefs. The case was tried before BLACKBURN, J., and a special jury in November, 1875. At the trial it appeared that a person named Blenkarn ordered goods in writing from the respondents, giving as his address "Blenkarn & Co., 37, Wood Street, and 5, Little Love Lane, Cheapside." There was a very respectable firm of Blenkiron & Sons, carrying on business in Wood Street, whose name was known to the respondents, and they supplied the goods believing that they were dealing with that firm. Blenkarn had no means of paying for the goods, and on the discovery of the fraud he was prosecuted for obtaining goods by false pretences, and was convicted. Before his conviction he had sold some of the goods to the appellants in the ordinary way of business, and the appellants had re-sold them before the fraud was discovered. It was admitted that they were bona fide purchasers for value. The Queen's Bench Division directed the verdict to be entered for the appellants on the ground that the property in the goods had passed to Blenkarn, and from him to the appellants, but this decision was reversed by the Court of Appeal.

Sir Hardinge Giffard, *Q.C.*, *Benjamin*, *Q.C.*, and *B. F. Williams* for the appellants.

Wills, *Q.C.*, and *Fullarton* for the respondents.

LORD CAIRNS, L.C.—We have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. In discharging that duty your Lordships can do no more than apply rigorously the settled and well-known rules of law. With regard to the title to personal property, those rules may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner, then the purchaser will obtain a good title, even though afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it and to set it aside, because those circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

A The question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property from Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even though, as I have said, it might afterwards be open to a process of reduction upon the ground of fraud, still in the meantime Blenkarn might B have conveyed a good title for valuable consideration to the present appellants.

There are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods passed, it could only pass by way of contract, there is nothing else which could have passed the property. The second observation is this: your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever, as to conversations C or as to acts done; the whole history of the transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally; everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case. Discharging that duty, and answering that inquiry, what the jurors have found in D substance is this: they have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which in turn he was addressed by the respondents, that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not E Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Sons, doing business in the same street. Those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case. If that is so, what is the consequence? It is that Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron & Sons to the applications for goods, and as if, when in return the goods were F forwarded, and letters were sent accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Sons.

Stating the matter shortly in that way, I ask the question, is it possible to imagine that in that state of things any contract could have arisen between the G respondents and Blenkarn? Of him they knew nothing, and of him they never thought, with him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement, or to any contract whatever. As between him and them there was merely the one side to a contract where, in order to produce a contract, two sides would be required. With the firm of H Blenkiron & Sons of course there was no contract, for as to them the matter was entirely unknown, and, therefore, the pretence of a contract was a failure.

The result, therefore, is this, that your Lordships have not here to deal with one of those cases in which there is de facto a contract made which may afterwards be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, I namely, in which the contract never comes into existence. That being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which it was attempted to give to the appellants was a title which could not be given to them. I, therefore, move your Lordships, that this appeal be dismissed with costs, and the judgment of the Court of Appeal be affirmed.

LORD HATHERLEY.—I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the Woolsack. The real

question we have to consider here is this, whether or not any contract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described by the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased from Alfred Blenkarn.

The case was most carefully stated by the learned judge in the court below thus:

> "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thomson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard? and further than that, did he actually by that fraud induce Mr. Thomson to send the goods to 37, Wood Street?"

Both these questions were answered in the affirmative by the jury. What then was the result? It was, that there were letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Sons, Wood Street. That was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And, further, his letters and invoices were headed "Wood Street," which was not an accurate way of heading them, for he occupied only a room on a third floor, looking into Little Love Lane on one side, and into Wood Street on the other. He headed them in that way in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood Street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood Street.

I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons, of Wood Street, if they had chosen to adopt it, and to no other person whatever; not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever.

It appears to me that this brings the case completely within the authority of *Hardman* v. *Booth* (1), where it was held that there was no real contract between the parties by whom the goods were delivered and the concocter of the fraud who obtained possession of them, because they were not sold to him. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to anybody except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore, the case really in substance is the identical case of *Hardman* v. *Booth* (1) over again.

My attention has been called to another case which seems to have been decided on exactly the same principle as *Hardman* v. *Booth* (1), and it is worth while referring to it as an additional authority upon that principle of law. It is *Higgons* v. *Burton* (2). There, one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent, but as he had been dismissed from the agency, there was no contract with the firm. No contract was ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to the loss. The point of the case is put so very shortly by Pollock, C.B., that I cannot do better than adopt his reasoning:

"There was no sale at all, but a mere obtaining of goods by false pretences; the property therefore did not pass out of the plaintiffs."

The other judges, Martin, Bramwell and Watson, BB., concurred in that judgment.

Here, I say, exactly as in those cases of *Hardman* v. *Booth* (1) and *Higgons* v. *Burton* (2), there was no sale at all; there was a false representation made by Blenkarn, by which he got goods sent to him upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron & Sons. But no contract was made with Blenkarn, nor was any contract made with Blenkiron & Sons, because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property.

We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued for the appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm. Or suppose he had said: "I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers"; then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly have passed the property. But this case is an entirely different one. The whole case, as represented here, is this: from beginning to end the respondents believed they were dealing with Blenkiron & Sons, they made out their invoices to Blenkiron & Sons, they supposed they sold to Blenkiron & Sons; they never sold in any way to Alfred Blenkarn; and, therefore, Alfred Blenkarn cannot by so obtaining the goods have by any possibility made a good title to a purchaser as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession of it.

LORD PENZANCE.—The findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by doing so they passed the property in them to Alfred Blenkarn is, I conceive, the real question to be determined. The respondents had never seen, or even heard of, Alfred Blenkarn, when they received a letter, followed by several others, signed in a manner which was not absolutely clear, but which the writer intended them to take, and they did take, to be the signature of a well-known firm of Blenkiron & Sons, which in fact carried on business at No. 123, Wood Street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Sons was known to the respondents, and it was also known that they lived in Wood Street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Sons in Wood Street, but in place of No. 123 they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Sons, No. 37, Wood Street, London. It was not doubted or disputed that throughout this correspondence, and up to and after the time that the respondents had despatched their goods to London, they intended to deal, and believed they were dealing, with Blenkiron & Sons, and with nobody else; nor is it capable of dispute that when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron & Sons, to whom they addressed these goods. The goods, however, were not delivered to Blenkiron & Sons, to whom they were addressed, but found their way into the

hands of Alfred Blenkarn, owing to the number in Wood Street being given as No. 37 in place of No. 123, a mistake which had purposely been brought about by the writer of the letters, as I have before mentioned, who was no other than Alfred Blenkarn, who had an office at No. 37, Wood Street.

In this state of things it is not denied that the contract or dealing which the respondents thought they were entering into with Blenkiron & Son, and in fulfilment of which they parted with their goods and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Sons knew nothing of the transaction. But the appellants say it was a contract with and a good delivery to Alfred Blenkarn, so as to pass the property in the goods to him, although the goods were not addressed to him, and the respondents did not know of his existence.

I am not aware that there is any decided case in which a sale and delivery intended to be made to one man has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that, as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there, whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron & Co.".

I am unable to distinguish this case in principle from that of *Hardman* v. *Booth* (1), to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them. The court held that there was no contract with Thomas Gandell & Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him. In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Sons, with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me quite alike. Another case of a similar kind is *Higgons* v. *Burton* (2), to which similar reasoning was applied.

Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be someone else of credit and stability, and under this belief to have actually delivered goods into his hands. I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can, I think, be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contact with Alfred Blenkarn; all their letters, though received and answered by him, were addressed to Blenkiron & Sons, and were intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Sons, though at a wrong address. This appeal, ought, therefore, in my opinion, to be dismissed.

LORD GORDON concurred.

Appeal dismissed.

Solicitors: *C. O. Humphreys & Son*; *Ashurst, Morris, Crisp & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

Re JOHNSON. SHEARMAN *v.* ROBINSON

[Chancery Division (Sir George Jessel, M.R.), July 19, 1880]

[Reported 15 Ch.D. 548; 49 L.J.Ch. 745; 43 L.T. 372; 29 W.R. 168]

B *Executor—Powers—Power to carry on business of testator—Indemnity from or lien on assets employed in carrying on business—Default of executor—Rights of trade creditors.*

Where a trustee or executor is authorised by a testator to carry on a business with certain funds, creditors supplying goods to the trustee or executor carrying on such business have a right to stand in the place of the trustee or C executor and to have the benefit of the indemnity or lien which the trustee or executor has upon the funds devoted to the business. Where, however, the trustee or executor has lost his right to indemnity or lien by being a defaulter and a debtor to the business, the creditors are not entitled to have their debts paid out of the trust estate, they being only entitled to stand in the place of the trustee or executor and not being in any better position.

D **Notes.** Considered: *Strickland* v. *Symons* (1884), 26 Ch.D. 245; *Re Firmin, London and County Banking Co.* v. *Firmin* (1887), 57 L.T. 45; *Re Blundell, Blundell* v. *Blundell* (1890), 44 Ch.D. 1. Distinguished: *Re Kidd, Kidd* v. *Kidd* (1894), 70 L.T. 648. Applied: *Re Frith, Newton* v. *Rolfe*, [1902] 1 Ch. 342. Referred to: *Fraser* v. *Murdoch* (1881), 6 App. Cas. 855; *Re Dimmock, Dimmock* v. *Dimmock* (1885), 52 L.T. 494; *Re Millard, Ex parte Yates* (1895), 72 L.T. 823; *Re* E *Shorey, Smith* v. *Shorey* (1898), 79 L.T. 349; *Jennings* v. *Mather*, [1901] 1 K.B. 108; *Re British Power Traction and Lighting Co., Halifax Joint Stock Banking Co.* v. *British Power Traction and Lighting Co.*, [1910] 2 Ch. 470.

As to power to carry on business of deceased testator, see 16 Halsbury's Laws (3rd Edn.) 366 et seq.; and for cases see 24 Digest (Repl.) 616 et seq.

Cases referred to:

F (1) *Re Ballman, Ex parte Garland* (1804), 10 Ves. 110; 1 Smith, K.B. 220; 32 E.R. 786, L.C.; 24 Digest (Repl.) 614, *6112*.

(2) *Re Beater, Ex parte Edmunds* (1862), 4 De G.F. & J. 488; 45 E.R. 1273; sub nom. *Re Beater, Dennant and Russ, Ex parte Coster's Executors*, 31 L.J.Bcy. 15; 8 Jur.N.S. 629; sub nom. *Re Coster, Beater & Co., Ex parte Coster's Executors*, 6 L.T. 199; 10 W.R. 372, L.JJ.; 24 Digest (Repl.) 664, G *6523*.

(3) *Owen* v. *Delamere* (1872), L.R. 15 Eq. 134; 42 L.J.Ch. 232; 27 L.T. 647; 21 W.R. 218; 24 Digest (Repl.) 617, *6129*.

(4) *Fairland* v. *Percy, In the Goods of Percy* (1875), L.R. 3 P. & D. 217; 44 L.J.P. & M. 11; 32 L.T. 405; 39 J.P. 632; 23 W.R. 597; 24 Digest (Repl.) 617, *6130*.

H Also referred to in argument:

Cutbush v. *Cutbush* (1839), 1 Beav. 184; 8 L.J.Ch. 175; 3 Jur. 142; 48 E.R. 910; 24 Digest (Repl.) 615, *6115*.

Further Consideration of an administration action and three summonses taken out by judgment creditors in respect of goods sold to the defendant, an executor I carrying on the business of a deceased testator.

The testator, Peter Johnson, made his will, dated May 27, 1873, and thereby appointed the defendant Robinson and another his executors, and, after making certain specific bequests, and directing the payment of his debts and funeral and testamentary expenses, he directed his executors, as soon as might be after his decease, to collect, get in, and receive all debts owing to him in respect of the business of a tailor carried on by him at Cambridge, and also all other debts owing to him not connected with the business carried on by him in London in partnership with Thos. Sadler, and (subject as therein mentioned) to sell and convert into

money all his Cambridge stock-in-trade, and to stand possessed of the proceeds and all other his personal estate and effect whatever (except his share and interest in the London business), not thereby specifically bequeathed, upon trust to pay one equal fourth part thereof amongst such of the children of his deceased sister Catherine (including his nephew John Neill) as should be living at the time of his decease, an equal fourth part to the plaintiff, and the other equal one-fourth parts as therein mentioned. He also declared that in case his nephew, John Neill, should be under the age of twenty-one years at the time of his decease, it should be lawful for his said executors, upon the request of the said John Neill, to postpone the sale of his Cambridge stock-in-trade, and allow his said business of a tailor at Cambridge to be carried on by the said John Neill for his own benefit under the supervision of his said executors until such time as the said John Neill should attain twenty-one, and during such period should use such part of the share of the said John Neill in his residuary personal estate as might be requisite for the due carrying on of the said business. He also directed in case that provision was carried into effect that an inventory and valuation of all his stock-in-trade at Cambridge should be taken immediately after his death, and that on the said John Neill attaining the age of twenty-one years he should have the option of taking the then existing stock at the amount of such valuation; and that if he declined to do so, and the said stock was sold, then the said John Neill should bring the amount of the proceeds of such sale into hotchpot in the calculations for the distribution of the residuary personal estate. The testator gave directions for the winding-up of his partnership in the London business, and directed that his share and interest therein should fall into his residuary estate.

The testator died on Nov. 25, 1875, and his will was proved by the defendant Robinson alone, the other executor having renounced probate. There were two children of his deceased sister Catherine living at the testator's death, one of whom was the said John Neill, then an infant. The defendant Robinson did not get in the book debts of the Cambridge business as directed by the will, but continued to carry on the business in his own name until June, 1878, when John Neill came of age, and he also continued the management of the testator's share in the London business. In order to enable him to carry on the Cambridge business, the defendant Robinson from time to time advanced sums out of John Neill's share in the residue, which sums were repaid out of the Cambridge business, but the defendant kept no separate banking account for the Cambridge business.

This action was instituted for the administration of the estate of the testator by one of the residuary legatees and a judgment creditor, and the usual order for administration had been made. On taking the accounts of the defendant Robinson, it was found that there was due from him a balance of £764 16s. 1d. for profits from the Cambridge business, and a balance of £1,668 3s. 1d. in respect of the general personal estate, including the testator's share in the London business. Several creditors in respect of the Cambridge business claimed to prove against the testator's estate in the administration action, but their claims were disallowed by the chief clerk, and summonses to vary his certificate were accordingly taken out by the creditors, and were adjourned into court. One summons was taken out by G. Standen & Co. for a sum of £460 5s. 10d. in respect of goods sold and delivered to the defendant, the executor, in the course of his carrying on the Cambridge business since the testator's death until the month of June, 1878, and such summons asked that the sum might be paid to them out of the share of the said John Neill in the residue, or in the alternative that the creditors might be declared entitled to a lien on that portion of the estate of the testator which on June 30, 1878, had been embarked in carrying on the testator's business, and for an inquiry what were the assets of the testator subject to such lien. Two other summonses were taken out by creditors for sums amounting to £600, asking that they might be at liberty to bring in their claims against the assets of the business carried on by the defendant Robinson under the trusts of the will, and that such assets might be applied in payment of what should be found due to them in respect of their debts. The

defendant Robinson had become insolvent. The further consideration of the action and the three summonses now came on to be heard.

Grosvenor Woods for Messrs. Standen & Co., judgment creditors.
Speed and *Maidlow* in support of the other summonses.
R. F. Norton for Neill, the legatee.
Byrne, *Seward Brice* and *E. C. Austin* for other parties.

SIR GEORGE JESSEL, M.R.—I shall dismiss the summonses, but I will give the creditors liberty to present a petition. I will not allow the assets to be distributed until they have presented a petition. That seems to me the regular course, but as the evidence at present stands, I do not see that they are entitled to anything. That seems to have been the course taken in several cases, and I think it is the right one, for the creditors are not parties to the suit. They ought to come in under a petition.

With regard to the point that has been argued, I understand the doctrine to be this—that where a trustee is authorised by a testator, or by a settlor, for it makes no difference, to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets, that is, I have a right to the benefit of any indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor; he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary right, as in those numerous cases in equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the cestuis que trust should get the benefit of the trade without paying the liabilities; therefore, the court will not allow a person who may be a man of straw to be set up as a trustee, to avoid the responsibility of the assets for carrying on the trade. The court puts the creditor, so to speak, in the place of the trustee. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts, has put them into his own pocket, then it appears to me there is no such equity, because the cestuis que trust are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in that case the creditor who has never contracted for anything, and who has only got the benefit of this equity by means of the trustee through the lucky accident of there being a trust, ought to be put in a better position than any other creditor. I do not see that any judge has said so.

If we start with *Ex parte Garland* (1), what Lord Eldon says in that case is this (10 Ves. at pp. 120, 121):

> "It is admitted they [the creditors] have the whole fund which is embarked in the trade [that is, as between themselves and the executors, the creditors can claim the application of the fund] and in addition they have the personal responsibility of the individual with whom they deal, the only security in ordinary transactions of debtor and creditor. They have something very like a lien upon the estate embarked in the trade. They have not a lien upon anything else, nor have creditors in other cases a lien upon the effects of the person with whom they deal, though through the equity, as to the application of the joint and separate estates to the joint and separate debts respectively, they work out that lien. If it is to be determined upon the convenience, it is not so inconvenient to say that those who deal with the executor must take notice that the testator's responsibility is limited by the authority given to the executor, as to say, on the other hand, that the executor being authorised to carry on that trade, making from day to day a great variety of engagements, or,

as it has been put, entering into one great and important engagement, but also authorised by the will to do many other acts which he must equally do in a due administration under the will, wherever for the benefit of one child the trade is directed to be carried on, all the other objects of the will must at any distance of time be considered, to the extent of the property they take, security for the creditors on the trade."

Then, after expressing his strong opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade, he says (ibid. at p. 122):

"If I am not bound by decision, the convenience of mankind requires me to hold that the creditors of the trade as such have not a claim against the distributed assets in the hands of third persons under the direction of the same will, which has authorised the trade to be carried on for the benefit 'of other persons.'"

That does not decide the point I have mentioned at all. All that it decides is that the claim of the creditors is limited to the assets devoted to trade. What their right against those assets is Lord Eldon does not decide. Then we have a case which I think comes nearest to the present case, *Ex parte Edmunds* (2), where Turner, L.J., says this (4 De G.F. & J. at p. 498):

"The case of *Ex parte Garland* (1) and the other cases referred to in the argument have not, in my opinion, any application to the present case; they proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort."

Having read these two authorities, which, being the decisions of a Lord Chancellor and of the Court of Appeal in Chancery, would be binding on me, I need only say that I do not think the point arises in any of the subsequent cases, or was even the subject of consideration in them. *Owen* v. *Delamere* (3), which is a mere dictum of Bacon, V.-C., but which is of course entitled to great respect if it did differ from what Turner, L.J., laid down in *Ex parte Edmunds* (2), as the true principle, would not be binding on me. But I do not think it is different, because Bacon, V.-C., is directing his attention to the point decided in *Ex parte Garland* (1); that is, that the creditors have no right to go beyond assets devoted to trade. The nature of the right as against those assets is not adverted to. That is plain, for after saying (L.R. 15 Eq. at p. 139) that *Ex parte Garland* (1) "contains a clear, distinct, and luminous exposition of the law on the subject," which it does upon the point that it is not the general estate of the testator which is liable, but only so much as he has authorised to be employed in the business, the vice-chancellor says:

"The court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to the purposes of the trust that estate which the testator designated and directed to be employed for that purpose."

It is merely repeating *Ex parte Garland* (1) without the slightest reference to the mode in which the claim is to be enforced.

The same may be said of *Fairland* v. *Percy* (4). I dispose of that case by saying that Sir James Hannen goes no further, and that he does not consider the second point at all.

The question raised by the second point—that is, the right to resort—is not treated of, as far as I can see, in any reported decision, except in *Ex parte Edmunds* (2). I think it is inferentially referred to in Lindley, J.'s book on Partnership, where I think he means to say the same that Turner, L.J., said, although I must say, with great deference to Lindley, J., it might have been more clearly put.

Nothing can be clearer than the way in which Turner, L.J., puts it. It is simply, as he says, the right to resort for indemnity to the assets actually directed to be employed, and the creditor is entitled to the benefit of that right. What Lindley, J., says is this (Lindley on Partnership (3rd Edn.), p. 1103): [His Lordship read the passage commencing "if an executor of a deceased partner" down to the words "lien on the assets of the deceased partner employed therein," and continued:] I am not sure that Lindley, J., had in view the remarks of Turner, L.J., in *Ex parte Edmunds* (2), for he does not cite the case, but he may have arrived at the same result independently.

The only other textbook that I have been looking at on this point is Williams on Executors (8th Edn.), p. 1798. After stating that a trade is not transmissible, but is put an end to by the death of the trader, it says:

> "Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue the business of the deceased."

Then it says, at p. 1800:

> "The testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets which he may sever from the general mass of his property for that purpose; and then, in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation."

Although the author cites *Ex parte Garland* (1), he does not appear to me to deal directly with the question I have to deal with, which is, what is the nature of the right of the creditors against the assets specifically appropriated by the testator for the purpose of carrying on the trade. I am, therefore, really thrown back on the authority of Turner, L.J. If the right of the creditors is, as is stated by Turner, L.J., the right to put themselves, so to speak, in the place of a trustee who is entitled to an indemnity, of course, if the trustee is not entitled except on terms to make good a loss to the trust estate, the creditors cannot have a better right. They do not get some additional benefit so as to avoid a supposed injustice, but the injustice to be avoided is the injustice of the cestuis que trust walking off with the assets which have been earned by the use of the property of the creditor; but where the cestuis que trust does not get that benefit there is no injustice as between him and the creditor, and there is no reason for the court interfering at the instance of creditors to give them a larger right than that which they bargained for, namely, their personal right against the trustee.

It appears to me, therefore, that if the trustee has no such right in such a case, he has none here. The particular case before me is peculiar. It appears by the evidence, and it is the fact, that the executor carried on the Cambridge business in his own name and not in the name of the infant, which was strictly in accordance with the terms of the will, for I do not suppose he could carry it on in any other way. By the will the testator allowed him to make use of one-eighth of the residue for the purpose of carrying on the business on behalf of the legatee, who was an infant of the name of Neill, during his minority; then Neill, on his attaining twenty-one, was to be allowed to take the stock-in-trade, if he thought fit, not at its then value, but at its value at the testator's death, and all the rest fell into residue. But the executor and trustee did not follow the will, for, as I said before, he carried on business in his own name as executor, and used the assets then in the business. He did not do what the testator told him to do, namely, to collect the book debts and throw them into general residue with the business, and then make use of one-eighth of the residue; he kept no separate banking account, so as to know the actual sums used in the business, but he carried on the business as it had been carried on before. Whether that makes any difference or not it is immaterial now

to inquire, but that is what he actually did. He carried on the business, and in carrying it on he received £764 16s. 1d. more profits than he has accounted for, and this amount he owes the estate. Besides that, he was carrying on the London business belonging to the estate. From that and other sources he received £1,668 3s. 1d. more than he has accounted for, so that he is a very large defaulter. It is manifest that he could not take one penny out of this estate by way of indemnity until he made good his default. Therefore, unless the creditors can be in a position to show—as to which there is no evidence before me—that there were profits from carrying on the business to an amount exceeding the deficit, so that something were gained by the use of these assets, it does not appear to me that they can be entitled to anything. However, as the facts on this point do not appear, I will give the creditors liberty to present a petition within a limited time, if they think they can support it, and I will not allow the assets to be distributed until they have had time to present their petition. I do not think it is a case to make the creditors pay costs. The summonses will, therefore, be dismissed without costs.

Solicitors: *Dod & Longstaffe*; *Ward, Mills, Witham & Lambert*; *Peacock & Goddard*; *Thompson, Son & Brooks*; *Lindsay, Mason & Greenfield*; *Ramsden & Austin*; *Risley & Stoker.*

[*Reported by* G. Welby King, Esq., *Barrister-at-Law.*]

PEARSON *v.* COX AND OTHERS

[Court of Appeal (Lord Coleridge, C.J., Bramwell, B., and Brett, J.), April 28, 1877]

[Reported 2 C.P.D. 369; 36 L.T. 495; 42 J.P. 117]

Negligence—Independent contractor—Injury caused to plaintiff by negligence of sub-contractor—Liability of contractor—Probability of accident not foreseeable.

The defendants, builders and contractors, removed a hoarding between a building and the highway when the outside work on the building had been completed. Thereafter internal plastering was being done by a sub-contractor employed by the defendants. One of the sub-contractor's employees, in the course of his work inside the building, caused a tool to fall out of a window which struck and injured the plaintiff who was passing along the highway. The jury found that the hoarding had been properly removed, but that the plaintiff's injury was caused by the defendants' negligence in not providing some other protection for the public.

Held: there being no evidence that the falling of the tool was a probable accident which must reasonably have been foreseen by the defendants, they were not liable.

Notes. Referred to: *Watkins* v. *Great Western Rail. Co.* (1877), 46 L.J.Q.B. 817.

As to liability of employer for tort of contractor, see 25 Halsbury's Laws (3rd Edn.) 497 et seq.; and for cases see 34 Digest (Repl.) 196 et seq.

Case referred to:

(1) *Bridges* v. *North London Rail. Co.* (*Directors, etc.*) (1874), L.R. 7 H.L. 213; 43 L.J.Q.B. 151; 30 L.T. 844; 38 J.P. 644; 23 W.R. 62, H.L.; 36 Digest (Repl.) 132, *676.*

Motion by the plaintiff to set aside a judgment of DENMAN, J., sitting with a jury, as far as the defendants Bradley and Barker were concerned, and to enter judgment for the plaintiff.

The defendants Bradley and Barker were contractors for the execution of certain building works on land belonging to the defendant Cox, in Market Street, Nottingham. Until the outside of the building was completed, the works were fenced off and protected from the street by a hoarding. The hoarding was removed when the outside of the building was finished and dressed down to the ground floor. The window sashes were not then in, and the glazing and interior work remained to be done. After the removal of the hoarding, plastering was being carried out in the interior by James Smith, a sub-contractor with the defendants Bradley and Barker, and three workmen employed by Smith. One of the workmen, while walking along a scaffolding set up inside one of the rooms of the building, in order to carry on the plastering, caused one of the planks to spring, and, in consequence, a straightedge, which was placed against it, fell out of the window. The plaintiff was passing in the street underneath, and the straightedge fell on her, causing her serious injury. In an action by the plaintiff against the defendants for damages for personal injuries, the jury found, in answer to questions left to them by the judge (i) that the defendants did not fail to continue the hoarding during a time during which the public safety or convenience required its continuance. (ii) That the injury to the plaintiff was not caused by such failure. (iii) That it was caused by the negligence of the defendants Bradley and Barker in not providing some other protection for the public; and they assessed the plaintiff's damages at £200. Judgment was entered for the defendants.

Buzzard, *Q.C.*, and *Lumley* for the plaintiff.
Mellor, *Q.C.*, and *Stanger* for the defendants Bradley and Barker.

LORD COLERIDGE, C.J.—I am of opinion that the judgment should be affirmed. The jury have found that the hoarding was properly removed, and, therefore, nothing turns on its removal. The first question is whether the dropping of the straightedge happened through the negligence of any person for whom the defendants were responsible. It is admitted that it did not so happen. Therefore, if the defendants are liable, it must be in virtue of some general duty to guard against accidents in the course of the erection of the building. But if there is such a duty, the duty must be to guard against accidents that might reasonably be prevented. There is no evidence that this was such an accident. It does not seem to me obvious in the nature of things that the falling of a tool under the circumstances here described was such a probable incident of the operation of internal plastering that anybody could reasonably have foreseen it. There was certainly no evidence given that such an accident must reasonably have been foreseen. On that ground, I think, the judgment was right; but if anyone was answerable for not providing some protection in the course of the plastering, I do not see any legal ground for casting this duty on the defendants. The liability rests, it seems to me, with the sub-contractors, who had contracted to do the plastering.

BRAMWELL, B.—I am of the same opinion, and for the same reasons. The only way in which the action could be maintained against the defendants would be to contend that the carrying on of the work in the course of which the accident happened was a nuisance to the highway, unless the passers-by were protected in some way. It may be that, when a building is being erected, there is a probability that tools or other things may drop from the scaffolding, and the jury might be justified, either on the evidence of experts or from knowledge of common life, in finding that some protection must be afforded. I do not stop to consider exactly what the protection ought to be, whether a hoarding must be erected, or whether it would be sufficient that a person should be placed there to warn persons off. I will assume that there ought to be a hoarding. In this case, there was a statutory provision requiring a hoarding. But the jury have disposed of any cause of

complaint in respect of that, they have found that the hoarding was properly removed, the external structure being finished.

Was there any other duty cast on the defendants? The internal plastering was the work in the course of which the accident happened. The question is whether a judge is bound to rule, as a matter of law, or to leave it to the jury to find, that the internal plastering of a room without some protection for the passers in the street below involves such a presumable danger to them as to amount to a nuisance to the public highway. It cannot be said that this should be ruled as matter of law. There was no evidence here that such was the case; no testimony of experts was given to the effect that plastering was a dangerous job. I doubt whether it ought to have been left to the jury. To my mind, the meaning of the finding must be that, in the opinion of the jury, there was something in the nature of a nuisance to the highway. I have great misgivings whether there was any evidence to go to them on the subject. But, however this might be, I am clearly of opinion that, if there was any such duty as is suggested in the finding, the duty lay on the parties whose proceedings were, in the course of such a protection, a nuisance to the highway. The builder must guard against dangers that might arise in the course of building; the plasterer must guard against dangers from the plastering. He knows how the work is going to be done, when it will begin, and when it will leave off, and so forth. I cannot see why the defendants should be liable. Therefore, assuming every other question answered in favour of the plaintiff, the last link in the chain fails, and the liability, if any, is on the sub-contractor, not on the defendants.

BRETT, J.—I think that the judgment was right on the ground that when the jury found that the hoarding was rightly removed, there was no evidence of any other negligence to go to the jury. It is admitted that, if the defendants are liable for any negligence, it is some other negligence than the men letting the tool drop, for that was the act of the servant of a sub-contractor. The negligence suggested is that though a hoarding had ceased to be requisite, some other protection ought to have been provided. I do not think that there was any evidence that could properly be left to the jury to show that anyone was bound to protect the window. There was no evidence to be left to the jury that such accident would probably happen, or might be expected to happen, from works such as this carried on by an open window. If there had been, there might have been a question to leave to the jury, viz., whether someone ought to have guarded the public against such a not improbable accident. If there had been such evidence, I should have thought it not so obviously contrary to common sense that the builders having the general contract of the building should be held to have been bound to give that protection. As it was there was no evidence that the accident was one likely to happen, and I cannot see that it was a thing the probability of which is so obvious that it must be known to all the world, and so the jury might take notice of it without evidence. Consequently, on the case as it stands, it might be that the accident was a highly improbable one, and nobody is bound to provide against improbable accidents.

With regard to the opinion I gave in *Bridges* v. *North London Rail. Co.* (*Directors, etc.*) (1), it is a mistake to suppose that, in that case, I meant to say that there is not, in these cases of negligence, a preliminary question for the judge, viz., whether there is any evidence to go to the jury. The opinion I then pronounced most clearly asserts that there is always such a preliminary question. I stated in my judgment (L.R. 7 H.L. at p. 232),

> "Such is the direction to the jury, but before giving this direction it is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish."

I then stated what is the proposition or rule of law which the judge should apply to the evidence in order to determine this question of law, and I stated the proposition to be this:

A "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?"

I saw the difficulty which this proposition involves, and I answered it in this way. I said that, although a judge might be of opinion that, on the facts, he himself would find one way, yet if there is some evidence on which reasonable men might B not unfairly come to an opposite conclusion, the judge should leave that evidence to the jury to decide on. Applying this to the present case, if there was evidence here on which reasonable and fair men might find that the accident might have been foreseen and provided against as one probable to happen, I should not think it right to interfere with the finding of the jury on that point; but I am of opinion that there was no such evidence to go to the jury, and, therefore, I hold that the C defendants are entitled to judgment on that finding.

Judgment for defendants.

Solicitors: *Johnson & Wetherall*, for *Burton, Son, & E. King*, Nottingham; *Taylor & Cooke*, for *Hunt & Williams*, Nottingham.

D [*Reported by* W. APPLETON, ESQ., *Barrister-at-Law.*]

E

R. *v.* PEMBLITON

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Coleridge, C.J., Blackburn and Lush, JJ., and Pigott and Cleasby, BB.), April 25, 1874]

F [Reported L.R. 2 C.C.R. 119; 43 L.J.M.C. 91; 30 L.T. 405; 38 J.P. 454; 22 W.R. 553; 12 Cox, C.C. 607]

Criminal Law—Malicious damage—Evidence—Intention to do unlawful act in relation to property damaged—Malicious Damage Act, 1861 (24 *& 25 Vict., c.* 97), *s.* 51.

G The prisoner, who had been fighting with other persons in the street, threw a stone at them which missed them but broke a window in a house. On an indictment under s. 51 of the Malicious Damage Act, 1861, for "unlawfully and maliciously" committing the damage, the jury found him guilty, but found that he had thrown the stone at the people with whom he had been fighting intending to strike one or more of them, and not intending to break the window.

H **Held:** for there to be a conviction under s. 51 of the Act of 1861, there must be wilful and intentional doing of an unlawful act in relation to the property damaged, and, accordingly, the conviction must be quashed.

Notes. Distinguished: *R.* v. *Welch* (1875), 45 L.J.M.C. 17. Followed: *R.* v. *Faulkner* (1877), 13 Cox, C.C. 550. Distinguished: *R.* v. *Latimer*, [1886–90] All E.R.Rep. 386. Referred to: *R.* v. *Martin*, [1881–5] All E.R.Rep. 699; *Hall* v. I *Richardson* (1889), 6 T.L.R. 71; *Shapiro* v. *La Morta*, [1923] All E.R.Rep. 378; *R.* v. *Cunningham*, [1957] 2 All E.R. 412.

As to malicious damage to property, see 10 HALSBURY'S LAWS (3rd Edn.) 874 et seq.; and for cases see 15 DIGEST (Repl.) 1205 et seq. For the Malicious Damage Act, 1861, s. 51, see 5 HALSBURY'S STATUTES (2nd Edn.) 772.

Cases referred to in argument:

R. v. *Plummer* (1701), Kel. 109; 12 Mod. Rep. 627; Fost. 352; 84 E.R. 1103; 14 Digest (Repl.) 97, *609*.

R. v. *Ward* (1872), L.R. 1 C.C.R. 356; 41 L.J.M.C. 69; 26 L.T. 43; 36 J.P. 453; 20 W.R. 392; 12 Cox, C.C. 123, C.C.R.; 14 Digest (Repl.) 502, *4850.*

R. v. *Haughton* (1833), 5 C. & P. 555; 15 Digest (Repl.) 1214, *12,356.*

R. v. *Monaghan and Granger* (1870), 23 L.T. 168; 11 Cox, C.C. 608; 15 Digest (Repl.) 1222, *12,468.*

Case Stated by the recorder of Wolverhampton.

At the quarter sessions of the peace held at Wolverhampton on Jan. 8, 1874, Henry Pembliton was indicted for that he

"unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry Kirkham,"

contrary to s. 51 of the Malicious Damage Act, 1861.

On the night of Dec. 6, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk" kept by the prosecutor. At about eleven o'clock p.m. the whole party were turned out of the house for being disorderly, and they then began to fight in the street and near the prosecutor's window, where a crowd of from 40 to 50 persons collected. The prisoner, after fighting some time with persons in the crowd, separated himself from them, and removed to the other side of the street, where he picked up a large stone, and threw it at the persons he had been fighting with. The stone passed over the heads of those persons, and struck a large plate glass window in the prosecutor's house, and broke it, thereby doing damage to the extent of £7 12s. 9d. The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. They returned a verdict of "guilty." The recorder respited the sentence, and admitted the prisoner to bail, and prayed the judgment of the Court for Crown Cases Reserved, whether, on the facts stated, and the finding of the jury, the prisoner was rightly convicted or not.

The prisoner did not appear and was not represented.

J. Underhill for the prosecution.

LORD COLERIDGE, C.J.—I am of opinion that this conviction must be quashed. [His Lordship stated the facts, and continued:] The question is whether, under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone coupled with the finding of the jury will do. I think that is not enough. The indictment is framed under the Malicious Damage Act, 1861, s. 51, which relates to malicious injuries to property, and the section enacts that whosoever shall unlawfully and maliciously commit any damage, etc., to or upon any real or personal property whatsoever either of a public or a private nature shall be guilty of a misdemeanour. Section 58 also deserves attention. That enacts:

"Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."

It seems to me that, in both these sections, what was intended to be provided against by the Act is the wilfully doing an unlawful act, and that that act must be wilfully and intentionally done on the part of the person doing it to render him liable to be convicted. Without saying that, on these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet, as they have found that he threw the stone at the people he had been fighting with intending to strike them and not intending to break the window, I think that the conviction must be quashed. I do not intend

A to throw any doubt on the cases which have been cited and which show what is sufficient to constitute malice in the case of murder. They rest on the principles of the common law, and have no application to a statutory offence.

BLACKBURN, J.—I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case B within the common law crime of murder, when we are construing the Malicious Damage Act, 1861, s. 51, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property shall be guilty of a misdemeanour. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is can the prisoner be said, when he not only threw the stone unlawfully but broke the C window unintentionally, to have unlawfully and maliciously broken the window? I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that he was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury D have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window, and that he was reckless whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think, therefore, that the conviction must be quashed.

E **PIGOTT, B.**—I am of the same opinion.

LUSH, J.—I also think that, on this finding of the jury, we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that the prisoner did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it F when he threw it. But they have not so found.

CLEASBY, B., concurred.

Conviction quashed.

Solicitor: *Barrow*, Wolverhampton.

[*Reported by* John Thompson, Esq., *Barrister-at-Law.*]

G

STACEY *v.* LINTELL

[QUEEN'S BENCH DIVISION (Mellor and Lush, JJ.), March 28, 1879]

[Reported 4 Q.B.D. 291; 48 L.J.M.C. 108; 40 L.T. 553; 43 J.P. 510; 27 W.R. 551]

Bastardy—"Single woman"—Married woman living with husband—Mother of bastard child married to man other than putative father at date of application for affiliation order.

A woman who, after being delivered of a bastard child, was married to a man other than the putative father, **held** not to be competent to obtain an affiliation order against the putative father when she was living with her husband.

Notes. The Bastardy Laws Amendment Act, 1872, has been replaced by s. 1 and s. 2 (1) of the Affiliation Proceedings Act, 1957.

Followed: *Tozer* v. *Lake* (1879), 4 C.P.D. 322; *Jones* v. *Davies*, [1900–3] All E.R.Rep. 243. Distinguished: *Boyce* v. *Cox*, [1921] All E.R.Rep. 658. Considered: *Watson* v. *Tuckwell* (1947), 63 T.L.R. 634. Referred to: *Healey* v. *Wright*, [1912] 3 K.B. 249; *Jones* v. *Evans*, [1945] 1 All E.R. 19.

As to who may apply for an affiliation order, see 3 HALSBURY'S LAWS (3rd Edn.) 110 et seq.; and for cases see 3 DIGEST (Repl.) 442 et seq. For the Affiliation Proceedings Act, 1957, ss. 1, 2 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 37, 38.

Case referred to:

(1) *Lang* v. *Spicer* (1836), 1 M. & W. 129; 1 Gale 426; 3 Nev. & M.M.C. 556; 5 L.J.M.C. 60; 150 E.R. 374; sub nom. *Laing* v. *Spicer*, Tyr. & G. 358.

Also referred to in argument:

R. v. *Luffe* (1807), 8 East 193; 103 E.R. 316; 3 Digest (Repl.) 404, *53*.

R. v. *Collingwood* (1848), 12 Q.B. 681; 3 New Mag. Cas. 53; 3 New Sess. Cas. 252; 17 L.J.M.C. 168; 12 L.T.O.S. 105; 12 Jur. 750; 12 J.P.Jo. 309; 116 E.R. 1025; 3 Digest (Repl.) 443, *349*.

R. v. *Pilkington* (1853), 2 E. & B. 546; 21 L.T.O.S. 165; 17 Jur. 554; 1 W.R. 410; 17 J.P.Jo. 388; 1 C.L.R. 945; 118 E.R. 872; sub nom. *Ex parte Grimes*, 22 L.J.M.C. 153; 3 Digest (Repl.) 443, *350*.

Case Stated by Buckinghamshire justices.

At a court of summary jurisdiction sitting at Chipping Wycombe, the appellant, Sarah Stacey, formerly Sarah Cogdell, preferred an information under s. 3 of the Bastardy Laws Amendment Act, 1872, against the respondent, Charles Lintell, charging him with being the father of her bastard child. It was proved that the appellant at the time of the birth of the child mentioned in the said information, namely, in January, 1876, was a single woman, and she deposed that the respondent was the father of the child, and that his wife, within twelve months next after the birth of the child, paid her money, which the appellant considered was intended for its maintenance. Since the birth of the child, but previous to the filing of the information, namely, on Feb. 6, 1878, the appellant had intermarried with, and become the wife of, Edward Stacey, and was at the date of the hearing living with him as his wife.

It was contended on behalf of the respondent that the appellant was not a single woman within the meaning of s. 3 of the Act of 1872, and that an order to affiliate the child could not, under the circumstances, be made on her application.

The justices, in the absence of any decision as to the words "single woman" applying to a married woman living with her husband at the time of the application and hearing, dismissed the information without going into further evidence as to the respondent being the father of the child, or having paid money as alleged in the information, on the ground that the appellant was not entitled to prefer the information or to obtain an order thereon, because she was a married woman and

living with her husband at the time the information was preferred and came on for hearing. The appellant appealed.

Graham for the appellant.
Croome for the respondent.

MELLOR, J.—I am of opinion that the decision of the justices was right, and that the appellant did not come within the definition of a single woman within s. 3 of the Bastardy Laws Amendment Act, 1872. It appears to me that the reasoning in *Lang* v. *Spicer* (1)—although this case is not actually governed by the decision there—shows us that we ought not to hold that a woman who is married at the time of her application for an order is within the contemplation of s. 3. By her marriage her husband becomes liable to maintain her bastard child, and, if she were at liberty also to apply and obtain an order against the putative father, there would be a double liability in reference to the maintenance of the same child. I think, also, that we are within the strict meaning of the words in the section. I think that the intention is that the woman throughout should be a single woman, or at least that she should be so in the sense of those cases where a woman separated from her husband has been held to be a single woman for the purpose of obtaining an order of affiliation. Those cases, however, only show that for the purposes of the Poor Law Acts, a married woman might come within the provision throwing the cost of the maintenance of the bastard of a single woman on the putative father.

LUSH, J.—I am of the same opinion. The policy of the law is to assist the mother in maintaining the child, and to ensure that she shall not throw the cost of it on the parish; and so the word single woman has received an interpretation which enables us to say that it does not necessarily mean "unmarried," but may include a woman separated from her husband, who, during such separation, has had a bastard child, and who, by such separation, has been reduced as it were to the position of a single woman. But the appellant was living with her husband at the time of her application, and, by s. 57 of the Poor Law Amendment Act, 1834,

> "every man who shall marry a woman having a child at the time of such marriage shall be liable to maintain such child as part of his family."

Therefore, as soon as the woman married, the child had a father, a person bound to maintain it. It has been observed that, in s. 5 of the Poor Law Amendment Act, 1844, there was a proviso that no order for the maintenance of a bastard child should be of any force after the marriage of the mother, and that that proviso is purposely omitted in the present Act, whence it is contended that the legislature intended that her subsequent marriage should not invalidate the order. I, however, do not so read the Act. I think that the effect is this, that the order does not now become ipso facto void on the marriage of the woman, but that, if the order has been made while she was single, it may be continued after her marriage, under the order of the justices, until the child is thirteen; that is, whether she marries or not, the order may be kept alive and in force up to that time. That is not this case. The question then is: When the appellant applied, was she in the position of a single woman? I think not; she was not, therefore, capable of applying, for to be within the Act she must be either single or separated from her husband.

Appeal dismissed.

Solicitors: *King & M'Millin*, for *James Batting*, Great Marlow; *D. Clarke*, High Wycombe.

[*Reported by* M. W. MCKELLAR, ESQ., *Barrister-at-Law.*]

NANT-Y-GLO AND BLAINA IRONWORKS CO., LTD. *v.* TAMPLIN

[CHANCERY DIVISION (Bacon, V.-C.), May 4, 1876]

[Reported 35 L.T. 125]

Mortgage—Assignment—Transfer of mortgage for value and without notice to mortgagor—Effect on transferee of equities as between mortgagor and mortgagee.

A mortgage was transferred by the mortgagee for value to T. who had no notice of equitable grounds upon which the mortgagor contended that the mortgage should be set aside.

Held: although the transferee of a mortgage without the mortgagor's concurrence took it subject to the equities affecting the account between the mortgagor and the mortgagee, this rule was displaced if, as here, the transferee acquired the mortgage for value and without notice of the equity.

Notes. As to transfers subject to outstanding equities and charges, see 27 HALSBURY'S LAWS (3rd Edn.) 267–268; and for cases see 35 DIGEST (Repl.) 434–436.

Cases referred to:

(1) *Parker* v. *McKenna* (1874), 10 Ch. App. 96; 44 L.J.Ch. 425; 31 L.T. 739; 23 W.R. 271, L.C. & L.JJ.; 3 Digest (Repl.) 154, *179.*

(2) *Judd* v. *Green* (1875), 45 L.J.Ch. 108; 33 L.T. 597; 35 Digest (Repl.) 435, *1294.*

(3) *Earl of Aldborough* v. *Tyre* (1840), 7 Cl. & Fin. 436; West 221; 4 Jur. 1149; 7 E.R. 1136, H.L.; 25 Digest (Repl.) 300, *1070.*

Also referred to in argument:

Gover's Case, Re Coal Economising Gas Co. (1875), 1 Ch.D. 182; 45 L.J.Ch. 83; 33 L.T. 619; 24 W.R. 125, C.A.; 9 Digest (Repl.) 110, *528.*

Norrish v. *Marshall* (1821), 5 Madd. 475; 56 E.R. 977; 35 Digest (Repl.) 435, *1291.*

Matthews v. *Wallwyn* (1798), 4 Ves. 118; 31 E.R. 62, L.C.; 35 Digest (Repl.) 302, *230.*

Williams v. *Sorrell* (1799), 4 Ves. 389; 31 E.R. 198, L.C.; 35 Digest (Repl.) 437, *1314.*

Chambers v. *Goldwin* (1804), 9 Ves. 254; 1 Smith, K.B. 252; 32 E.R. 600; 35 Digest (Repl.) 420, *1127.*

Gunn v. *Bolckow, Vaughan & Co.* (1875), 10 Ch. App. 491; 44 L.J.Ch. 732; 32 L.T. 781; 23 W.R. 739, L.JJ.; 6 Digest (Repl.) 427, *3003.*

Motion for an injunction.

In July, 1869, James Carlton sold certain coal and ironworks, situate at Blaina, in the county of Monmouth, for £132,000, to the Blaina Coal and Iron Co., Ltd., which was promoted and formed by himself, and of which he was a director. £40,000, part of the said purchase-money of £132,000, was at the request of the company left on mortgage of the Blaina property, at 5 per cent. interest, and accordingly the company executed a mortgage for that amount to James Carlton. The Blaina property adjoined extensive ironworks, which belonged to and were worked by a firm of J. and C. Bailey, and were known as the Nant-y-glo and Beaufort Ironworks. In July, 1871, the plaintiff company was duly incorporated and registered, with a capital of £750,000, divided into 7,500 shares of £100 each, and was established with the object of carrying into effect the two agreements following:

"(a) An agreement, dated July 22, 1871, made between John Richardson and James Carlton of the one part, and George Henry Dean of the other part, for the purchase of the Nant-y-glo and Beaufort Ironworks and property connected therewith.

(b) An agreement, dated July 22, 1871, made between the Blaina Iron and Coal Co., Ltd., of the one part, and the said George Henry Dean of the other part, for the purchase of the Blaina Ironworks."

The agreements provided that £430,000 should be the purchase-money for the Nant-y-glo and Beaufort property, and £220,000 should be the purchase-money for the Blaina property. The mortgage of £40,000 formed part of the consideration agreed to be paid by the plaintiff company to the Blaina Co. for their property, that is to say, the plaintiff company purchased the Blaina property subject to the mortgage, and took upon themselves the liability of discharging the same.

In November, 1872, the original mortgage of £40,000, which was under the seal of the Blaina Co., was exchanged for one under the seal of the plaintiff company. This substituted mortgage bore date Nov. 16, 1872, and was executed by the plaintiff company in satisfaction of the original mortgage, but it was for the same amount and upon the same property and for securing the same original debt, namely, the £40,000 unpaid purchase-money on the original sale by Carlton to the Blaina Co.

In October, 1874, a suit of *Nant-y-glo and Blaina Ironworks Co., Ltd.* v. *Carlton* was instituted by the plaintiff company against James Carlton, Albert Grant, and others, the bill in which alleged that in 1870, the defendants, Carlton and Grant, entered into arrangements for promoting and bringing out the plaintiff company, which they ultimately did; that at the time these transactions were on foot, Carlton was a director and the vice-chairman of the Blaina Co., and that he and Grant were at the same time agents and promoters of the plaintiff company; that Carlton and Grant, on the occasion of the sales of the Blaina works and the Nant-y-glo and Beaufort works to the plaintiff company, severally received and retained out of the purchase-moneys large sums by way of commission and otherwise, which they put into their own pockets; and the bill prayed for a declaration that the defendants, Carlton and Grant, were trustees, agents, and promoters of the plaintiff company in carrying out the sales, and, as such, might be ordered to account for and make good to the plaintiff company all such sums as they had so improperly received and retained. The defendants put in their answers in due course, and the suit was still pending.

On April 8, 1875, Carlton transferred his £40,000 mortgage to F. Tamplin as security for sums to the amount of £20,000, for which Tamplin became liable for Carlton in respect of commercial transactions in no way connected with the subject-matter of the suit of *Nant-y-glo and Blaina Ironworks Co., Ltd.* v. *Carlton*. On April 15th the plaintiff company received notice of the transfer from Tamplin. On June 1 Tamplin served the plaintiff company with the usual notice requiring payment of the mortgage moneys within six months, and that in default of payment he should proceed to exercise his powers of sale. On Sept. 2 the plaintiff company received from Carlton a letter of account, sent with Tamplin's consent, demanding payment of the interest due on the mortgage down to Aug. 28, 1875, which after some demur was paid. On Nov. 25, a few days before the expiration of the six months' notice, the plaintiff company commenced this action against Tamplin and Carlton, the writ of summons being endorsed with a claim that the indenture of mortgage of Nov. 16, 1872, might be set aside, and an injunction granted to restrain the defendants, or either of them, their or either of their agents, from selling the hereditaments comprised in the mortgage, or any part thereof, or taking any proceedings whatever under the mortgage for compelling payment of the sum thereby secured, or any part thereof. The plaintiff company moved for an injunction in the terms of the endorsement on the writ. The defendant Tamplin filed an affidavit denying all knowledge or complicity in the transactions referred to in the suit of *Nant-y-glo and Blaina Ironworks Co., Ltd.* v. *Carlton*, and insisting that he was a purchaser for value without notice.

Kay, Q.C., and *E. S. Ford* in support of the motion.
Sir H. M. Jackson, Q.C., and *Ford North* for the defendant Tamplin.
Swanston, Q.C., and *H. A. Giffard* for the defendant Carlton.

BACON, V.-C.—The case is one by no means without difficulty, but the importance of it is infinitely greater than any difficulties it may present.

The bill in *Nant-y-glo Ironworks Co., Ltd.* v. *Carlton*, and the evidence on this motion, charge the most improper dealings that can be suggested with the property of a joint stock company against not only the plain enactments of the law, but against every principle of good faith and fair dealing between men. Whether that will ever be established or not is a matter which I cannot at present even imagine. I am speaking of it only as a charge, and I most carefully guard myself against expressing any opinion as to the merits of the case or as to the possibility of establishing these charges. The charge is that these gentlemen, or one of them at least, who is in a fiduciary position towards the company, took advantage of his position to put money into his pocket which he could not honestly receive. That is the plain English of the charge. If that is established, then not only the principle of *Parker* v. *McKenna* (1), but the principle of every case in which persons who are in a fiduciary position have been made to account in a court of equity, applies directly, and every shilling so received, if it were so received, the defendants who are charged would be liable for.

The defendant Carlton, in his affidavit, justifies all that he has done. At the hearing of the cause he may succeed in establishing that justification, and then all that is raised by way of imputation against him will be scattered to the winds, and he will be entitled to the relief which the court gives to a man who is unjustly assailed. The other part of the case, that which relates to the defendant Tamplin, is of a totally different character. His case is, as I understand it, this, that being a man engaged in commerce he entered into certain regular and proper transactions with Mr. Carlton, in the course of which he came under liabilities for Mr. Carlton, accepted bills for him, and is at this moment liable for the payment of those bills—for they are current, I think, and some of them fall due in a fortnight—and he takes as a security a mortgage deed, which on the face of it appears to be a perfectly valid instrument. I bear in mind all that I decided in *Judd* v. *Green* (2), and I bear most distinctly in mind what was decided by the House of Lords in *Earl of Aldborough* v. *Tyre* (3).

In *Judd* v. *Green* (2) I was satisfied there were two points to be considered. The first was, whether the plaintiff had been cheated into executing a mortgage deed; the second was, what right the defendants could have to retain that deed, or the property secured by that deed, for some advances which they had made. On the authority of *Earl of Aldborough* v. *Tyre* (3) and on the plain positive evidence in the case, I was satisfied that the plaintiff had executed that mortgage in order that money might be raised upon it, and it came, therefore, not only within the principle but almost the letter of the decision in *Earl of Aldborough* v. *Tyre* (3), that a person who is applied to to lend money on the security of a deed which is executed for the purpose of raising money, cannot be held to more than (and undoubtedly he is so far held) to account for what is due between the borrower and the lender upon the original transaction, or the consideration, upon the account beginning with the sum stated in the security deed.

I have not the least desire to withdraw from anything I decided in *Judd* v. *Green* (2), and I should be sorry to be under the necessity of doing so. In this case I find that Mr. Tamplin is very much in the position of the defendant, not the principal defendant, but the other defendant who held the security, in *Judd* v. *Green* (2). They had advanced their money, as Mr. Tamplin had advanced his money, on what was apparently good security, and were under no obligation to inquire further than to examine the seals and signatures to that deed. I think, therefore, that the relief which the plaintiffs ask in this case can only be granted on the terms of paying to Mr. Tamplin that money which he says is due to him on the mortgage, and which, for all I know, he may have urgent necessity for using to enable him to take up these bills which he has accepted; and I cannot grant the order which I am asked to make on any other terms. That will put an end to the case as against him.

With respect to Mr. Carlton, the case is totally different. The charge against him is, that in November, 1872, some considerable time after 1871, when the transactions were entered into, he took from the company a mortgage for £40,000, the mortgage in question having at that time, if the plaintiff's charge is true, more than £60,000 of the moneys of the company in his pocket. Upon a suit in which the validity of that mortgage, as regards Mr. Carlton, is called in question, without any taking of accounts, without any set-off, without any set-off of unliquidated damages against moneys which are secured by an instrument under seal, the plaintiffs, if they succeeded, would unquestionably be entitled to have that treated as a nullity.

The only order, therefore, which I make now, and I am very sorry to have to deal partially with so serious a case as this, will be that on payment of the £20,000 due to Mr. Tamplin, he and Mr. Carlton will be restrained from proceeding to exercise the powers which are contained in that mortgage deed. That is the only order I make, and it is made without prejudice to any questions whatever between the parties. The costs of all parties will be costs in the cause.

Solicitors: *Shaw & Tremellen*; *W. W. Wynne*; *Phelps & Sidgwick.*

[*Reported by* H. L. Fraser, Esq., *Barrister-at-Law.*]

OKELL *v.* EATON AND OKELL

[Court of Queen's Bench (Sir Alexander Cockburn, C.J., Blackburn, Quain and Archibald, JJ.), November 4, 1874]

[Reported 31 L.T. 330]

Partnership—Borrowing—Right of partner to borrow on credit of firm—Application by partner of borrowed money to own purposes—Liability of firm—Duty on bona fide lender to inquire as to authority of borrower.

Where a partner borrows money on the credit of the partnership and applies it to his own purposes it is no defence to an action by the lender against the partnership that the lender omitted to communicate with the other partners and make inquiries as to the borrowing partner's authority to pledge the partnership credit, provided that the lender acted bona fide and there were no suspicious circumstances which should have put him on inquiry.

Notes: As to pledging partnership credit or assets for private debt, see 28 Halsbury's Laws (3rd Edn.) 507; and for cases see 36 Digest (Repl.) 467 et seq.

Case referred to:

(1) *Loyd* v. *Freshfield* (1826), 2 C. & P. 325; sub nom. *Lloyd* v. *Freshfield*, 9 Dow. & Ry.K.B. 19; 36 Digest (Repl.) 468, *383.*

Also referred to in argument:

Gunn v. *Roberts* (1874), L.R. 9 C.P. 331; 43 L.J.C.P. 233; 30 L.T. 424; 22 W.R. 652; 2 Asp.M.L.C. 250; 41 Digest 275, *1248.*

Motion for a rule nisi to enter a verdict for the defendants on the ground that the verdict was against the weight of the evidence, in an action before Archibald, J., at the Liverpool Summer Assizes, 1874, brought by the plaintiff, Miss Okell, against the defendants, who had been in partnership as cotton dealers, to recover £200, the balance of £300, which had been lent by the plaintiff to one of the partners.

The plaintiff was the sister of the defendant Okell, and they lived together. In January, 1871, the defendant Okell asked the plaintiff for a loan of £300, alleging that the money was wanted for the firm of Eaton and Okell, and was intended to be used for the purposes of the partnership. On the faith of this representation, the plaintiff advanced the sum of £300, without taking any security. Some time afterwards she retained, in part payment of the loan, a sum of money belonging to the defendant Okell which he had placed in her hands, and it was to recover the balance of £200 that this action was brought. The plaintiff had frequently seen the defendant Eaton after the money had been lent, but had never applied to him for payment, or mentioned the subject of the loan to him, until after the partnership between the defendants was dissolved. At the trial, the defendant Okell swore that he had handed over the £300 to Eaton for the purposes of the partnership; but the defendant Eaton was called and denied that he had ever received any of the money. The jury, in answer to questions left to them by the judge, found that the money was borrowed by the defendant Okell from the plaintiff, in the name of Eaton and Okell; that the money was not paid over to the defendant Eaton, nor used for the purposes of the firm; that the plaintiff had not known that the money was used by the defendant Okell for his own purposes, instead of for the purposes of the firm. In answer to the question: "If the money was borrowed in the name of the firm, and misapplied, was there negligence on the part of the plaintiff in lending the money without communicating with the defendant Eaton?" the jury found that there was negligence on the part of the plaintiff. The judge, on these findings, directed the verdict to be entered for the plaintiff for £200, reserving leave to move to enter it for the defendants.

Charles Russell, Q.C., for the defendants.

SIR ALEXANDER COCKBURN, C.J.—I am of opinion that there ought to be no rule. ARCHIBALD, J., is satisfied with the verdict, and I see no reason for disturbing it on the ground that it is against the weight of evidence. With regard to the argument, that the negligence of the plaintiff in advancing the money to one of the defendants without communicating with the other, deprives her of the right to recover against the partnership, it is clear that where one of the members of a firm of partners applies for a loan for the purposes of the partnership, it is not incumbent upon the person to whom the application is made to make inquiries as to whether the applicant has authority from the other partners to borrow money for the firm, unless there exist facts which ought to lead to the inference that the partner who applies for the loan is acting fraudulently towards his co-partners, and in this case there were no circumstances which ought to have led to such an inference.

BLACKBURN, J.—I am of the same opinion. The evidence showed that the money was advanced by the plaintiff to her brother, and the questions whether she bona fide lent the money for the purposes of the partnership, and whether she had notice of its misapplication, were entirely for the jury; they were left to the jury, who on these points found in favour of the plaintiff. Counsel for the defendants appears to have gone to the jury on the ground that the plaintiff, Miss Okell, never spoke to the defendant Eaton on the subject of the loan, and to have urged, not that her silence was evidence of mala fides or of knowledge of the misapplication of the money, but that it was negligence, and the jury found that it was; but this does not entitle the defendants to the verdict, for where it is within the scope of the purposes of the partnership to borrow money, one partner has authority to borrow on behalf of the partnership, and no duty is cast upon the person advancing the money to make any further inquiries. *Lloyd* v. *Freshfield* (1) is no authority for anything of the kind, for there the advance was made to the defendant Kaye on his own cheque, and the money was paid by him to the credit of his account at his private banker's, who was not the banker of the firm. The report of the motion for a new trial in 2 C. & P. 325 is not very intelligible, and it differs from the

other report of the same case in 9 Dow. & Ry.K.B. 19, in which the expressions attributed to Bayley, J., do not appear.

QUAIN, J.—I am of the same opinion.

ARCHIBALD, J.—I am of the same opinion. There was evidence on both sides for the jury, and they found that the loan was made bona fide. I reserved the point as to the effect of the plaintiff's negligence, in consequence of the statement of the law in Collyer on Partnership (2nd Edn.), pp. 321, 322, which was cited by counsel for the defendants at the trial, and in deference to the authority of *Lloyd* v. *Freshfield* (1), but I am convinced that that case, when examined, does not support the contention on behalf of the defendants.

Rule nisi refused. Judgment for plaintiff.

LEVY *v.* WALKER

[Court of Appeal (Sir George Jessel, M.R., James and Bramwell, L.JJ.), February 5, 1879]

[Reported 10 Ch.D. 436; 48 L.J.Ch. 273; 39 L.T. 654; 27 W.R. 370]

Business—Goodwill—Sale—Right of purchaser to use firm name.

In 1875 C. and W. carried on a partnership business in London in the firm name of C. and W. On Nov. 20, 1877, C. married L. and they carried on a similar business in Paris in the firm name of C. et Cie. The London partnership was dissolved and by order of the court an assignment was made to the purchasing partner, W., of all the right share and interest of the non-purchasing partner, C., in the business carried on by the firm of C. and W., with the leasehold premises, trade fittings, fixtures, stock-in-trade, and goodwill, including the right to represent that the business formerly carried on by C. and W. was now carried on by W. Thereafter W. carried on the London business under the old firm name of C. and W., and L. and his wife sought to restrain him, by injunction, from doing so.

Held: the assignment to W. of the goodwill and business of C. and W. carried with it the exclusive right to the use of the trade name which was one of the assets of the business, and L. and his wife had no right to restrain W. from using the firm name.

Per James, L.J.: The sole right to restrain a person from using any name they please in their trade or business is when the name adopted, whether fictitious or real, is calculated to do injury to any other person by representing that such business is the business of that other person.

Notes. Applied: *Chappell* v. *Griffith* (1885), 53 L.T. 459. Considered: *Chatteris* v. *Isaacson* (1887), 57 L.T. 177. Distinguished: *Gray* v. *Smith* (1889), 43 Ch.D. 208. Applied: *Bodega Co.* v. *Owens* (1889), 7 R.P.C. 31. Considered: *Burchell* v. *Wilde*, [1900] 1 Ch. 551. Referred to: *Thynne* v. *Shove*, [1886–90] All E.R.Rep. 874; *Jennings* v. *Jennings*, [1898] 1 Ch. 378; *Re David and Matthews*, [1895–9] All E.R.Rep. 817; *Pomeroy* v. *Scalé* (1906), 23 T.L.R. 170; *Waring and Gillow, Ltd.* v. *Gillow and Gillow, Ltd.* (1916), 32 T.L.R. 389.

As to injunctions after dissolution of partnership, see 28 Halsbury's Laws (3rd Edn.) 560; and for cases see 36 Digest (Repl.) 603 et seq.

Case referred to:

(1) *Millington* v. *Fox* (1838), 3 My. & Cr. 338; 40 E.R. 956, L.C.; 28 Digest (Repl.) 924, *1578*.

Also referred to in argument:

Banks v. *Gibson* (1865), 34 Beav. 566; 6 New Rep. 373; 34 L.J.Ch. 591; 29 J.P. 629; 11 Jur.N.S. 680; 13 W.R. 1012; 55 E.R. 753; 36 Digest (Repl.) 603, *1644*.

Churton v. *Douglas* (1859), John. 174; 2 L.J.Ch. 841; 33 L.T.O.S. 57; 5 Jur.N.S. 887; 7 W.R. 365; 70 E.R. 385; 36 Digest (Repl.) 604, *1650*.

Webster v. *Webster* (1791), 3 Swan. 490, n.; 36 E.R. 949, L.C.; 36 Digest (Repl.) 492, *602*.

Maxwell v. *Hogg*, *Hogg* v. *Maxwell* (1867), 2 Ch. App. 307; 36 L.J.Ch. 433; 16 L.T. 130; 31 J.P. 659; 15 W.R. 467, L.JJ.; 35 Digest (Repl.) 786, *13*.

Clark v. *Freeman* (1848), 11 Beav. 112; 17 L.J.Ch. 142; 11 L.T.O.S. 22; 12 Jur. 149; 50 E.R. 759; 28 Digest (Repl.) 864, *935*.

Emperor of Austria v. *Day and Kossuth* (1861), 3 De G.F. & J. 217; 30 L.J.Ch. 690; 4 L.T. 494; 7 Jur.N.S. 639; 9 W.R. 712; 45 E.R. 861, L.C. & L.JJ.; 28 Digest (Repl.) 862, *920*.

Lewis v. *Langdon* (1835), 7 Sim. 421; 4 L.J.Ch. 258; 58 E.R. 899; 36 Digest (Repl.) 603, *1643*.

Appeal by the defendant from an order of HALL, V.-C., granting the plaintiffs an interim injunction, in the terms sought in their action, to restrain the defendant from carrying on business, either alone or in partnership with any other person, under the style or firm name of Charbonnel and Walker and from holding out that the plaintiffs or either of them were or was in partnership with the defendant. The motion for the injunction was dismissed on appeal and was by consent treated as the trial of the action which was accordingly dismissed.

In 1875 Mlle. Charbonnel and the defendant, Miss Minnie Walker, entered into partnership, and carried on business at 169, New Bond Street, under the style of Charbonnel and Walker, Parisienne confectioners and bonbon manufacturers. On Nov. 20, 1877, Mlle. Charbonnel married S. A. Levy, and they went to reside in Paris, where they started a similar business in the Avenue de l'Opera, under the name of Charbonnel et Cie. In an action of *Walker* v. *Levy* a judgment was delivered on April 16, 1878, by consent, by which the partnership was dissolved, and accounts were directed, and it was further ordered that the partnership business and the leasehold premises, trade fittings, fixtures, stock-in-trade, goodwill and business be forthwith sold as a going concern to Miss Walker or Mr. and Mrs. Levy, whichever should be the highest bidder, and that a proper deed of assignment be executed by the non-purchaser. At the sale on May 22, 1878, Miss Walker was the highest bidder, and thus became the purchaser of the partnership business, and under the direction of the court Mr. and Mrs. Levy assigned to her the leasehold premises, and all their right, share, and interest in the said business in New Bond Street, and the goodwill thereof, including the right to represent that the business as recently carried on by Mlle. Charbonnel and Miss Walker was now being carried on by Miss Walker. The business was afterwards carried on by Miss Walker, upon the same leasehold premises, under the old style of Charbonnel and Walker, and in November, 1878, the plaintiffs, Mr. and Mrs. Levy, issued a writ in this action against the defendant, Miss Walker, for an injunction to restrain her from carrying on the business under the firm name of Charbonnel and Walker, and an interim injunction was granted to the plaintiffs on their motion. The defendant appealed.

Hastings, *Q.C.*, and *Chubb* for the defendant.

W. Pearson, *Q.C.*, and *Pauli* for the plaintiffs.

SIR GEORGE JESSEL, M.R., stated the terms of the injunction appealed from, stated the facts, and continued: Speaking with deference to HALL, V.-C., I am

A utterly at a loss to conceive on what ground his judgment was founded. The plaintiffs are under no liability by reason of the defendant, Miss Walker, so carrying on the business. The plaintiffs are not actual partners in the firm of Charbonnel and Walker, the dissolution decreed by the court has been duly advertised, and no persons dealing with the defendant for the first time can make Mr. and Mrs. Levy liable. Notice has been given to all the persons who dealt with the firm at the B dissolution, and none of them can make the plaintiffs liable. What conceivable interest the plaintiffs have in the question as to the firm name under which the defendant chooses to carry on the business I, for one, have been unable to ascertain. She has the right to use the name of Charbonnel and Walker, unless someone else has a title to prevent her so using it. The plaintiffs appear to me to have no such right. Even if their name had remained Charbonnel, I do not see, by not carrying C on business in London, and not being interfered with in the use of any trade mark of theirs, that they could interfere with anybody who chooses as a fancy name to carry on business under the name of Charbonnel and Walker. It appears to me the plaintiffs have no right to sue, and that on this ground the injunction should have been refused, which order must now be made.

D **JAMES, L.J.**—I am of the same opinion. It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark. That is to say, somebody has a right to say, "You must not use a name, whether fictitious or real, or a description, whether true or not, which is intended to represent, or calculated to represent to the world that your business E is my business, and therefore deprive me by a fraudulent mis-statement of yours from the profits of the business which would otherwise come to me." That is the sole principle on which the court interferes. The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything. If there is any misleading, that may be F for the criminal courts of the country to take notice of, or for the Attorney-General to interfere with, but the right of a plaintiff is a right to prevent a person from representing himself as being the person who had already established a name, and reputation by the name.

In this case, how it is possible that persons carrying on business in Paris under G the style of Charbonnel et Cie., which they did not carry on before, or contemporaneously, or subsequently to, the carrying on of the business in the name of Charbonnel and Walker, can pretend to say that persons conducting an old business of Charbonnel and Walker in London are representing themselves as being the firm of "Charbonnel et Cie." in Paris, I am utterly at a loss to conceive. If that is so, it seems there is really no ground for this suit. But there is another point upon H which I myself cannot entertain any doubt, which is this, that the assignment of the goodwill and business of Charbonnel and Walker did convey the right to use the name of Charbonnel and Walker, and the exclusive right to use that name as between the vendor and the purchaser of that business. Whether it would prevent a person from using the name of Charbonnel afterwards, or anything else, I do not say; but the trade name made up of parts of two real names, as SIR GEORGE I JESSEL, M.R., says, whether it was entirely a fictitious name can make no difference, was the name of the business, and that business was sold. That was a name with which every article sold might have been impressed, just as in *Millington* v. *Fox* (1), where the name was considered as part of the designation of the article sold.

I hold that the sale of the goodwill and business did convey the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and as against all the world if any person in that world were representing himself as carrying on

the same business. I am of opinion that HALL, V.-C., ought not to have granted the injunction, and that it must be dissolved.

BRAMWELL, L.J.—I am of the same opinion. I suppose an injunction would be granted to prevent damage or the violation of the infringement of a right. I cannot see that any right is violated, and I cannot conceive a possible case of damage from what has been done. It seems to me that no action could possibly lie at common law for that which is made the subject of this injunction, and, therefore, I entirely agree with the judgment which has been pronounced.

Appeal allowed.

Solicitors: *Lee & Pemberton*; *Richard Furber.*

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

PHILLIPS *v.* LONDON AND SOUTH WESTERN RAIL. CO.

[COURT OF APPEAL (Bramwell, Brett and Cotton, L.JJ.), December 17, 1879]

[Reported 5 C.P.D. 280; 49 L.J.Q.B. 223; 42 L.T. 6; 44 J.P. 217]

Damages—Assessment—Direction to jury—"Fair and reasonable compensation"—Matters to be considered.

Negligence—Damages—Pecuniary loss—Pain and suffering—Matters to be considered.

The plaintiff, a physician with a large practice, was injured while a passenger on the defendants' railway. In an action by him for damages for negligence, there was evidence that for three years prior to the accident his professional earnings amounted to some £5,000 a year, that this sum included several large special fees from patients, and that he had been incapacitated from following his profession for two years and was likely to be so incapacitated for a further period of one-and-a-half to two years.

Held: the jury should be directed that damages could not be assessed according to an exact mathematical calculation, but should be a fair and reasonable compensation for the plaintiff's pecuniary loss and for his pain and suffering, and that, in arriving at a figure, they should consider all the circumstances, including the plaintiff's income at the time of the accident and the period during which he was unable to work. The plaintiff's special fees were a matter rightly to be considered by the jury.

Notes. Considered: *Johnston* v. *Great Western Rail. Co.*, [1904] 2 K.B. 250; *Roach* v. *Yates*, [1937] 3 All E.R. 442; *Heaps* v. *Perrite, Ltd.*, [1937] 2 All E.R. 60; *Harris* v. *Bright's Asphalt Contractors, Ltd.*, [1953] 1 All E.R. 395. Referred to: *Price* v. *Glynea and Castle Coal and Brick Co.* (1915), 85 L.J.K.B. 1278; *Smith* v. *Schilling*, [1928] 1 K.B. 429; *Ley* v. *Hamilton* (1934), 151 L.T. 360; *Flint* v. *Lovell*, [1934] All E.R.Rep. 200; *Rose* v. *Ford*, [1937] 3 All E.R. 359; *Shepherd* v. *Hunter & Co.*, [1938] 2 All E.R. 587; *Henderson* v. *Watmough & Co.* (1939), 161 L.T. 233.

As to prospective damages, see 11 HALSBURY'S LAWS (3rd Edn.) 222–223; and for cases see 36 DIGEST (Repl.) 198.

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

(2) *Rowley* v. *London and North Western Rail. Co.* (1873), L.R. 8 Exch. 221; 42 L.J.Ex. 153; 29 L.T. 180; 21 W.R. 869, Ex. Ch.; 17 Digest (Repl.) 185, *808*.

Also referred to in argument:

Hobbs v. *London and South Western Rail. Co.* (1875), L.R. 10 Q.B. 111; 44 L.J.Q.B. 49; 32 L.T. 252; 39 J.P. 693; 23 W.R. 520; 17 Digest (Repl.) 115, *274*.

Appeal from the Common Pleas Division. The plaintiff was a physician with a large practice in London, and independently of his professional earnings he had a considerable private income. The action was brought to recover compensation for severe injuries suffered by him in a collision which took place on the defendants' railway on Dec. 8, 1877, between an engine and a train in which the plaintiff was a passenger. The case was first tried before Field, J., when the jury found for the plaintiff, and awarded £7,000 damages. This verdict was set aside and a new trial granted by the Queen's Bench Division, on the ground that the damages were insufficient. This decision was affirmed by the Court of Appeal.

The case was tried a second time before Lord Coleridge, C.J., and a special jury. In summing-up, Lord Coleridge told the jury that there was no answer to the prima facie case of negligence, and proceeded as follows:

"It is, therefore, really and truly in fact a mere question of the assessment of damages, what, under the present circumstances, it is fair and reasonable the defendants should pay to the plaintiff by way of compensation for the injuries he has sustained. . . . It is to be such compensation as, under all circumstances of the case, the jury who have to assess it think is fair and reasonable. . . . I am afraid anything more definite or intelligible I am unable to lay down. It is a matter in which really the common sense of the country as represented by you twelve gentlemen in the jury-box must determine. . . . An absolute compensation is not the true measure of damage in this case . . . it is not to be an absolute compensation, but a fair and reasonable amount of damages. . . . Now what is really that fair and reasonable amount? It must be made up . . . of several ingredients. I do not mean that if you give, I will take a round sum, say £100 . . . you must go so far as to give £25 for pain and suffering, £25 for loss and damage, £25 for future suffering, and £25 for the chance of not doing work again. By saying the compensation consists of so many ingredients I do not mean to say you must put a fixed sum against each of these, but there are certain leading considerations to be taken into account by you in arriving at the lump sum which at last it will be your duty to assess in this case. Now, one of these is the [plaintiff's] pain and suffering; . . . Then there is the loss, at any rate for two years, of his business. Now, what is that business?"

The Chief Justice then directed the attention of the jury to the evidence as to the plaintiff's professional income, which during the three years before the accident, after deducting all the expenses had been about £5,000 a year. He then proceeded as follows:

"But then it is said that is too much, because [included here] are large payments which have come from nine clients, and in the nature of things, it is not likely that these sums will recur. . . . [His Lordship exemplified these special payments, and continued]: Now, I do not see at all why the confidence of the gentlemen who make these large payments should diminish, or their generosity either, and I do not quite see why . . . the same gentlemen should not pay £5,000 over again . . . I really do not see why these should be the only nine people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous; but you must give it such weight as you think fit. Subject to that observation it comes to this, that it is about £5,000 a year, and it has

been an increasing practice. . . . from [the time of the accident] . . . he has not earned a shilling, and for that some very considerable compensation is to be awarded by the company. Now then comes a far more important question, and that is, what is to be his future?"

LORD COLERIDGE then commented on medical evidence and said that as to compensation for loss of future income the injury must take into consideration the probability that for a year and a half to two years more the plaintiff would be unable to follow his profession.

The jury found for the plaintiff and awarded £16,000 damages. The Common Pleas Division refused a rule for a new trial, and the defendants now moved in the Court of Appeal for a rule nisi for a new trial on the grounds of misdirection, and that the damages were excessive.

Serjeant Ballantine (*J. Brown*, *Q.C.*, and *Dugdale* with him) for the defendants.

BRAMWELL, L.J.—I am of opinion that there ought to be no rule. I will deal first with the last objection, namely that LORD COLERIDGE directed the jury that they were to take £5,000 a year as the plaintiff's net income, and were not to make any deduction in respect of the precarious income composed of special emoluments. If the Chief Justice had said this it would have been inaccurate, for it would be fairly open to the jury, in estimating the plaintiff's average income, to say, "we cannot take in the special fees, for they are specialities which may not occur again." On the other hand it would be equally wrong to say that the special fees ought to be altogether excluded from consideration. I am quite certain that the possibility or probability of their recurrence ought to be included. A physician may not be able to designate any other patient who will pay him £500; the probability is, however, that in the course of his life he will have not only one but many other similar fees. LORD COLERIDGE did not tell the jury that they were not to take into account the precarious nature of these fees but gave them what was a most proper direction.

I will now deal with the main question. In many cases where a complaint is made of the amount found by a jury it is impossible to get at the elements on which the computation was made. If such had been the case before us, I should say that as the Chief Justice and the Common Pleas Division are satisfied with the findings at the second trial it would require a very strong case indeed to induce this court to set aside a verdict so given and affirmed. A case is nearly always better tried on the second occasion, the points in dispute being better understood. If we could not guess the ground on which the jury proceeded, I should say there was nothing so wrong in what they had done as to induce the court to disregard the opinions of LORD COLERIDGE and of the other judges before whom, after a second trial, the case has come, and who are satisfied with the verdict. But I do not think that we ought to dispose of the case in that way, because we can judge tolerably well the ground upon which the jury proceeded. I will assume that they gave the plaintiff £1,000 for his pain and suffering, and three years' income at the rate of £5,000 a year. I think that is right. They ought to have given him as much as that, and the only misgiving which I have is whether they ought not to have given him more.

What is the proper direction for a judge to give to a jury in cases of this description? I think the direction given by LORD COLERIDGE in the present case is the usual and proper one. It is the common form of summing-up, which, after trying a very great number of these cases, I have never known questioned until now. It comes to this: "You must give the plaintiff compensation for his money loss; you must give him compensation for his pain and suffering; of course it is almost impossible for you to do what can strictly be called 'compensate' him, but you must take a reasonable view of the case, and consider under all the circumstances what is a fair sum to give him." For instance, one often has the case of a labourer who has suffered an injury, which has kept him out of work for, say, six months. He was making 25s. a week at the time when the injury

A was done; then you tell the jury "that is twenty-six weeks at 25s. a week." If he says that for ten weeks more he has only been able to earn 10s. a week, you say to the jury "that is ten times 15s." He may also say that he will not be able to get into full work again for twenty weeks, and then you say to the jury "that is twenty times 15s." To these amounts something is added for his doctor's expenses, and in that way one arrives at some kind of compensation for his B pecuniary loss.

In the case of a professional man, and where perhaps it may be impossible to arrive at any definite term during which the plaintiff will be unable to work. In that case the direction to the jury should be that they must consider for themselves how long the plaintiff will be incapacitated from practising his profession. They should also take into account the chance of his losing employment if he had not had C an accident. After all, the fundamental direction is to give the man a fair and reasonable compensation for his pecuniary loss. I have always understood this to be the right direction, and I have never heard it questioned until now, nor am I able to see in it any such wrong or anomaly as counsel for the defendants has pointed out. It is said to be unreasonable that where two persons are carried for the same fare, one of them if injured should recover £10,000 against the company, D while the other would only be able to recover £1,000. It may be unreasonable as regards the two passengers inter se, but it is not unreasonable as between the railway company and the public. The company have taken their powers on certain conditions, and one of them is that if they break their contracts to carry they shall make compensation to persons injured by reason of the breach. If one man who has paid a half-crown fare recovers £1,000 damages from the company, and E another man who has paid the same fare recovers £10,000, the legitimate conclusion may be that, as regards the two passengers inter se, the former may have paid too much for his ticket, and the latter may have paid too little. Nevertheless they have between them paid enough to compensate the company for the risk which they incur of becoming liable for injury to passengers. Here the defendants have entered into a contract, and having broken that contract they must indemnify the person F with whom they made the contract for the loss which has been occasioned to him.

In conclusion, I wish to point out what to my mind is the utter dissimilarity between the present case and that of *Hadley* v. *Baxendale* (1). In that case there had been delay in the delivery of a chattel, and the plaintiff put forward a claim for certain damages, not for injury done to the chattel itself, but consequential upon the delay which had taken place. In the present case the damages claimed G are for injury done to the individual as a passenger, and are not damages claimed in consequence of his non-arrival at a particular place at a particular time. The analogy would apply more to a case where there were goods of different values than to a case of consequential damages for delay, such as *Hadley* v. *Baxendale* (1). The Carriers Act, 1830, allows railway companies to charge an additional sum for insurance on a declaration being made of the value of certain specified kinds of H goods, but there are many classes of goods which are not within the Act, and, although of different values, such goods are carried at the same rate. I have gone into these different matters, which are perhaps not of any great consequence, because the whole effect of our judgment is that the set form of summing-up has been observed in the present case, and there is no ground for supposing that the jury have given anything as damages beyond what that summing up authorises and I directs; I am, therefore, of opinion that a rule must be refused.

BRETT, L.J.—I am also of opinion that we are bound to refuse a rule in this case. After the very great number of times I have had occasion to consider this question, I can have no doubt that the direction to the jury in this case was right according to the recognised rule of law. The action was brought for a breach of contract to carry a passenger safely, and damages are awarded only for breach of that contract. The fundamental proposition undoubtedly is that the plaintiff is to receive such damages as will compensate him for the injury ensuing from the

breach of contract. The injury is complicated; it is an injury to the body, and in addition a further injury consisting of pecuniary loss.

There has been for years a recognised mode of leaving the question of damages to the jury. In the present case LORD COLERIDGE left it to them in this form—that the damages were to be such compensation as in all the circumstances the jury thought fair and reasonable, but that they must not attempt to give an absolutely perfect compensation with regard to the money loss. I think both these propositions are correct, and that the reason why that general mode of leaving the question to the jury is right is that human ingenuity has not been able to formulate a more correct proposition. If one were to try to make a more correct proposition one would be sure either to state something wrong or to omit something that ought to be stated. The law is settled by authority; in *Rowley* v. *London and North Western Rail. Co.* (2) it was held wrong to tell the jury that they could or ought to try to make an absolute compensation. That, I apprehend, means a perfect mathematical or arithmetical compensation. The reason is that it would be impossible for the jury to have before them all the circumstances which would enable them to make such a compensation. In that case KELLY, C.B., tried to direct the jury to a perfect compensation by telling them to calculate an annuity which would produce for a certain number of years, or for such years as they might think necessary, such a sum as the plaintiff was making yearly. The Court of Exchequer Chamber thought the direction wrong, because in attempting to make a perfect compensation the jury would of necessity leave out a number of circumstances which ought to be taken into consideration, but which no human ingenuity and no evidence which could be produced could bring before them. I am strongly of opinion that the decision in that case was right. We are, therefore, bound by a decision of a court of co-ordinate jurisdiction with the present Court of Appeal, to hold that the direction of LORD COLERIDGE was right.

As to the direction that the compensation to be awarded must be such as under the circumstances of the case should be fair and reasonable: that, as I have said, has been the recognised mode of summing up, because it is not possible to make a better one. However, a judge would not properly assist a jury if he only left that bare proposition to them. It is necessary to point out some of the circumstances which they are to take into consideration, and where the loss has been suffered by a person having a professional or trading income, that one of the principal factors to be considered is, what is the amount of that income. Counsel for the defendants contends that the jury ought not to take the plaintiff's income at the time of the accident into account at all. That would be strange indeed. If LORD COLERIDGE had told the jury, as a matter of law, that if it had not been for the accident the plaintiff must have made £5,000 a year during the time he was disabled, I should have thought that a wrong direction, for although the plaintiff is still alive, yet a thousand circumstances might have prevented him from making that income if he had remained well, and the accident had not happened. But LORD COLERIDGE did not direct the jury in that way. He told them that they were to consider what was the average income which the plaintiff had been making, that the defendants had thrown no real doubt upon the plaintiff's evidence that he had practically been making £5,000 a year, and that, unless they could see any circumstances which in any probability would have made that income less, they might well take it that the plaintiff would have made that income during the time he was disabled. I think that was right. BRAMWELL, L.J., has pointed out generally how the earnings of a working man ought to be dealt with in similar cases. I agree with his view subject to this: that his description assumes that there were no circumstances which would have prevented the working man from earning the same wages in the period during which he was disabled. If the plaintiff had worked in a mill in Lancashire, and during the time between the accident and the trial all the mills in Lancashire had been closed, the jury ought to consider that fact and say whether the plaintiff would have earned the 25s. a week during that period if he had not been injured. As to compensation for money loss for the time

to come, supposing the plaintiff had not been injured, there are a thousand circumstances which might have prevented him from earning a fixed income. He might have been ill, he is subject to the ordinary vicissitudes of life, and when one considers all those circumstances, of which no evidence could possibly be given, it is beyond the region of practical life that any accurate arithmetical compensation could be given. No doubt the jury would be wrong if they did not consider those circumstances as upon the doctrine of chances. It is impossible to give evidence of them, and the judge can only leave it at large to the jury, telling them that all the circumstances and possible chances are to be taken into account and give a fair and reasonable compensation. I agree that it is a wrong direction to the jury that the proved income is the basis—in the sense that it is to be the only basis—of compensation; but LORD COLERIDGE did not so direct the jury. He only said to them that it was a fact, or one of the circumstances which ought to be taken into account.

It is said that there is an anomaly because a small practitioner, who had paid the same fare as another person who was making a large professional income, might receive £500, while the other received £15,000 for similar injuries caused by the same accident. But although the personal injury is the same in both cases, the pecuniary loss is not; for the small practitioner might lose perhaps £300, while the other lost £13,000. It is right to say that to a working man and to a person of great wealth the same amount of compensation should be given for personal injuries, if the pain and suffering is the same. You should give to each of them the amount of the expenses actually sustained, but with regard to the pecuniary loss incurred, you should give each as reasonably and nearly as you can something to repay the loss actually sustained. I can see no anomaly or injustice in this mode of leaving the case to the jury. The fundamental reason for this mode of summing-up I have always understood to be that no more accurate definition can be given, and the law does not require an impossibility. I think, therefore, that the only way in which the question can be left to juries in the future is the way in which it has been left to them for so many years in the past.

COTTON, L.J.—I agree that there should be no rule.

The plaintiff having established his right to recover judgment against the defendants is entitled by way of damages to a fair and reasonable compensation for his suffering and for his money loss. The defendants complain of misdirection as to the latter head of compensation, and their contention amounts to this, that in estimating the compensation the income which the plaintiff was earning ought to be entirely disregarded. That amounts to saying that in estimating the money loss it is necessary to leave out of consideration that which really constitutes the money loss, viz., the loss of that income which if it had not been for the accident the plaintiff would have earned, and which he was prevented by the accident from earning. I am of opinion that it is impossible to disregard the income in estimating the money loss.

Then there remains the question whether the income was properly taken into account in the present case. I propose to state my view as to how it ought to be taken into account. It is impossible by any mathematical calculation to arrive at a fair and reasonable compensation for money loss, but the nature of the income must be taken into account, and the probability of its continuance, how far it depends on favour, and how far on exertion which may or may not be carried on for long, and having taken into consideration all the circumstances affecting the income, the jury ought to say what is a reasonable sum to award as compensation. Of course they ought not to give the amount of the income as an annuity for the rest of the injured person's life, nor ought they to assume that the income would always continue as it was at a particular time; but taking into consideration all the circumstances affecting it, the income must be taken as a basis of compensation.

LORD COLERIDGE told the jury to give a fair compensation for the money loss. He laid before them all the evidence as to the plaintiff's income and as to the

special fees, and told them to consider whether the plaintiff's evidence was a fair representation of what the income was and what it would have been likely to be. It would have been wrong to exclude the special fees entirely from consideration, for when a man has arrived at such a position in his profession as to receive many large special fees, it certainly is for the jury to consider whether he would not have received similar fees in the future. The question was properly left to the jury.

It was contended on behalf of the defendants that in estimating the damages the fact that the plaintiff had a private income ought to be taken into account. I do not think this is so, for it does not make the money loss any less if the plaintiff has an independent income. The question ought to be considered in relation to his suffering, for he is likely to suffer more from the bodily injury if deprived of his means of support, and so is unable to provide himself with that which may alleviate his sufferings. I am of opinion that the Divisional Court were right in refusing a rule.

Rule refused.

Solicitor: *M. H. Hall.*

[*Reported by* P. B. Hutchins, Esq., *Barrister-at-Law.*]

Re NATHAN. Ex parte STAPLETON

[Court of Appeal (Sir George Jessel, M.R., James and Bramwell, L.JJ.), February 6, 1879]

[Reported 10 Ch.D. 586; 40 L.T. 14; 27 W.R. 327]

Bankruptcy—Trustee in bankruptcy—Powers—Contract by bankrupt for purchase of goods—Election of trustee to fulfil.

Sale of Goods—Bankruptcy of buyer before delivery—Seller's right to re-sell and prove in bankruptcy—Right of sub-buyer from bankrupt buyer.

On the bankruptcy of the buyer of goods before delivery, the seller has the right to sell the goods and to prove in the bankruptcy for a deficiency on the re-sale unless the trustee in bankruptcy elects within a reasonable time to fulfil the contract and tenders the contract price in cash. A sub-buyer from the bankrupt buyer has the same right as the trustee in bankruptcy of electing to fulfil the contract on tendering the contract price in cash within a reasonable time.

Notes. Disclaimer of onerous property is dealt with by s. 54 of the Bankruptcy Act, 1914 (2 Halsbury's Statutes (2nd Edn.) 389).

Considered: *Pitts* v. *La Fontaine* (1880), 6 App. Cas. 482. Not followed: *Re McKenzie, Ex parte Sheriff of Hertfordshire*, [1899] 2 Q.B. 566. Referred to: *Tolhurst* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, *Associated Portland Cement Manufacturers (1900), Ltd.* v. *Tolhurst*, [1902] 2 K.B. 660.

As to the right of the trustee in bankruptcy to enforce contracts, see 2 Halsbury's Laws (3rd Edn.) 427, and as to re-sale by seller, see 34 Halsbury's Laws (3rd Edn.) 141 et seq.; for cases see 5 Digest (Repl.) 1001 et seq.

Cases referred to in argument:

Re Edwards, Ex parte Chalmers (1873), 8 Ch. App. 289; 42 L.J.Bcy. 37; 28 L.T. 325; 21 W.R. 349, L.C. & L.JJ.; 39 Digest 570, *1753*.

Morgan v. *Bain* (1874), L.R. 10 C.P. 15; 44 L.J.C.P. 47; 31 L.T. 616; 23 W.R. 239.

Mirabita v. *Imperial Ottoman Bank* (1878), 3 Ex.D. 164; 47 L.J.Q.B. 418; 38 L.T. 597; 3 Asp.M.L.C. 591, C.A.; 39 Digest 520, *1357*.

Appeal from a decision of Mr. Registrar Hazlitt sitting as Chief Judge in Bankruptcy.

On Dec. 10, 1877, Stapleton contracted to sell to the debtor Nathan a cargo of maize, to be shipped from Baltimore to England, and to be paid for by the purchaser's acceptances to the vendor's drafts. On Jan. 19, 1878, the cargo being then at sea, and the bill of lading being in possession of the vendor to whose order it had been made out, Nathan filed a petition for the liquidation of his affairs by arrangement. Under the liquidation petition a receiver was appointed on the same day, and he gave immediate notice of his appointment to Stapleton. On Feb. 6, 1878, Stapleton entered into a contract for the sale of the cargo to a third person for a sum considerably less than the original contract price, and the evidence showed that the market was then falling, and continued to fall afterwards, and that the vendor obtained the best possible price on the re-sale. On Feb. 8, 1878, Stapleton tendered the cargo to the trustee in the liquidation, who refused to accept the tender as a fulfilment of the contract with the debtor, and did not offer to pay the price in cash. The loss on the re-sale, or the difference between the original contract price and that obtained on the re-sale, amounted to £688, for which Stapleton claimed to prove in the liquidation. The Registrar rejected the proof. Stapleton appealed.

Finlay Knight for Stapleton.

R. Vaughan Williams for the trustee in bankruptcy.

SIR GEORGE JESSEL, M.R.—The real question in this case is, first, whether there was a breach of the contract; and if there was, secondly, when it occurred. The filing of the liquidation petition having been known and announced to the vendor before the arrival of the cargo, it would be absurd to suppose that he was bound to part with the cargo in exchange for the purchaser's acceptances, which were worthless, or nearly so. But if the debtor gives notice that he has divested himself of his property, and is consequently unable to pay for the cargo, is not that equivalent to a disclaimer of the contract to purchase the cargo? Of course that would not affect the right of the trustee to elect within a reasonable time to fulfil the contract on paying the contract price in cash. But, if he does not elect within a reasonable time, the vendor is entitled to treat the contract as broken, without the necessity of making any tender to the trustee. The vendor re-sold the cargo in a falling market, and the measure of damages is plainly the difference between the contract price and the price obtained on the re-sale. Stapleton must, therefore, be admitted to prove for the amount of the difference between the two prices. I should add that a sub-purchaser from the debtor would have had the same right of electing to fulfil the contract, on tendering the price in cash within a reasonable time.

JAMES and **BRAMWELL, L.JJ.**, concurred.

Appeal allowed.

Solicitors: *Williamson, Hill & Co.*; *Simpson & Cullingford.*

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

Re D'ANGIBAU. ANDREWS *v.* ANDREWS

[Court of Appeal (James, Brett and Cotton, L.JJ.), March 2, July 12, 1880]

[Reported 15 Ch.D. 228; 49 L.J.Ch. 756; 43 L.T. 135; 28 W.R. 930]

Power of Appointment—Exercise—Infant—Power in gross—Personalty. Settlement—Marriage settlement—Covenant to settle after-acquired property—Enforcement of covenant by volunteers—Wife's next-of-kin.

A husband, by the settlement made on his marriage to an infant, agreed that a fund to which on her marriage she became entitled in reversion should be settled in trust for her for life, for her separate use, without power of anticipation; then for the husband if he survived her, for life or until bankruptcy; then for the children of the marriage; and, in default of issue and subject to the trusts aforesaid, the trust funds were to be held for such purposes as the wife should appoint by deed or will, and in default of appointment, in the events which happened, for the wife's next-of-kin. The wife, while still an infant, by deed poll appointed the fund to her husband absolutely, subject to the trusts of the settlement in favour of herself, her husband, and children, and died an infant without issue. The wife's interest remained reversionary, and no further settlement of it was made by the husband. After the wife's death the husband became bankrupt, and his trustee claimed the fund against the next-of-kin.

Held: (i) the next-of-kin were volunteers, not being within the marriage consideration, and could not obtain specific performance of the covenant in the marriage settlement to settle the fund; and (ii) (per James and Brett, L.JJ., Cotton, L.J., dissenting) although a power in gross (i.e., a power given to a person who had an interest in the property over which the power extended, but such an interest as could not be affected by the exercise of the power) could not be exercised by an infant over realty or by will, it might be exercised over personalty by deed; accordingly, the power was effectively exercised, and the husband's trustee in bankruptcy was entitled to the property.

Notes. Considered: *Re Flavell, Murray* v. *Flavell* (1883), 25 Ch.D. 89. Followed: *Re Plumptre's Marriage Settlement, Underhill* v. *Plumptre*, [1910] 1 Ch. 609. Considered: *Pullan* v. *Koe*, [1911–13] All E.R.Rep. 334. Applied: *Re Hewett, Hewett* v. *Eldridge* (1913), 40 L.Jo. 10; *Re Pryce, Nevill* v. *Pryce* [1916–17] All E.R.Rep. 573. Considered: *Re Sutton, Boscawen* v. *Wyndham*, [1921] 1 Ch. 257; *Re Parsons, Barnsdale* v. *Parsons*, [1940] Ch. 973; *Cannon* v. *Hartley*, [1949] 1 All E.R. 50. Referred to: *Re Baker, Collins* v. *Rhodes, Re Seaman, Rhodes* v. *Wish* (1881), 44 L.T. 414; *Shipway* v. *Ball* (1881), 16 Ch.D. 376; *Re Newcastle's Estates* (1883), 24 Ch.D. 129; *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Re Torrington*, [1913] 2 Ch. 623; *Re Wernher, Wernher* v. *Beit*, [1918] 2 Ch. 82; *Re Kay's Settlement, Broadbent* v. *MacNab*, [1939] 1 All E.R. 245.

As to classification of powers, see 30 Halsbury's Laws (3rd Edn.) 206 et seq.; as to exercise of powers by infants, see 21 Halsbury's Laws (3rd Edn.) 164; as to persons within the marriage consideration, see 34 Halsbury's Laws (3rd Edn.) 458–461; and for cases see 28 Digest (Repl.) 487, 492–494.

Cases referred to:

(1) *Hearle* v. *Greenbank* (1749), 1 Ves. Sen. 298; 3 Atk. 695; 27 E.R. 1043, L.C.; 28 Digest (Repl.) 492, *102*.

(2) *Colyear* v. *Countess of Mulgrave* (1836), 2 Keen, 81; 5 L.J.Ch. 335; 48 E.R. 559; 12 Digest (Repl.) 47, *255*.

(3) *Dickenson* v. *Wright* (1860), 5 H. & N. 401; 29 L.J.Ex. 150; 2 L.T. 155; affirmed sub nom. *Clarke* v. *Wright* (1861), 6 H. & N. 849; 30 L.J.Ex. 113; 7 Jur.N.S. 1032; 9 W.R. 571; sub nom. *Wright* v. *Dickenson*, 4 L.T. 21, Ex. Ch.; 25 Digest (Repl.) 259, *671*.

A Also referred to in argument:

Re Cardross's Settlement (1878), 7 Ch.D. 728; 47 L.J.Ch. 327; 38 L.T. 778; 26 W.R. 389; 28 Digest (Repl.) 493, *111.*

Price v. *Easton* (1833), 4 B. & Ad. 433; 1 Nev. & M.K.B. 303; 2 L.J.K.B. 51; 110 E.R. 518; 12 Digest (Repl.) 45, *238.*

Gale v. *Gale* (1877), 6 Ch.D. 144; 46 L.J.Ch. 809; 36 L.T. 690; 25 W.R. 772;
B 25 Digest (Repl.) 259, *668.*

Simson v. *Jones* (1831), 2 Russ. & M. 365; 9 L.J.O.S.Ch. 106; 39 E.R. 433; 28 Digest (Repl.) 552, *677.*

Sutton v. *Chetwynd* (1817), 3 Mer. 249; 36 E.R. 96; 25 Digest (Repl.) 200, *208.*

Davenport v. *Bishopp* (1846), 1 Ph. 698; 9 L.T.O.S. 33; 41 E.R. 798; 40 Digest (Repl.) 570, *758.*

C *Newstead* v. *Searle* (1737), West temp Hard. 287; 1 Atk. 265; 25 E.R. 942, L.C.; 25 Digest (Repl.) 258, *667.*

Clayton v. *Earl of Wilton* (1813), 3 Madd. 302, n.; 6 M. & S. 67, n.; 56 E.R. 516; 25 Digest (Repl.) 258, *664.*

Jefferys v. *Jefferys* (1841), Cr. & Ph. 138; 41 E.R. 443, L.C.; 25 Digest (Repl.) 270, *789.*

D *Kekewich* v. *Manning* (1851), 1 De G.M. & G. 176; 21 L.J.Ch. 577; 18 L.T.O.S. 263; 16 Jur. 625; 42 E.R. 519, L.JJ.; 25 Digest (Repl.) 588, *280.*

Richardson v. *Richardson* (1867), L.R. 3 Eq. 686; 36 L.J.Ch. 653; 15 W.R. 690; 25 Digest (Repl.) 588, *278.*

Richards v. *Delbridge* (1874), L.R. 18 Eq. 11; 43 L.J.Ch. 459; 22 W.R. 584; 25 Digest (Repl.) 588, *276.*

E *Allen* v. *Allen and D'Arcy* (1859), 29 L.J.P.M. & A. 166; 23 J.P. 247; 27 Digest (Repl.) 502, *4445.*

Martin v. *Martin* (1860), 29 L.J.P.M. & A. 106; 2 L.T. 118; 8 W.R. 367; 27 Digest (Repl.) 310, *2581.*

Whittingham's Case (1603), 8 Co. Rep. 42, b.; 77 E.R. 537; 28 Digest (Repl.) 487, *44.*

F *Re Blakely Ordnance Co., Lumsden's Case* (1868), 4 Ch. App. 31; 19 L.T. 437; 17 W.R. 65, L.JJ.; 9 Digest (Repl.) 413, *2672.*

Appeal by the next-of-kin of Mrs. Perryman from a decision of Sir George Jessel, M.R., holding that the exercise of a power in gross over certain property by Mrs. Perryman while an infant was valid, and that her husband's trustee in bankruptcy was entitled to the property.

G By the settlement made on the marriage in 1874 of Robert Perryman with Mary Frances D'Angibau, who was then nineteen years of age, it was agreed that the share in the residuary estate of her father, to which under his will Mrs. Perryman became entitled on her marriage, should be assigned to trustees, and the income paid to her for life for her separate use, without power of anticipation, and then for the husband for life or until bankruptcy, and then for the children of the mar-
H riage. And it was declared that, in default of such issue, and subject to the trusts aforesaid, the trust funds

> "should be held by the trustees for such person or persons, and for such purposes as Mrs. Perryman should by deed, with or without power of revocation and new appointment, or by will or codicil, appoint,"

I and in default of appointment, and so far as such appointment should not extend upon trust for Mrs. Perryman absolutely if she should survive her husband, and for her next-of-kin if she should die before him. By deed poll of Mar. 28, 1875, Mrs. Perryman, being still an infant, appointed the trust funds, subject to the trusts contained in the settlement in favour of herself, her husband, and the children of the marriage, for the benefit of her husband absolutely. Mrs. Perryman died on Sept. 20, 1876, still an infant, and without issue. Her interest in the fund remained reversionary, and no further settlement had been made by Mr. Perryman in pursuance of the covenant in the marriage settlement. After her death

Mr. Perryman went into liquidation, and his trustee, the plaintiff, claimed to be entitled to certain funds standing in the names of the trustees of the will of Mrs. Perryman's father, and representing her share of the residuary estate, and brought this action for the administration of the father's estate, and for a declaration that the trustee was entitled to the fund in question. Mrs. Perryman's next-of-kin also claimed the funds on the ground that the appointment by her was void, and demurred to the plaintiff's statement of claim. SIR GEORGE JESSEL, M.R., overruled the demurrer, holding that the power was well exercised. The next-of-kin appealed.

Ince, *Q.C.*, and *T. L. Wilkinson* for the next-of-kin.
Chitty, *Q.C.*, and *Phillpotts* for the plaintiff.

Cur. adv. vult.

July 12, 1880. **COTTON, L.J.,** read the following judgment: This is an appeal from a judgment of the Master of the Rolls on a demurrer filed by certain of the defendants to the statement of claim. The plaintiff is the trustee in bankruptcy of one Robert Perryman, and he is also the legal personal representative of Mary Frances Perryman, the late wife of the bankrupt. The plaintiff, by his action, seeks to have it declared that he is entitled to certain funds bequeathed to Mary Frances Perryman by the will of her father, and for consequential relief; and the demurrer raises the contention that he is not entitled to any interest in that property.

Mary Frances Perryman was at the time of her marriage, under the will of her father, entitled to considerable personal estate. She, when still a minor, and some time in the month of October, 1874, married Robert Perryman, and the question in this action refers to a sum of money which, under the will of her father, was set apart to provide for an annuity for her mother, who is still living, and her interest in this fund was at the time of the marriage, and still is, reversionary. It is still held by the trustees of the father's will to provide for the annuity given to his widow. Previously to the marriage of Mr. and Mrs. Perryman an indenture of settlement was executed, which, under the circumstances, was the settlement of the husband only. By it Robert Perryman covenanted that, in the event of the marriage taking place, he and all other necessary parties would assign to trustees the interest to which his intended wife was entitled under the will of her father in the fund set apart to provide for the annuity of his widow, and that they should hold the fund upon trust for the intended wife for her life for her separate use, and after her death upon certain trusts for the benefit of Robert Perryman till he should become bankrupt, and, after the death of the intended wife and failure of the trusts in favour of the said Robert Perryman, in trust for the issue of the marriage; and, if there should be no issue of the marriage, who should become absolutely entitled, in trust as the said intended wife should by deed or will appoint, and in default of such appointment, if the said Mary F. Perryman should survive the said Robert Perryman, in trust for her absolutely; but, if he should survive her, in trust for the persons who under the Statute of Distribution, 1670, would, on the death of the said M. F. Perryman, have been entitled thereto if she had died possessed thereof intestate and a widow.

There was no issue of the marriage, and Mary Frances Perryman died when still an infant. She by a deed poll dated in March, 1875, purported to exercise the power of appointment in favour of her husband. She died on Sept. 20, 1876. Her husband survived her, and shortly after her death he filed a petition in bankruptcy for the liquidation of his affairs, and the plaintiff has been appointed trustee under resolutions which have been duly passed for the liquidation of the estate of the said Robert Perryman. The trustees of the marriage settlement were made defendants to the action. They by their statement of defence did not insist on the settlement, but submitted that the mother and brother of the said Mary F. Perryman should be made defendants. This was done, and the mother and brother filed a demurrer to the plaintiff's statement of claim. This was overruled by the Master of the Rolls. Hence the appeal to us. The Master of the Rolls did not call on

A the plaintiff to support his claim, and the case was dealt with as if his title depended solely on the exercise by Mary Frances Perryman of the power of appointment. The Master of the Rolls was of opinion that the power was to be considered as in gross, that is, as he explained his meaning, one which, though not simply collateral, did not affect any interest of the infant. He was of opinion that, although an infant cannot exercise a power appendant, he may validly exercise a B power in gross; and further that, even if the power was not to be dealt with as a power in gross, there was a clear intention that the power might be exercised during infancy, and that the exercise was therefore valid.

I am unable to concur in this view of the Master of the Rolls. There is very little authority as to the exercise by an infant of a power over personal estate. *Hearle* v. *Greenbank* (1) is, as regards powers over personal estate, only an C authority that a power to appoint by will can be exercised during infancy after the infant has attained the age when, independently of any power, he could make a will of personal estate; and the passage of Lord St. Leonards (Sugden on Powers (6th Edn.), p. 220), referred to before the Master of the Rolls and in argument before us, does not carry the case any further. That passage is as follows:

D "An infant cannot exercise a power over real estate unless it be a power simply collateral; but as to personalty, clearly he may exercise a power over that at the age at which, by law, he may dispose of personalty to which he is absolutely entitled."

There is no authority that a power the exercise of which can affect the interest of the infant, and one in gross can be exercised by an infant except when infancy E would not, if there was no power, prevent him from disposing of the property. I think, in the absence of authority, that on principle an infant cannot exercise a power like the present one, which, in my opinion, is in the nature of property; by which I mean that the trusts of the settlement, independently of the trusts for the children and husband, were intended to put the wife as nearly as possible in the same position as regards the enjoyment of and power over the property settled as F if she was a feme sole.

To hold that an infant can exercise such a power would, in my opinion, be to allow an infant to bind her property, which the law on general principles of public policy says she cannot do. The case might be different if there were an indication of intention on the part of the donor of the power that it might be exercised notwithstanding the infancy of the donee. The mere fact that a power which may not G have to be exercised for many years is given to a person who at the time is an infant is not, in my opinion, a sufficient indication of intention that the power may be exercised during infancy; and I am unable to find that the settlement expresses any such intention. The fact that this power may be exercised by deed or will is, I think, against there being any such intention, as no will can be made by an infant; and as at the date of the settlement the property settled was reversionary H and the wife was, though an infant, upwards of nineteen years of age, there is, I think, no presumption that the consent to a change of investment might have to be made during her infancy. In my opinion there was not a valid exercise of the power.

This was the only point dealt with by the Master of the Rolls. But the plaintiff contended before us that his title did not depend solely on the exercise of the I power. The fund in question has never come to the hands of the trustees of the settlement, and the plaintiff contends that he, as legal personal representative of the deceased Mary Frances Perryman, has a legal title to the fund; that the contention of the defendants in support of their demurrer must be based on this; that the court at their instance will, as against the plaintiff's legal title, enforce the settlement; and the plaintiff contends that this it will not do because the settlement contains no declaration of trust on the part of the husband, and is merely a covenant by him to make a settlement, and that the demurring defendants must be considered as volunteers, and the court will not, at the instance of the demurring

defendants, enforce the contract against the legal title of the plaintiff. I am of opinion that the plaintiff's contention on this point is correct.

The first question for consideration is whether the settlement of 1874 can be considered as a declaration of trust constituting the relation of trustee and cestui que trust as between the husband and his assignee on the one part, and the demurring defendants on the other part, because, if it can be so treated, effect will be given to the trust even in favour of volunteers. But on the construction of the settlement it is clear that the husband never constituted himself or intended to be a trustee of the fund. He contracts to make a settlement by transferring the fund to trustees, who were to hold it upon trust, and the distinction between a complete voluntary trust and a voluntary contract to create a trust is clear. If it is once established that the settlement is not a declaration of trust, there is, in my opinion, an answer to the contention of the defendants that the court can at their instance interfere with the legal title of the plaintiff. If the court enforces a contract to create a trust, whether contained in a marriage settlement or any other instrument, it will enforce it in its entirety. But as a rule the court will not enforce a contract as distinguished from a trust, at the instance of persons not parties to the contract. *Colyear* v. *Countess of Mulgrave* (2) is an example of this. The court would probably enforce a contract in a marriage settlement at the instance of the children of the marriage, but, if so, this is an exception from the general rule in favour of those who are especially the objects of the settlement. The demurring defendants were not parties to the contract, not within the consideration of the marriage, and, in my opinion, they are not entitled to enforce against the legal title of the plaintiff the contract to create a trust contained in the settlement.

It was urged that a decision to this effect would be contrary to the judgment of the Exchequer Chamber in *Clarke* v. *Wright* (3), and especially to the reasons given by BLACKBURN, J., in that case. But in that case the court was considering a very different question, namely, whether a limitation to collaterals in a marriage settlement of real estate was void as against a subsequent purchaser for value under the Act of 27 Eliz., c. 4. The settlement had been executed and completed by a conveyance of the property, and for this conveyance in its entirety there was a sufficient consideration to prevent any of the estates created from being defeated by a subsequent sale. That is a very different question from that which arises in the present case.

I am of opinion that the demurring defendants cannot interfere with, or control, the legal estate of the plaintiff, and that the demurrer must be overruled.

BRETT, L.J.—Upon the second point I entirely agree with the judgment of my brother, COTTON, L.J., and that is, of itself, sufficient to determine the dispute in this case.

But inasmuch as the other point was fully argued, and is a point of great importance, and may perhaps be of importance in this case, he has thought it right to give a judgment upon the first point. I entirely agree with him in the propriety of so doing, and I think it my duty therefore to state my opinion upon the first point. With some diffidence, in consequence of the opinion of my brother COTTON, I have come to a contrary conclusion. I have considered this point and considered it often. It seems to me that the power given in this case was what I should prefer to call a pure mandate—that is to say, it was a power which did not deal with any property or interest of the infant, but did deal with the property and the interest in the property of the settlor. Even if it had affected some interest of the infant, I should have thought that the proper inference from this document is that it was the intention of the settlor that the power should be exercised by the infant while an infant. It seems to me that the considerations as to both points are very nearly the same. The power given is a mandate; the moment that mandate is exercised, it seems to me to take legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will. It is said that he, having given that power to a person whom he knew at the time to be an infant,

A the power of exercising that delegated authority is to be suspended till the infant comes to full age, inasmuch as the power is given by a person who had full authority to give that power, who delegates that which he could have most effectively done himself if he had chosen. It seems to me that to say that power is to be suspended till the infant comes to full age is, to say the least of it, a most artificial doctrine. If it were to be exercised with regard to real estate, I think we should be bound by B authority to say that it could not be exercised till the infant was of full age, an authority which at this time we are not at liberty to overrule; but I must confess that the same reasoning which leads me to the conclusion to which I now come would, if it had not been for authority, have brought me to the same conclusion with regard to real estate.

That authority which we are bound to obey with regard to real property is C founded, as I venture to say, upon one of those artificial rules which have done more to bring the law into popular question or disgrace than any other part of its administration, but we are bound with regard to real property. With regard to the exercise of this power by will we are bound by Act of Parliament, but it seems to me the Act of Parliament goes a long way to show what was the opinion of the legislature, for they were not contented to say that no will can be made by an in- D fant; but, foreseeing that these mandates might be treated, not as the will of the person who was exercising the mandate, but only as an exercise of the mandate with a peculiar solemnity, they put into the Act of Parliament and thought it necessary to put in a particular clause to say that, even where it was the exercise of a power of appointment, it could not be done unless the person had arrived at full age. We are bound, therefore, in the case of real property by authority, and with E regard to the exercise of the power of appointment, even of personal estate, by will, by an Act of Parliament; but, unless there is some principle which should carry it further, it seems to me that we are not bound to carry it one step further when dealing with personal estate. Therefore, this being a pure mandate, in my opinion, which does not deal with any property of the infant, there is no rule which prevents us from saying that that power might be exercised by deed during the infancy.

F As a general rule an infant may exercise a mandate, and if this had been to appoint by writing, or under her hand only, I can see no reason why it should not have been exercised at any time. Is there any rule, therefore, why it should not be exercised by deed? It is not a deed of the infant; it is the exercise of the mandate by a peculiarly solemn form, and that is all. The artificiality of this rule seems to me to be shown more clearly where the case arises under a marriage G settlement of an infant female than in any other case. It does seem strange upon any principle that a person who is either the husband as in this case, or a father, or a relation who is allowing a female to marry—who thereby makes her the head of a family, who thereby makes her the head of a household, who thereby makes her under certain circumstances the guardian of her children—should be supposed when he gives this particular power to come to this extraordinary conclusion that, H although she has all the other powers, yet if she has more than one child before she is twenty-one and has a power given her to appoint as between those children, that power is to fail and become wholly ineffective if she happens to die before she is twenty-one, so that there shall be no appointment as among her children. I confess that seems to me to show the extreme artificiality of this rule more than anything that one can offer to one's mind.

I But then there is the other point: What is the intention? Here is a person giving this power; he gives this power in terms which have no reference to time. According to all the ordinary rules of construction, if he meant a case of this doctrine, that time would commence from the beginning, there is no reason why it should not. But it is said this power is to be postponed, although there are no words of postponement. It strikes my brother COTTON that, because the power must be postponed in the case of the will, therefore, the true inference is that the person intended to postpone it in the case of the deed. It is strange how differently things affect different minds on questions of construction. I should rather myself

conclude that, having given the power to perform this by will and also by deed, the contrary inference would be drawn—that he meant to say, "By deed till she is twenty-one, and by deed after she is twenty-one, if she so selects; by will not till after twenty-one, because the law forbids me to give that power." On both points it seems to me, with great deference, that the view of the Master of the Rolls was right, and that as a general rule in cases of personal property, unless there are words to postpone the exercise of the power, that power is intended to be commenced, and does commence by law, from the time when the power can first be exercised.

JAMES, L.J. I entirely concur in the reasoning by which COTTON, L.J., arrived at the conclusion in support of the decision of the Master of the Rolls as to the second point—that is to say, that the persons claiming adversely to the plaintiff are volunteers who have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant, and never been performed.

But I also concur with the Master of the Rolls in the ground upon which he has put his judgment, and which has been expressed by BRETT, L.J. It goes even further in my view than that which the Master of the Rolls thought it necessary to express as to those powers. According to my view, an infant may be an agent. An infant may be the donee of a power of attorney. It is difficult to understand why he may not be the donee of a power in a will or in a settlement, as well as the donee of an ordinary power of attorney. *Hearle* v. *Greenbank* (1), the only decision on the subject, no doubt decided that an infant could not exercise a power over real estate, but the judgment was expressly and carefully limited to real estate, and is, if not an implication that it was otherwise as to personal estate, and probably otherwise as to gavelkind estates in Kent, at least no authority to the contrary.

As to personal estate, it has been considered by eminent text-writers as an authority that an infant could exercise powers over personal estate, and it has, I think, been understood by conveyancers that there is this distinction; for while provision has always been carefully made for the exercise of powers over land during the minority of a tenant for life, no such provision, as far as I am aware, is ever introduced into settlements of personal estate, and I should be sorry to express any doubt that a feme covert infant cannot exercise the ordinary powers contained in a marriage settlement of personalty, unless there be something to raise the presumption that it was not so intended, and I can see nothing in the settlement before me to raise such a presumption. Of course an infant could not by settlement, or otherwise, give himself a power; the power in this case is given by the adult husband.

Appeal dismissed.

Solicitors: *Garde & Loader*, for *Pearson & Whidborne*, Dawlish; *Wilkins, Blyth & Fanshawe.*

[*Reported by* C. A. COOK, ESQ., *Barrister-at-Law.*]

HIRSCHFELD *v.* LONDON, BRIGHTON AND SOUTH COAST RAIL. CO.

[Queen's Bench Division (Mellor and Lush, JJ.), November 10, 1876]

[Reported 2 Q.B.D. 1; 46 L.J.Q.B. 94; 35 L.T. 473]

Deed—Invalidation—Deed obtained by fraudulent representation.

In an action for damages for injuries arising from a railway accident, it was pleaded that the plaintiff had, on payment of a certain sum, by deed released the defendants from all further claim. In his reply the plaintiff said that the release had been obtained by the fraudulent representation that his injuries were of a trivial and temporary nature, and that, if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from the defendants; that he was induced thereby to execute the deed; and that, after he had executed it, his injuries turned out to be more serious than he had anticipated. On demurrer,

Held: the reply was good, since there had been a fraudulent representation of facts and a fraudulent statement that the deed would not be binding under the circumstances which had arisen.

Semble, that a deed is invalidated by a fraudulent representation as to its legal effect.

Notes. As to the effect of misrepresentation, see 26 Halsbury's Laws (3rd Edn.) 856 et seq.; and for cases see 35 Digest (Repl.) 74 et seq.

Case referred to:

(1) *Edwards* v. *Brown* (1831), 1 Cr. & J. 307; 1 Tyr. 182; 9 L.J.O.S.Ex. 84; 148 E.R. 1436; 35 Digest (Repl.) 12, *58*.

Also referred to in argument:

Foster v. *Mackinnon* (1869), L.R. 4 C.P. 704; 38 L.J.C.P. 310; 20 L.T. 887; 17 W.R. 1105; 17 Digest (Repl.) 242, *457*.

Thoroughgood's Case, *Thoroughgood* v. *Cole* (1584), 2 Co. Rep. 9a; 1 And. 129; 76 E.R. 408; sub nom. *Throwgood* v. *Turnor*, Moore, K.B. 148; 35 Digest (Repl.) 75, *688*.

Lewis v. *Jones* (1825), 4 B. & C. 506; 6 Dow. & Ry.K.B. 567; 3 L.J.O.S.K.B. 270; 107 E.R. 1148; 17 Digest (Repl.) 315, *1217*.

Beattie v. *Lord Ebury* (1872), 7 Ch. App. 777; 41 L.J.Ch. 804; 27 L.T. 398; 20 W.R. 994, L.JJ.; affirmed (1874), L.R. 7 H.L. 102; 44 L.J.Ch. 20; 30 L.T. 581; 38 J.P. 564; 22 W.R. 897, H.L.; 35 Digest (Repl.) 10, *37*.

Lee v. *Lancashire and Yorkshire Rail. Co.* (1871), 6 Ch. App. 527; 25 L.T. 77; 35 J.P. 726; 19 W.R. 729, L.JJ.; 12 Digest (Repl.) 558, *4225*.

Demurrer.

The plaintiff claimed damages for injuries sustained in a collision on the defendants' railway. In the statement of defence, it was stated, inter alia, that an officer of the defendants had had an interview with the plaintiff subsequent to the collision, and that, at such interview, the plaintiff informed the officer that he intended to make a claim against the defendants arising out of the collision, and after some discussion on the subject between the plaintiff and the officer, it was ultimately agreed between them that the defendants would pay to the plaintiff (as they then accordingly did through their officer) a sum of £3 3s. in full satisfaction and discharge of all cause of action which he then had, or at any time or times thereafter might have, against the defendants on account of or in any way incidental to the collision, and that the plaintiff would (as he then accordingly did) accept such sum from the defendants in full satisfaction and discharge of such cause of action, and would then and there make and execute (as he then and there in fact did) a release to the defendants from such causes of action. By the reply, the plaintiff

said that the officer procured him to execute the deed of release by fraudulently representing to him for that purpose that his injuries were of a trivial and a temporary nature, and that, if they should afterwards turn out to be more serious than he then anticipated, he would still, even though he had executed the deed, be in a position to obtain, and would obtain, further compensation from the defendants in respect thereof; and that the plaintiff, fully believing in the representations and acting on the faith thereof, was induced thereby to execute the deed, and then executed the same on and subject to the express condition that he should not thereby exclude himself from further compensation from the defendants if his injuries should turn out to be more serious than he then anticipated. The injuries of the plaintiff did turn out to be of a more serious nature than he anticipated at the time of executing the deed.

Jeune (*Lopes*, *Q.C.*, with him) in support of the demurrer.
Wood Hill for plaintiff.

MELLOR, J.—I see no obstacle to our giving full effect to this replication. It clearly and sufficiently informs us that two representations were made by the officer of the defendants. The first was, that the plaintiff's injuries were of a temporary and trivial character, and that the sum of three guineas was sufficient compensation for them, and there is a distinct allegation that this was fraudulently done. The second and distinct representation was, that, in case the injuries should prove to be of a more serious nature, the release would not operate as a bar to future proceedings. At the end of the replication there is a denial of the facts alleged by the officer of the defendants. There has, therefore, been a fraudulent representation of facts and a fraudulent statement that the deed would not be binding under the circumstances which have arisen. I entirely approve of fair and reasonable settlements between railway companies and the public without resort to litigation, but I am extremely glad that representations such as these in the case before us afford no bar to a plaintiff's preferring his claim for injuries before a jury. There is no obstacle in law, and we are also now at liberty to act on the rules of equity as to fraud. I am of opinion that the plaintiff is entitled to pursue his action.

LUSH, J.—I am of the same opinion. I do not think it necessary to say in this case whether a fraudulent misrepresentation of the legal effect of the deed would be sufficient to invalidate it. Bayley, B., in *Edwards* v. *Brown* (1), says (1 Cr. & J. at p. 312), in deciding another point:

> "though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, the deed of the defendant, and he is not at liberty, upon the plea of non est factum, to say it was not."

It is not necessary to decide that point here, but if it were, I should emphatically say that such a fraudulent representation would be sufficient to invalidate the release.

Demurrer overruled.

Solicitors: *Neal & Philpot*; *Norton, Rose & Norton.*

[*Reported by* A. H. Poyser, Esq., *Barrister-at-Law.*]

SYERS *v.* METROPOLITAN BOARD OF WORKS

[COURT OF APPEAL (James, L.J., Bramwell, J.A., and Amphlett, J.A.), February 14, 1877]

[Reported 36 L.T. 277]

Compulsory Purchase—Land subject to short tenancy—Right of tenant to compensation—Notice to treat—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, *c.* 18), *s.* 18.

The plaintiff was quarterly tenant of premises which the defendants purchased from the freeholder under the Lands Clauses Consolidation Act, 1845. They then gave the plaintiff notice to quit.

Held: the defendants, having purchased the premises, had given the plaintiff notice to quit as assignees of the reversion, and, accordingly, the plaintiff was not entitled to compensation under the Act of 1845, nor to a notice to treat under s. 18 of that Act.

Notes. As to notice to treat, see 10 HALSBURY'S LAWS (3rd Edn.) 60 et seq.; and for cases see 11 DIGEST (Repl.) 186 et seq. As to the acquisition of land subject to a lease, see 10 HALSBURY'S LAWS (3rd Edn.) 219 et seq.; and for cases see 11 DIGEST (Repl.) 288 et seq. For the Lands Clauses Consolidation Act, 1845, s. 18, see 3 HALSBURY'S STATUTES (2nd Edn.) 902.

Appeal by the plaintiff from a decision of SIR GEORGE JESSEL, M.R.

The plaintiff was quarterly tenant of No. 56, Turnmill Street, Clerkenwell. The house being required for the purposes of the Metropolitan Streets Improvement Act, 1872, the Metropolitan Board of Works, in December, 1875, purchased it of the freeholder under the compulsory powers of the Lands Clauses Consolidation Act, 1845. Having become owners of the premises, the defendants served the plaintiff with a notice to quit in June, 1876, or at the expiration of his tenancy, on the ground that the house was required to be pulled down. The plaintiff brought an action with the object of having the defendants restrained from pulling down the house until they should have compensated him for his alleged interest therein, and moved for an injunction to restrain the defendants from entering on the premises until they had given him the notice required by s. 18 of the Lands Clauses Consolidation Act, 1845, and should have either paid to the plaintiff, or deposited in the bank, the purchase money or compensation agreed or awarded to be paid under the Act for his interest in the premises. SIR GEORGE JESSEL, M.R., held that, as the defendants had purchased the whole legal and equitable interest in the premises and, the tenancy having expired by reason of the notice to quit, the plaintiff was not entitled to any compensation under the Act of 1845, nor was he entitled to a notice to treat under s. 18 of that Act.

C. H. Anderson for the plaintiff.

Cookson, *Q.C.*, and *Everitt* for the defendants.

JAMES, L.J.—I am of opinion that there is not the slightest foundation for this application. The truth is that it is contrary to the universal practice that has prevailed ever since railways have been established with statutory powers. Railway companies and other companies never do buy the interest of short tenants whom they can get rid of by legal notice, unless they want possession before the expiration of the notice, for which special provision is made by the Lands Clauses Consolidation Act, 1845, s. 121. The company deals with the freeholder. It acquires, either under compulsory powers or by contract with the freeholder (it may be by voluntary agreement) his interest, and with that the whole of his interest. Part of that interest is the right to determine the tenant's right by giving three months' notice. Here, the defendants have bought the freehold; they are assignees of the freehold; they do give the plaintiff three months' notice, as any other assignee of the reversion might do; and, at the end of the three months, the

plaintiff must give up possession or be subject to be turned out by process of law —not under any statutory power, but under the right which is incidental to the property of the defendants. SIR GEORGE JESSEL, M.R., could not have made any other order than the one that he has made, and we must refuse this appeal with costs.

BRAMWELL, J.A.—I am of the same opinion. The defendants are not exercising any statutory powers here at all, nor threatening to exercise any. They are claiming to exercise that right which they have as reversioners at common law. Then there is another conclusive argument against the plaintiff. They are not bound to give notice at any particular time. They need not, therefore, have given notice until the three months had expired and the tenancy had expired; and what on earth were they then to ask the plaintiff to treat about? He had no interest remaining. It is rather strange to me that this experiment should have been tried in one court; that it should have come to a second court is something wonderful.

AMPHLETT, J.A.—I am of the same opinion.

Appeal dismissed.

Solicitors: *E. J. Eady*; *Solicitors to the Board of Works.*

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

Re SOLOMON. Ex parte DRESSLER

[COURT OF APPEAL (James, Brett and Cotton, L.JJ.), June 20, 1878]

[Reported 9 Ch.D. 252; 48 L.J.Bcy. 20; 39 L.T. 377; 43 J.P. 23; 27 W.R. 144]

Bankruptcy—Lease—Rent—Liability of trustee in bankruptcy—No disclaimer.

A trustee in bankruptcy who takes possession of the bankrupt's leasehold property, and does not disclaim the lease within the prescribed time when called upon by the landlord to decide whether he will do so or not, is personally liable for all the rent accruing due after he takes possession.

Per COTTON, L.J.: The Bankruptcy Act, 1869, s. 35 [now Bankruptcy Act, 1914, Sched. 2, r. 20] which provided that the landlord might prove for a proportionate part of the rent up to the day of adjudication, as if such rent grew from day to day, did not relieve the trustee from his liability for the whole of the rent.

Notes. The Bankruptcy Act, 1869, ss. 23 and 24, have been replaced by the Bankruptcy Act, 1914, s. 54. The Bankruptcy Act, 1869, s. 35, has been replaced by the Bankruptcy Act, 1914, Sched. 2, r. 20.

Followed: *Wilson* v. *Wallani* (1880), 5 Ex.D. 155. Explained and Followed: *Titterton* v. *Cooper*, [1881–5] All E.R.Rep. 757. Explained: *Hopkinson* v. *Lovering* (1883), 11 Q.B.D. 92.

As to devolution of leaseholds on bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 423, 23 HALSBURY'S LAWS (3rd Edn.) 663–664; and for cases see 4 DIGEST (Repl.) 286–290; 5 DIGEST (Repl.) 1021–1023. For the Bankruptcy Act, 1914, s. 54, and Sched. 2, r. 20, see 2 HALSBURY'S STATUTES (2nd Edn.) 389, 447.

Case referred to:

(1) *Re Sneezum, Ex parte Davis* (1876), 3 Ch.D. 463; 45 L.J.Bcy. 137; 35 L.T. 389; 25 W.R. 49, C.A.; 5 Digest (Repl.) 1005, *8102*.

Also referred to in argument:

Re Ware, Ex parte Carter (1878), 8 Ch.D. 731; 39 L.T. 185; 27 W.R. 106, C.A.; 5 Digest (Repl.) 1188, *9575*.

Re Hide, Ex parte Llynvi Coal and Iron Co. (1871), 7 Ch. App. 28; 41 L.J.Bcy. 5; 25 L.T. 609; 20 W.R. 105, L.JJ.; 4 Digest (Repl.) 287, *2625*.

Hanson v. *Stevenson* (1818), 1 B. & Ald. 303; 106 E.R. 112; 5 Digest (Repl.) 1021, *8251*.

Appeal by J. A. Dressler, the landlord of certain premises, from a decision of Mr. Registrar Pepys, sitting as Chief Judge in Bankruptcy, dismissing his application against the trustees in bankruptcy of the tenant, for an order that the trustees were personally liable to pay the sum of £32 10s., being the quarter's rent due on Mar. 25, 1877.

Joseph Solomon, a trader, held a shop at No. 47, South Audley Street, as tenant to J. A. Dressler, at a yearly rent of £130, payable quarterly in arrear. On Feb. 10, 1877, Solomon filed a petition for the liquidation of his affairs by arrangement. The first meeting of the creditors was held on Mar. 6, when resolutions were duly passed in favour of a liquidation and appointing trustees, and these resolutions were duly confirmed at a second meeting. The trustees took actual possession of the shop and of the debtor's effects in it. Dressler put in a distress for the quarter's rent due at Christmas, 1876, which had not been paid, and the trustees paid the amount. Before the next quarter day, Mar. 25, 1877, the debtor's effects were removed from the shop, having been sold by the trustees, and Dressler was, therefore, unable to distrain for the quarter's rent then due. On April 11 Dressler's solicitor wrote to the trustees' solicitor:

> "Do your clients, the trustees, intend to keep possession of the premises in South Audley Street? My client will certainly look to them for the rent, and I shall be glad if you will let me have a cheque for the rent due Mar. 25 last as promised."

On April 13 the key of the shop was sent to Dressler, who accepted it, but the rent was not paid. The trustees executed no written disclaimer of the lease. On April 14 the trustees' solicitor wrote to Dressler's solicitor, saying that Dressler must prove for the rent due on Mar. 25 with the other creditors. Further correspondence took place, and on Aug. 22, the rent not having been paid, Dressler commenced an action in the Exchequer Division against the trustees for the quarter's rent due on Mar. 25.

On Dec. 11 the trustees applied to the London Court of Bankruptcy for an injunction restraining further proceedings in the action, and by the consent of Dressler's counsel an injunction was granted staying all further proceedings in the action, the trustees submitting to the jurisdiction of the court in respect of the matters in difference between them and Dressler. The costs of all parties of the action and of this application were reserved to be dealt with thereafter by the court, and all parties were to be at liberty to apply to the court as they might be advised. Subsequently Dressler applied to the Court of Bankruptcy for an order that the trustees should personally pay him the sum of £32 10s., the quarter's rent due on Mar. 25, 1877, and the costs of the action and of the applications to the Court of Bankruptcy. Mr. Registrar Pepys, sitting as Chief Judge, refused this application, and ordered Dressler to pay the costs of it, as well as the costs reserved by the order of Dec. 11. From this decision Dressler appealed.

By the Bankruptcy Act, 1869:

> "Section 23. When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured

to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

"Section 24. The trustee shall not be entitled to disclaim any property in pursuance of this Act in cases where an application in writing has been made to him by any person interested in such property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application or such further time as may be allowed by the court declined or neglected to give notice whether he disclaims the same or not."

"Section 35. When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication as if such rent or payment grew due from day to day."

Roxburgh, *Q.C.*, and *E. C. Willis* for Dressler.
Patchett, *Q.C.*, and *Tatlock* for the trustees.

JAMES, L.J.—I am of opinion that the order of the registrar cannot be sustained. The trustees may not have been well advised in the course which they have adopted, but they have not proceeded in the way pointed out by ss. 23 and 24 of the Bankruptcy Act, 1869; they have not executed any disclaimer of the lease in writing. What we decided in *Re Sneezum*, *Ex parte Davis* (1), was, that we could not enlarge the words of those sections, or of s. 25, so as to alter pre-existing legal rights any further than they are actually altered by those sections.

What, then, were the legal rights of an assignee in bankruptcy with regard to leasehold property of the bankrupt before the passing of the Bankruptcy Act, 1869? Under the old law, if the assignee elected to take possession of the bankrupt's leasehold property, he became, by reason of his privity of estate, personally liable for the payment of the rent. He could get rid of his liability by assigning the lease to a pauper, but, if he took possession of the property, he made himself liable to pay the rent. It is not contested in the present case that actual possession of the property was taken by the trustees, and, indeed, it is manifest from the correspondence that the trustees knew that they were in possession, and that they had actually promised to send a cheque for the rent which became due in March. That being the legal effect of possession being taken by the trustees, the result is that they are liable as assignees of the estate to pay the rent, and, as between themselves and the landlord, they are personally liable, though they are entitled to an indemnity out of the debtor's assets. And no injustice will be done to them, for they ought to have retained out of the assets a sum sufficient to answer the rent. There will be an order, therefore, for payment of the quarter's rent to Dressler, and he must have his costs.

BRETT, L.J.—It seems to me that, after the appointment of the trustees, and during the currency of the quarter in respect of which rent is claimed, the trustees did take actual possession of the leasehold premises, and remained in possession till after the expiration of the quarter. After the letter of April 11, by which the trustees were in substance asked whether they intended to disclaim or not, they sent the key of the premises to the landlord, and he accepted it. But they never executed any disclaimer of the lease in writing. The question is whether the trustees are personally liable for the rent which became due in March. I think they are. Under the old law I think they would have been personally liable on the ground that, by taking actual possession of the premises, they elected to accept the lease, and adopted the assignment which had been made to them.

Is there anything in ss. 23 and 24 of the Bankruptcy Act, 1869, to take away that liability? Section 23 is intended to relieve the trustee; but, in order to obtain the benefit of the section, he must take the course thereby provided. The section provides that the trustee may by writing under his hand disclaim any property of the bankrupt burdened with onerous covenants, and upon the execution of such disclaimer the property disclaimed shall, if a lease, be deemed to have been surrendered on the date of the order of adjudication. The words, be it observed, are "such disclaimer," and not "a disclaimer." If the trustee wishes to obtain the relief given by s. 23, which he may do although he has taken actual possession of the property, he must execute a written disclaimer; if he does not do so, he is not entitled to the relief given by the section. He may execute the disclaimer at any time, except so far as the time is limited by s. 24. He might disclaim at any time within twenty-eight days even after action brought, and I am disposed to think that the action could not then be maintained. At all events he could disclaim at any time before action brought.

In the present case the notice referred to in s. 24 of the Act was given by the landlord in the letter of April 11. The surrender of the lease here was only by operation of law, namely, by delivery of the key to the landlord who accepted it, and not by virtue of a disclaimer under the Act. What is the real effect of s. 24? It appears to me that, if a trustee takes possession of the bankrupt's leasehold property, the landlord may give notice to him and he must then make up his mind whether he will disclaim the lease or not. Section 24 is intended to limit the time within which the trustee must exercise his right to disclaim to twenty-eight days after receipt of the notice; and if he lingers over the twenty-eight days he cannot disclaim at all under s. 23, unless the court has extended the time under the power given to it by s. 24. The trustee then remains personally liable for the rent during the whole of the remainder of the lease, unless the landlord chooses to release him, as has been done in the present case. The only right the trustee has to get rid of his personal liability is by s. 23; and if he does not follow the course prescribed by that section, his liability remains as it was under the old law. And that is really the force of the decision in *Re Sneezum, Ex parte Davis* (1), where MELLISH, L.J., says:

> "Neither s. 23 nor s. 24, however, enacts anything as to what is to be the effect if the trustee does not disclaim,"

that is, if he does not disclaim in the way pointed out by s. 23. If he does not, neither s. 23 nor s. 24 enacts anything as to the trustee's liability, which is left as if those sections had not been passed; that is, he remains personally liable for the rent. This reading of the Act will, I think, produce no such hardships as suggested. The landlord cannot force the trustee to make up his mind as to disclaiming except within the twenty-eight days.

The trustee is further protected by r. 28 of the Bankruptcy Rules, 1871 [now r. 278 of Bankruptcy Rules, 1952], which provides that he is not to disclaim a lease without first obtaining the leave of the court. He cannot be made personally liable upon a lease except upon fair and reasonable terms. A trustee ought to make up his mind speedily whether he will disclaim a lease or not.

COTTON, L.J.—I also am of opinion that the order of the Registrar cannot be sustained. Before I give my reasons for so thinking I must observe that we are not now deciding that without the submission of the parties we could entertain this appeal. I say this in order that it may not be assumed in any future case that without such a submission the Registrar would have had any jurisdiction to entertain the application to him, or that this court would have had any jurisdiction to entertain the appeal. Upon the evidence I think it is clear that the trustees were in possession of the property up to April 13; and, that being so, it is not disputed that under the old law an assignee in bankruptcy would have been personally liable for the rent. Is there, then, anything in the Act of 1869 to relieve the trustee from this liability? Under s. 23 he can entirely relieve himself from liability by adopting the course pointed out by that section. That has not been done in the present case. And that being so, the trustees remain liable for the rent as they would have been under the old law.

Section 35 of the Act was relied upon to show that they are only liable for a part of the quarter's rent proportioned to the time during which they were in possession. But, in my opinion, that section simply gives the landlord a right of proof which he would otherwise not have had, and in no way relieves the trustees from the personal liability which would have attached to them under the old law for the whole quarter's rent.

Appeal allowed.

Solicitors: *H. W. Christmas*; *W. J. Foster.*

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

BUTCHER *v.* STEAD

[House of Lords (Lord Cairns, L.C., Lord Hatherley, Lord O'Hagan and Lord Selborne), June 25, July 12, 1875]

[Reported L.R. 7 H.L. 839; 44 L.J.Bcy. 129; 33 L.T. 541; 24 W.R. 463]

Bankruptcy—Fraudulent preference—Creditor unaware of intention to prefer—Protection of payment.

Insolvent debtors paid a creditor with a view to giving him preference over other creditors. The creditor was not aware of the debtor's insolvency or of their intention to give him a preference. The trustee in liquidation claimed this payment constituted a fraudulent preference.

Held (Lord Selborne dissenting): the payment was made to "a payee in good faith and for valuable consideration" within s. 92 of the Bankruptcy Act, 1869 [now s. 44 of the Bankruptcy Act, 1914], and was, therefore, protected.

Notes. The Bankruptcy Act, 1869, s. 92, has been replaced by the Bankruptcy Act, 1914, s. 44, which was amended by the Companies Act, 1947, ss. 92, 115 (3), (4), and (6); the provisions of s. 92 were incorporated in the Companies Act, 1948, s. 321, and the whole section was repealed by the 1948 Act except as applied by s. 115 (4) of the 1947 Act; s. 115 of the 1947 Act has been amended by the 1948 Act.

Considered: *Re Tate, Ex parte Tate* (1876), 35 L.T. 531. Distinguished: *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213. Referred to: *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505; *Sharp* v. *Jackson*, [1895–9] All E.R.Rep. 755.

As to avoidance of fraudulent preference, see 2 HALSBURY'S LAWS (3rd Edn.) 554–561; and for cases see 5 DIGEST (Repl.) 960–964. For the Bankruptcy Act, 1914, s. 44, see 2 HALSBURY'S STATUTES (2nd Edn.) 381; for the Companies Act, 1947, ss. 99, 115 (as amended), see 3 HALSBURY'S STATUTES (2nd Edn.) 447, 448.

Cases referred to:

(1) *Re Walker, Ex parte Topham* (1873), 8 Ch. App. 614; 42 L.J.Bcy. 57; 28 L.T. 716; 37 J.P. 628; 21 W.R. 655, L.JJ.; 5 Digest (Repl.) 955, *7767*.

(2) *Re Craven and Marshall, Ex parte Tempest* (1870), 6 Ch. App. 70; 40 L.J.Bcy. 22; 23 L.T. 650; 19 W.R. 137, L.JJ.; 5 Digest (Repl.) 944, *7728*.

(3) *Re Cheeseborough, Ex parte Blackburn* (1871), L.R. 12 Eq. 358; 25 L.T. 76; 19 W.R. 973; sub nom. *Re Cheeseborough, Ex parte Hitchcock*, 40 L.J.Bcy. 79; 5 Digest (Repl.) 962, *7808*.

Also referred to in argument:

Alderson v. *Temple* (1768), 4 Burr. 2235; 1 Wm. Bl. 660; 98 E.R. 165; 5 Digest (Repl.) 960, *7790*.

De Tastet v. *Carroll* (1815), 1 Stark. 88; 2 Rose, 462; 5 Digest (Repl.) 939, *7686*.

Marks v. *Feldman* (1870), L.R. 5 Q.B. 275; 39 L.J.Q.B. 101; 10 B. & S. 371; 5 Digest (Repl.) 973, *7841*.

Stevenson v. *Newnham* (1853), 13 C.B. 285; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 138 E.R. 1208; 5 Digest (Repl.) 972, *7839*.

Mavor v. *Croome* (1823), 1 Bing. 261; 8 Moore C.P. 171; 1 L.J.O.S.C.P. 90; 130 E.R. 105; 5 Digest (Repl.) 1034, *8353*.

Re Golden, Ex parte Norton (1873), L.R. 16 Eq. 397; 21 W.R. 402; 5 Digest (Repl.) 973, *7844*.

Strachan v. *Barton* (1856), 11 Exch. 647; 25 L.J.Ex. 182; 26 L.T.O.S. 246; 4 W.R. 292; 156 E.R. 990; 5 Digest (Repl.) 938, *7669*.

Belcher v. *Jones* (1837), 2 M. & W. 258; Murp. & H. 34; 6 L.J.Ex. 89; 1 Jur. 72; 150 E.R. 752; 5 Digest (Repl.) 941, *7702*.

Appeal by the trustee in liquidation of the firm of Meldrum and Wylder from a decision of the Court of Appeal (MELLISH and JAMES, L.JJ.), reported sub nom. *Re Meldrum, Ex parte Butcher*, 9 Ch. App. 595, affirming a decision of BACON, C.J., who had reversed a decision of the judge of the Manchester County Court, holding that a payment by Meldrum and Wylder to the respondent, Stead, constituted a fraudulent preference.

Stead had been in the habit of selling goods to the firm of Meldrum and Wylder, of Manchester, on what were known as "Manchester terms," namely, that goods bought before the 25th of any month were to be paid for in cash on the first Tuesday after the end of the following month. In October, 1873, Stead sold to Meldrum and Wylder goods to the amount of £190, which sum, according to this course of dealing, would have been payable on Dec. 2. On Nov. 22, they paid Stead £186 13s. 9d. (being the £190 less discount and interest), and on Dec. 3 they filed a petition for liquidation by arrangement. It was admitted that at the date of the payment to Stead they were insolvent, and intended to give their trade creditors a preference, but Stead was not aware of this. The appellant was appointed trustee under the liquidation, and claimed to recover the sum so paid from Stead, on the ground that the payment was a fraudulent preference, and the judge of the Manchester County Court decided in his favour, but his decision was reversed as above mentioned, on the ground that Stead's part in the transaction, being in good faith, was protected by s. 92 of the Bankruptcy Act, 1869.

By the Bankruptcy Act, 1869, s. 92:

> "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own monies in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall,

if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or encumbrancer in good faith and for valuable consideration."

Herschell, Q.C., and *Ford North* for the appellant.
Benjamin, Q.C., *Marten, Q.C.*, and *Jordan* for the respondent.

Their Lordships took time for consideration.

July 12, 1875. The following opinions were read.

LORD CAIRNS, L.C.—I cannot doubt that there was in this case, within the meaning of s. 92 of the Bankruptcy Act, 1869, "a payment made by a person unable to pay his debts as they became due from his own moneys, in favour of a creditor, with a view of giving that creditor" (along with several others) "a preference over other creditors," and that if there was nothing more in the case, inasmuch as the person making the payment became bankrupt within three months, the payment should be deemed fraudulent and void, as against the trustees of the bankrupt. I do not forget the observations made by the counsel for the respondent that the goods supplied to the bankrupt, in respect of which the debt arose, were supplied in order to enable him to carry on his trade, and after he had fallen into the state of insolvency contemplated by the section in question. If the goods had been supplied for ready money it might well be that that would have negatived the inference of a fraudulent preference. But the goods were here supplied upon credit, and although the bankrupt by obtaining credit on the pretence of carrying on business might, if that pretence was false, and if a jury should not be satisfied that he had no intent to defraud, have made himself liable to punishment for a misdeameanour, the subsequent payment for the goods so supplied on credit might not the less be a preference of a particular creditor which would be deemed fraudulent and void.

The only question appears to me to be whether the transaction, being a fraudulent preference so far as the bankrupt was concerned, is, by the last words of s. 92, protected quoad the respondent, the recipient of the payment, who is admitted to have had no knowledge of the fraudulent preference which was intended. There is no doubt that s. 92 of the Act of 1869 introduced a considerable change into the law on this subject. Before that Act payments by way of fraudulent preference were held to be void, but were not forbidden by any express enactment, and the Act of 1869, possibly because the administration of bankruptcy was for the future to be taken in great part away from the court and placed in the hands of trustees, appears, in the case of fraudulent preferences, and many other similar cases, to have endeavoured to reduce into definite propositions the law that hitherto had to be derived from a comparison of decided cases. The Act, however, did not profess to express the existing law without making considerable changes in it. In the case of fraudulent preferences, for example, in place of raising an inquiry whether it was done in contemplation of bankruptcy, the Act provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts as they became due from his own moneys, and that he should become bankrupt within three months from the date of payment. The Act appears to have left the question of pressure as it stood under the old law, and, indeed, the use of the word "preference," implying an act of free will, would of itself make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the lords justices in *Ex parte Topham* (1).

The section, however, contains at the end of it a provision which appears to me to introduce a new ingredient into the consideration of fraudulent preferences. Before the Act of 1869, if a payment were made of a debt without pressure, and

in contemplation of bankruptcy, it was a fraudulent preference, even although the person receiving the payment did not know that he was being fraudulently preferred. Section 92, however, now ends with this provision:

"This section shall not affect the rights of a purchaser, payee, or encumbrancer in good faith, and for valuable consideration."

What is the meaning of the words, "This section shall not affect the rights of a payee?" In my opinion the word "payee" is to be read as meaning "person receiving payment as a creditor." What are the rights of a person receiving payment as a creditor? His rights undoubtedly are prima facie to keep the money which he so receives. What is the meaning of the words "in good faith and for valuable consideration?" I think there can be no doubt that the words "in good faith" mean "without notice that any fraud or fraudulent preference is intended." The words "for valuable consideration" are more difficult to explain. They occur also in several places in ss. 94 and 95, and it might be doubted whether they had not been introduced in s. 92, and coupled with the words "in good faith," without observing that they were less appropriate in that section than in ss. 94 and 95. The words, however, are capable of the construction put upon them by the lords justices, namely, that they are used to negative the payment of a voluntary bond or covenant for which no valuable consideration was given, or they may have been used as applicable to the words "purchaser or encumbrancer," though less applicable, or not applicable at all, to the word "payee."

The argument of the appellant fails to give any effect whatever to this provision at the end of s. 92; and it appears to me to be a provision intended to have a specific and particular effect, and I am unable to see that any meaning or effect can be given to it, except that given by the lords justices. I think it was the intention of the legislature, in defining for the first time the law as to fraudulent preference, and changing the old rule as to contemplation of bankruptcy into a rule which exposed the payment to be impeached for a period so long as three months, to accompany and temper this enactment by a provision of great convenience in mercantile dealings, and giving a protection, where it is obviously much required, to those who in good faith take money which ought to be paid to them, without notice that the person paying is doing anything injurious to his other creditors.

In my opinion, the judgment of the Court of Appeal in Chancery ought to be affirmed and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD HATHERLEY.—I have come to the conclusion that the interpretation to be placed upon s. 92 of the Bankruptcy Act, 1869, is that which has been given to it by my noble and learned friend on the Woolsack. I think there may be some difficulty in attributing this meaning to the exact form of words which has been employed in this section, but looking at the saving clause as it comes in at the end of the section, and finding that it is intended to counteract the effect of the section itself, the words being not "provided that nothing in this Act contained shall affect" such and such rights, but "this section shall not affect" those rights, one naturally would look at the antecedent words contained in that section, which had imposed the consequence of nullity upon certain deeds on the part of a debtor afterwards becoming a bankrupt. Looking at the early part of the section we find that the legislature has imposed this consequence of nullity in all cases where the bankrupt conveys by way of purchase, where he encumbers, and where he makes any payment, as well as does certain other acts, such as the taking or suffering any judicial proceeding, which of course must mean taking or suffering any judicial proceeding affecting his property.

That being so, you would expect à priori to find that the saving clause would have a corresponding relation to the acts struck at in the anterior part of the section, and that it would provide that in certain cases those acts should not be attended with the consequence of nullity. In that way, applying the words "purchaser" and "encumbrancer," to the words in the previous part of the section

referring to a conveyance, or a mortgage, you are led up to the word "payee," which, although not used according to the ordinary legal meaning of the word, seems appropriately enough for the purposes of the section to express a person to whom a money payment is made. Indeed, the only other construction which has been suggested on the side of the appellant is that by these words, "purchaser, payee, or encumbrancer," the legislature must have intended to save the interests of third persons, although destroying the interest of the particular creditor to whom the payment or transfer by way of sale or encumbrance had been made, and that it intended that where there had been a mortgage made, or a sale made, or a payment made within three months before bankruptcy, in any of those cases the creditor who had become a purchaser or a mortgagee, or had obtained payment, should lose the benefit of that purchase, that encumbrance, or that payment so made to him, but that his so losing it should not affect with nullity the instrument he took, provided he had passed it over to a third person, who had taken it without notice and without knowledge. I confess that strikes me as a very forced construction, especially when you come to the word "payee," because what is suggested there is that the favoured creditor might be paid by a cheque, or by a bill of exchange, that he might hand over this cheque or this bill to a third person, and that it was intended that that person should be entitled to recover upon it, though the person who received the cheque or the bill originally could not, as between himself and the trustee, have insisted on such payment.

It appears to me that the word "payee" is sufficient, although not perhaps thoroughly technical in its import, to indicate a favoured creditor, to whom a payment is made. I think the legislature intended to say that if you, the debtor, for the purpose of evading the operation of the bankruptcy laws, and in order to give a fraudulent preference, make this payment or this charge, it shall be wholly done away with, except in cases where the person whom you have so favoured is wholly ignorant of your intention to favour him, and receives payment simply for valuable consideration and bona fide, that is, without any notice of any intention on your part fraudulently to favour one creditor above another. I take the words "in good faith and for valuable consideration" to mean this: It might be that either a voluntary bond for a payment, or some other voluntary instrument, might have been given by a debtor if he were willing to favour a relation or other individual; but in order that the favoured individual to whom he had given such a bond or such a payment should be exempted from the previous part of the section he must have received it bona fide, that is, he must not be conscious himself of an attempt to favour one creditor above another, and he must further have given a "valuable consideration" for it. That will entitle him to hold that payment so made to him in preference, he himself not being a guilty party—I mean not being conscious of a preference being intended to be given to him. I think that is a reasonable sense to give to this proviso, having regard to the scope and the frame of the previous part of the section. It appears to me, I confess, the more natural and obvious conclusion to arrive at, that these words are so used, and, therefore, I concur in the judgment proposed by my noble and learned friend.

LORD O'HAGAN.—In this case two states of facts seem, beyond controversy, to have existed. In the first place, it is plain that the debtor was guilty of a fraudulent preference within the meaning of s. 92 of the Bankruptcy Act, 1869. He made a payment when he was unable to discharge his debts from his own moneys, and with a view unduly to prefer one creditor to another. It is equally plain that the creditor so preferred had a bona fide claim against the debtor, had no notice or knowledge of the circumstances, and, in receiving payment of the debt, acted in perfect good faith.

The sole question is whether the preferred creditor is protected by the proviso of s. 92, and entitled to retain the money paid to him, notwithstanding the admitted fraud of the debtor. I think he is, and that if he were not the proviso would fail of the result which was intended by the legislature. It has been strongly

A urged that, so considered, the proviso will tend to the practical repeal of the salutary restrictions imposed by the law on fraudulent preference, and enable a debtor to dispose of his estate in contemplation of bankruptcy for the benefit of one set of his creditors and to the detriment of the rest; and certainly there is force in the argument, for it is impossible to doubt that such a mischief to some extent may reasonably be apprehended. But on the other hand, it is said, with equal B force, that reason and justice warrant the protection of a trader who is paid his debt in the customary course of business by the man who owes it, and with whose embarrassments he is wholly unacquainted. It is contended that such a protection is intrinsically just, and is of great consequence to the trading classes, and I observe that the Chief Judge considers that the proviso, interpreted as securing that protection, is quite as important for the public interests as the antecedent enact- C ment that a trader, unable to pay his debts with his own moneys, giving preference to a particular creditor, should be held to commit fraud. I observe also that the construction adopted by the Chief Judge, and approved by the lords justices, which we are asked to condemn, has been acted on for years, and those learned judges seem to deny that any serious evil has resulted from it to the commercial community, a statement which may dispel apprehension as to the dangers alleged D to attach to that construction.

But be this as it may, looking to the probable policy of the Act, we have at least a balance of advantage and disadvantage on one side and the other; and à priori each of the conflicting constructions would appear to have much to be urged in its favour. We must, therefore, consider the language of the proviso without preconception or speculation as to the motives of its framers, and, so regarding it, I E think that the creditor in this case must be taken to be the "payee" whom it was intended to protect. The debtor made the payment, and the creditor to whom it was made is the "payee," that is, the person accepting the payment. I see no reason for putting on the word any other than its plain and natural meaning, and the suggestion made at the Bar that it should be held to describe a third person to whom the creditor had transferred a bill or other security for the payment of his F debt, seems to me untenable. It is not necessary to determine whether such a third person might not possibly be comprehended within the description of a "payee," it is enough to say that there is nothing to make it apply exclusively to such a person, or prevent its more natural application to the creditor directly receiving payment for himself. If we do not adopt the suggestion to which I have referred, I have heard no other giving any effect to the word "payee," which is G consistent with the appellant's case. As to the argument arising on the expression "for valuable consideration," it seems to me sufficiently met by the cases to which the lords justices advert: *Ex parte Tempest* (2); *Ex parte Blackburn* (3); and on the whole, feeling no pressure from any assumptions as to the supposed policy and the possible operation of the statute, and dealing with the words as I find them, I think your Lordships will be warranted in adopting the only construction H capable of satisfying the terms of the proviso, and carrying it into practical effect. Therefore, I am of opinion that the judgment of the lords justices should be affirmed.

LORD SELBORNE.—The judgment of your Lordships, concurring, as it does, with that of the lord justices and the Chief Judge in Bankruptcy, is probably right, I and it will of course settle the law. For my own part, I am bound to say that I have felt more than the rest of your Lordships appear to have done, that the construction of s. 92 of the Act of 1869, which your Lordships think necessary, opens a very wide door to frauds upon the bankrupt law; every voluntary preference of favoured creditors by an insolvent debtor upon the eve and in contemplation of bankruptcy, being, as I conceive, in its own nature, and not merely by positive law, a fraud upon the administration in bankruptcy.

After a careful consideration of ss. 92 and 95, I have been unable to satisfy myself that it was really the intention of the legislature in such cases to give effect

to preferences by the debtor of favoured creditors, being creditors for valuable consideration, as against the principle of equal distribution in bankruptcy, merely on the ground of possible good faith on the part of such creditors. Section 95 appears to me to be that which was intended to draw the line between these bona fide dispositions of the bankrupt's property by payments or otherwise which ought generally to be protected, and fraudulent preferences; and I should have been myself very much disposed to think that the words, "a purchaser, payee, or encumbrancer in good faith and for valuable consideration," in s. 92 might be properly construed as requiring to constitute the "rights" thereby intended to be saved, not merely passive good faith on the part of any creditor for value, but some distinct consideration for the purchase, payment, or encumbrance—distinct, I mean, from the original debt—and which new consideration might proceed either from the creditor himself, or from any person claiming in good faith under him.

The old law as to the effect of pressure by the creditors remaining unchanged, and bona fide payments and dispositions of property by the debtor being protected by s. 95, such a construction of s. 92 would have appeared to me to do full justice to the creditor in every other case in which his protection could be reconciled with the principles and objects of the law of bankruptcy.

Appeal dismissed.

Solicitors: *Pritchard & Sons*, for *Grundy & Kershaw*, Manchester; *Pritchard, Englefield & Co.*, for *J. Leigh*, Manchester.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

SALT *v.* COOPER

[Court of Appeal (James, Cotton and Lush, L.JJ.), December 21, 1880]

[Reported 16 Ch.D. 544; 50 L.J.Ch. 529; 43 L.T. 682; 29 W.R. 553]

Bankruptcy—Execution—Appointment of receiver in bankruptcy—Subsequent appointment of receiver by way of equitable execution.

On motion on behalf of a judgment creditor in an action in the Queen's Bench Division a receiver was appointed of the equitable property of the debtor. On the same day, but shortly prior in time, a petition in bankruptcy was presented in the county court, and a receiver in bankruptcy was appointed.

Held: the receiver appointed on the application of the execution creditor could not lawfully seize property when a bankruptcy receiver had been appointed; to sustain a right against the receiver in bankruptcy under s. 95 (2) of the Bankruptcy Act, 1869 [now s. 40 of Bankruptcy Act, 1914], there had to be a lawful seizure of the property before possession was taken by the court.

Notes. The Bankruptcy Act, 1869, s. 13 and s. 95 (2), have been replaced by the Bankruptcy Act, 1914, s. 9 and s. 40, respectively.

Considered: *Leggott* v. *Western* (1884), 12 Q.B.D. 287; *Walmsley* v. *Mundy*, *Ex parte Goodenough* (1884), 50 L.T. 317. Distinguished: *Wills* v. *Luff* (1888), 38 Ch.D. 197. Considered: *Holmes* v. *Millage*, [1893] 1 Q.B. 551; *Re Hearn*, *De Bertodano* v. *Hearn* (1913), 108 L.T. 452; *Ideal Films* v. *Richards*, [1926] All E.R.Rep. 271. Referred to: *Re Whiteley*, *Whiteley* v. *Learoyd* (1887), 56 L.T. 846; *Brereton* v. *Edwards* (1888), 37 W.R. 47; *Harris* v. *Beauchamp*, [1894] 1 Q.B. 801.

A As to rights of execution creditors in case of bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 541 et seq.; as to appointment of receiver of property already in possession of a receiver, see 32 HALSBURY'S LAWS (3rd Edn.) 411; as to equitable execution, see 16 HALSBURY'S LAWS (3rd Edn.) 104 et seq.; and for cases see 5 DIGEST (Repl.) 874–883. For the Bankruptcy Act, 1914, s. 40, see 2 HALSBURY'S STATUTES (2nd Edn.) 376.

B Cases referred to in argument:

Anglo-Italian Bank v. *Wells*, *Anglo-Italian Bank* v. *Davies* (1878), 38 L.T. 197, C.A.; 6 Digest (Repl.) 443, *3114*.

Re Watkins, *Ex parte Evans* (1879), 13 Ch.D. 252; 49 L.J.Bcy. 7; 41 L.T. 565; 28 W.R. 127, C.A.; 4 Digest (Repl.) 390, *3542*.

C *Re Hall*, *Ex parte Rocke* (1871), 24 L.T. 475; reversed, 6 Ch. App. 795; 40 L.J.Bcy. 70; 25 L.T. 287; 19 W.R. 1129, L.C. & L.JJ.; 5 Digest (Repl.) 869, *7295*.

Appeal by the plaintiff, Edward Salt, a judgment creditor of the defendant, J. Cooper, from a decision of SIR GEORGE JESSEL, M.R., dismissing a motion by the plaintiff by which he sought an order that C. Corbidge, the receiver of certain D equities of redemption to which the defendant had been entitled, might receive any surplus moneys in the hands of the mortgagees and pay out of such moneys the plaintiff's debt and costs. SIR GEORGE JESSEL, M.R., decided that F. Carter, the defendant's receiver in bankruptcy, held such equities of redemption for the benefit of the trustees in bankruptcy. The trustees were the respondents to this appeal.

E The plaintiff obtained judgment against the defendant, J. Cooper, on Sept. 2, 1880, for £115 14s., and costs. The plaintiff issued a writ of elegit, but a return of nulla bona was made, because the land of the debtor was vested, as to the legal estate, in mortgagees. On Sept. 14, 1880, the plaintiff applied to STEPHEN, J., in chambers, for the appointment of a receiver, and for an equitable delivery in execution of certain equities of redemption, the property of the defendant. The F defendant held certain leasehold estates which were mortgaged. On Sept. 14, about 4 p.m., C. Corbidge was appointed receiver.

On the same day a petition in bankruptcy was presented in the Huddersfield County Court by J. A. Love against J. Cooper for £183 18s. 6d., and about 3.45 p.m. F. Carter was appointed receiver in the bankruptcy, by the county court. On Sept. 21, J. Cooper was served with the petition; but there was no adjudication G made on it. On Sept. 24, J. Cooper presented a petition in liquidation, the bankruptcy proceedings were changed into a liquidation by arrangement, and at the meeting of creditors F. Carter was appointed receiver in liquidation, and afterwards trustee with T. G. Sharpe. On Oct. 27, 1880, the action was transferred to the Master of the Rolls. Upon motion that the order appointing Corbidge receiver might be extended so as to enable him to receive the surplus moneys in the hands of the mortgagee, pay the plaintiff's debt and costs, and pay the surplus to the H trustees of the defendant Cooper, SIR GEORGE JESSEL, M.R., held that the receiver in bankruptcy held the equities of redemption for the benefit of the trustees, and he, accordingly, dismissed the motion. From this decision the plaintiff appealed.

By the Bankruptcy Act, 1869:

I "Section 13. The court may, at any time after the presentation of a bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt provable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy or commenced during its continuance, to proceed upon such terms as the court may think just. The court may also, at any time after the presentation of such petition, appoint a receiver or manager of the property or business of the debtor against whom the petition is presented, or of any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof."

"Section 95. Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy. . . . (2) Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

Winslow, *Q.C.*, and *W. C. Fooks*, jun., for the plaintiff.
Macnaghten, *Q.C.*, and *Oswald* for the trustees.

JAMES, L.J. –I am of opinion that this appeal cannot be allowed. The question in this case is whether a receiver appointed on the application of an execution creditor in an action can lawfully seize property when a bankruptcy receiver has already been appointed. The main object of the appointment of a receiver in bankruptcy is to prevent seizure of the property by others. Section 95 of the Bankruptcy Act, 1869, does not take away the right of the receiver in bankruptcy. There must be a lawful seizure of the property before possession has been taken by the court to sustain a right against the bankruptcy receiver.

COTTON, L.J.—I am of the same opinion. No question arises here under s. 95. On Sept. 14 an execution creditor took possession of some property of the debtor. The same day, but earlier in point of time, the Court of Bankruptcy appointed a receiver, the object of such an appointment being to prevent other persons from seizing the property. The receiver in bankruptcy held the property at the very time the execution creditor seized, and the latter was thus prevented from getting the benefit of his seizure. There is no reason why the bankruptcy receiver should be postponed to the execution creditor. The bankruptcy receiver so appointed and so holding, no subsequent person could prevail against him.

LUSH, L.J.—I am of the same opinion. Section 95 does not apply here. The Master of the Rolls was right. The object of the appointment of a receiver in bankruptcy is to protect the property to prevent its seizure by other persons. Section 95 assumes that the court has not got possession and defines the rights of the execution creditor and the trustee. In this case s. 13 had already given the property into the hands of the court.

Appeal dismissed.

Solicitors: *Stevens & Co.*; *E. K. Binns*; *Layton & Jaques*, for *Ainlay & Hall*, Huddersfield.

[*Reported by* Frank Evans, Esq., *Barrister-at-Law.*]

A

PATSCHEIDER *v.* GREAT WESTERN RAIL. CO.

[EXCHEQUER DIVISION (Cleasby, B., and Hawkins, J.), January 21, 1878]

[Reported 3 Ex.D. 153; 38 L.T. 149; 42 J.P. 296; 26 W.R. 268]

B *Carriage of Goods—Railway—Passengers' luggage—Duty of railway company at end of journey—Duty of passenger.*

It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner in the exercise of due diligence can call and receive it. It is the owner's duty to call for and remove it within a reasonable time.

C

Notes. Distinguished: *Hodkinson* v. *London and North Western Rail. Co.* (1884), 14 Q.B. 228. Referred to: *Firth* v. *North Eastern Rail. Co.* (1888), 36 W.R. 467.

As to duties of carrier towards passengers' luggage, see 4 HALSBURY'S LAWS (3rd Edn.) 168 et seq., and as to liability of railway company, see 31 HALSBURY'S LAWS D (3rd Edn.) 778. For cases see 8 DIGEST (Repl.) 128 et seq.

Case referred to:

(1) *Richards* v. *London, Brighton and South Coast Rail. Co.* (1849), 7 C.B. 839; 6 Ry. & Can. Cas. 49; 18 L.J.C.P. 251; 13 L.T.O.S. 139; 13 Jur. 986; 137 E.R. 332; 8 Digest (Repl.) 135, *869*.

E Also referred to in argument:

Shepherd v. *Bristol and Exeter Rail. Co.* (1868), L.R. 3 Exch. 189; 37 L.J.Ex. 113; 18 L.T. 528; 16 W.R. 982; 8 Digest (Repl.) 36, *209*.

Appeal by the defendants from a decision of DENMAN, J., sitting with a jury. The plaintiff, a lady's maid, travelled with her mistress from Malvern to Paddington on the defendants' railway. With them they took six boxes of luggage, F one of which belonged to the maid. On arrival at Paddington the maid saw all six boxes unloaded on to the platform from the luggage van. While the boxes were still on the platform she went for a porter to give instructions to take the boxes to a hotel. When the boxes arrived at the hotel, however, the maid's box was missing. The learned judge, in summing-up to the jury, did not tell them what was sufficient in law to constitute a delivery by the company to the passen- G ger, nor what was the company's duty at the end of the journey. The jury found for the plaintiff, and assessed damages at £30, and verdict was entered accordingly. The defendants obtained a rule for a new trial on the grounds of misdirection by the judge, and that the verdict was against the weight of the evidence.

Hume Williams and *J. Torr* for the plaintiff.

J. Digby and *Darling* for the defendants.

H

CLEASBY, B.—It appears to me we ought not to make the rule absolute for a new trial in this case, upon the ground either of misdirection or of the verdict being against the weight of evidence. Upon hearing counsel for the defendants read the passage he did from REDFIELD ON CARRIERS, p. 61, it appeared to me to put the question in a very intelligible and convenient form of words. It is this:

I "It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and remove it within a reasonable time."

Now there might be a case in which the question turned upon this second paragraph or sentence: "It is the owner's duty to call for and remove it within a reasonable time." There might be such a breach of duty on the part of the owner,

in not doing what he ought to have done, as to disentitle him; but I do not think that question arises in this case. The question of the owner's negligence may have been put in the form suggested by counsel for the defendants, but not because he was not there ready to call for it within a reasonable time; and I think until the passenger has the opportunity of taking away his luggage it remains in the custody of the company. It can hardly be disputed that, until he has the opportunity of claiming it and taking it away, it is in their custody. I should say the sole question in this case was whether the box was taken before the plaintiff had the opportunity of claiming it and taking it away. As far as regards any question of law to be laid down upon the subject, I should have no hesitation in saying their throwing it out upon the platform, mixed as it might be with other luggage, was not a delivery or discharge of the defendants' obligation. It can hardly be contended it could be so; but it must be placed there and kept until the passenger has the opportunity of calling for it and receiving it.

Could there be any other question here than this, whether it was taken away before anything had taken place in the way of delivering except placing it upon the platform. If placing it upon the platform is not enough, was it taken away before anything had taken place in the way of delivery? If it had been put in that way to the jury, and they had thought that it was taken away before any delivery, except the putting it upon the platform, it is impossible to say there was not evidence to justify them in coming to that conclusion. The only conclusion one can come to is that it did happen in that way. Then I think, in dealing with another question in this case, namely, whether that was properly left to the jury, there is no doubt it was left to the jury generally. You cannot in every case, in leaving a question to a jury, adopt exactly the phrase or the words other persons might think most appropriate. If one could see that what was left to the jury was whether the particular circumstance amounted to a delivery, I should have had a good deal of difficulty in saying that was the proper way of leaving it to the jury; but I take it the question left to the jury was not whether the circumstances amounted to a delivery, but what were the circumstances of the case, and how it happened, and in that way, it seems to me, coupling it with the proper observations which appear to have been made, the question was brought before the jury as to the time when the box was taken away, when it ceased to be in the custody of the company.

The advantage of leaving a question of negligence to the jury, whether there was negligence on the part of the defendants, is this, not that it is really the question in the case; but if you find the conclusion the jury arrived at was that it was taken away by the negligence of the defendants, it would almost follow from that as a matter of fact they thought it was taken away while in the custody of the defendants, which is the question in the cause.

HAWKINS, J.—The plaintiff's box came into the defendants' possession under circumstances that imposed upon them the duty to convey it to its destination. That they conveyed it was clear, because the plaintiff saw it taken out of the van and put upon the platform. The remaining question is whether the defendants delivered the box to the plaintiff. Upon that part of the case I am clearly of opinion, upon this evidence, the jury having found the box was not delivered, we ought not to disturb the verdict. There clearly was never a delivery of the box to the plaintiff. Then it is said the plaintiff was guilty of negligence, having seen the box come out of the van, in not having kept her eye upon it to see no one took it away. I think the jury were quite right in coming to the conclusion that she was guilty of no negligence. Then there was one point discussed in the course of the argument about which I should like to say a word. The company are bound to deliver at the end of the journey, but that must be subject to this, that the plaintiff, the passenger, is ready and willing to receive within a reasonable time. I quite understand, if a reasonable time elapses for a passenger to take his luggage, and he does not take it, he cannot complain and say the railway company are to be responsible.

I am of opinion, therefore, this rule should be discharged. In *Richards* v. *London, Brighton and South Coast Rail. Co.* (1), WILLIAMS, J., said (7 C.B. at p. 860):

"I express no opinion whether or not the defendants could be compelled to do more than deliver the luggage on the platform; but if the company chooses to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicle by which it is to be taken away, I think their liability as carriers continues until the porters have discharged their duty."

Here it was the duty of the defendants to keep safely the plaintiff's luggage until a reasonable time had elapsed.

Rule discharged.

Solicitors: *Gorton & De Fivas*; *Nelson.*

[*Reported by* H. F. DICKENS, ESQ., *Barrister-at-Law.*]

CHAPMAN *v.* GREAT WESTERN RAIL. CO.
CHAPMAN *v.* LONDON AND NORTH WESTERN RAIL. CO.

[QUEEN'S BENCH DIVISION (Cockburn, C.J., Lush and Manisty, JJ.), March 5, April 7, 1880]

[Reported 5 Q.B.D. 278; 49 L.J.Q.B. 420; 42 L.T. 252; 44 J.P. 363; 28 W.R. 566]

Carriage of Goods—Common carrier—Goods to be left at destination till called for—Loss of goods—Liability of carrier—Failure by owner to remove goods in reasonable time.

Where goods are carried by common carriers to their destination and are marked "to be left till called for" the carriers can after a reasonable time treat their responsibility as carriers as at an end, and exchange it for that of warehousemen. What is a reasonable time is a question of fact.

Goods were delivered to the defendants addressed to the plaintiff, a commercial traveller, and directed "to be left till called for" at a station on the defendants' line of railway. The plaintiff had no residence or place of business near this station, and, having inquired for the goods the day before they arrived, he left the neighbourhood in pursuit of his employment. He called again at the station two days after the arrival of the goods and found they had been destroyed that morning in the defendants' warehouse by an accidental fire.

Held: in the absence of any express contract, the goods having been kept in the warehouse for the plaintiff's convenience, the defendants were not liable as carriers beyond a reasonable time after the arrival of the goods; under the circumstances the plaintiff's delay in calling for them was unreasonable; and, therefore, he could not recover their value.

Notes. Applied: *Manchester and Northern Counties Federation of Coal Traders Associations* v. *Lancashire and Yorkshire Rail. Co.* (1897), 76 L.T. 786. Considered: *Hirschel and Meyer* v. *Great Eastern Rail. Co.* (1906), 96 L.T. 147.

As to liability of carriers, see 4 HALSBURY'S LAWS (3rd Edn.) 147 et seq. and for cases see 3 DIGEST (Repl.) 87 et seq.; 8 DIGEST (Repl.) 38.

Cases referred to:

(1) *Garside* v. *Trent and Mersey Navigation Proprietors* (1792), 4 Term Rep. 581; 100 E.R. 1187; 3 Digest (Repl.) 87, *199.*

(2) *Bourne* v. *Gatliffe* (1841), 3 Man. & G. 643, Ex. Ch.; on appeal (1844), 11 Cl. & Fin. 45; 8 Scott N.R. 604, H.L.; 8 Digest (Repl.) 38, *218*.

(3) *Re Webb* (1818), 2 Moore, C.P. 500; 8 Taunt. 443; 129 E.R. 455; 3 Digest (Repl.) 87, *200*.

Action before COCKBURN, C.J., and special jury at Bristol. Verdict was given for the plaintiff, the question of law being reserved to be argued on motion for judgment.

The plaintiff was a traveller in drapery. A parcel of such goods was delivered to the defendants, the Great Western Railway at Bristol, for forwarding to their Wimborne station. A second parcel was delivered to the defendants, the London and North Western Railway Company in London, to be forwarded to Wimborne. Both were addressed to the plaintiff and both were directed "to be left till called for." The parcel from Bristol arrived on Mar. 24, the one from London on the 25th, and were placed in the station warehouse. They had not been called for on the morning of the 25th, the warehouse was burnt down and the plaintiff's goods were lost. The plaintiff brought an action against both defendants as common carriers, contending that their liability still existed when the goods were destroyed. The plaintiff was aware that the goods were coming, and called on the 22nd and again on the 27th, the goods being destroyed earlier that day.

Poole for the plaintiff.
Kinglake for the defendants.

Cur. adv. vult.

April 7, 1880. **COCKBURN, C.J.,** read the following judgment of the court— These two cases depend on the same facts and involve the same point. The facts are not in dispute, and lie in a word, but they give rise to a question of considerable importance. [HIS LORDSHIP stated the facts, and continued:] The question is whether the goods in question are to be considered as having been in the custody of the defendants as carriers, in which case the defendants would be liable for the loss, though not arising from any default of theirs, or as warehousemen, in which case they would be liable only for want of proper care, which is not alleged to have been the case here. The facts not being in dispute, it was arranged on the trial at nisi prius that a verdict should pass for the plaintiff for the value of the goods in each case, but that the question of law as to the liability of the defendants should be reserved for the decision of the court on an application for judgment.

The question of where the liability of the carrier ceases, or rather becomes exchanged for that of an ordinary bailee for hire is sometimes one of considerable nicety, and by no means easy of solution. We are not, however, embarrassed in the present case by any consideration as to an undertaking to forward the goods, such as arose in *Garside* v. *Trent and Mersey Navigation Proprietors* (1), or as to any obligation on the part of the company to give notice of their arrival, which was one of the points which arose in *Bourne* v. *Gatliffe* (2). It is plain that the delivery was to be made at the station to which the goods were addressed, and to the plaintiff himself or someone duly authorised on his behalf. Nor does any question arise as to the readiness of the defendants to deliver. The goods had arrived safely, and were ready for delivery had they been called for down to the time of the fire. It is not suggested that the defendants were under any obligation to give notice to the plaintiff of the arrival of the goods, nor indeed could they have done so. He was not a resident at Wimborne, nor did they know his address. He was going about the country on his business between the arrival of the goods and the time of their destruction. No evidence was offered at the trial of any prior course of dealing between the parties or of any established practice on the part of the railway company in dealing with goods addressed to and to be delivered at the station.

We have, therefore, to consider the question with reference to general principles alone. The contract of the carrier being not only to carry, but also to deliver, it follows that to a certain extent the custody of the goods as carrier must extend

beyond as well as precede the period of their transit from the place of consignment to that of destination. First, there is in most instances an interval between the receipt of the goods and their departure, sometimes one of considerable duration. Next, there is the time which in most instances must necessarily intervene between their arrival at the place of destination and the delivery to the consignee unless the latter, which, however, is seldom the case, is on the spot to receive them on their arrival. Where this is not the case some delay, often a delay of some hours, as for instance when goods arrive at night, or late on a Saturday, or where the train consists of a number of trucks which take some time to unload, unavoidably occurs. In these cases, while on the one hand the delay being unavoidable, cannot be imputed to the carrier as unreasonable, or give a cause of action to the consignor or consignee. On the other hand, the obligation of the carrier not having been fulfilled by the delivery of the goods they remain in his hands as carrier, and subject him to all the liabilities which attach to the contract of a carrier. A fortiori will this be the case where there is unreasonable delay on the part of the carrier if the consignee is ready to receive.

The case, however, becomes altogether changed when the carrier is ready to deliver, and the delay in the delivery is attributable not to the carrier, but to the consignee of the goods. Here, again, just as the carrier is entitled to a reasonable time within which to deliver, so the recipient of the goods is entitled to a reasonable time to demand and receive delivery. He cannot be expected to be present to receive delivery of goods which arrive in the night time or of which the arrival is uncertain, as of goods coming by sea or by a goods train the time of the arrival of which is liable to delay. On the other hand he cannot, for his own convenience or by his own laches, prolong the heavier liability of the carrier beyond a reasonable time. He should know when the goods may be expected to arrive. If he is not otherwise aware of it, it is the business of the consignor to inform him. His ignorance, at all events where the carrier has no means of communication with him, which was the case in the present instance, cannot avail him in prolonging the liability of the carrier as such beyond a reasonable time. When once the consignee delays taking away the goods beyond a reasonable time the obligation of the carrier becomes that of an ordinary bailee; being confined to taking proper care of the goods as a warehouseman he ceases to be liable in case of accident.

What will amount to reasonable time is sometimes a question of difficulty, but as a question of fact, not of law. As such it must depend on the circumstances of the particular case. Such being the general rule it is, of course, competent to the parties to modify the contract by the introduction of any terms or conditions they may please. The question arises whether they have done so, and if so, to what extent in the present instance. The goods were specially directed "to be left till called for." What is the meaning of these words? What effect, if any, have they on the contract as effecting the liability of the defendants? In our opinion, none. They amount to no more than an intimation to the carrier that the goods are not to be delivered elsewhere, but will be fetched from the station. They are words which have been in use and had their origin in former times when the carrier generally had his office in the town to which he carried, and was in the habit of delivering at the house or place of business of the person to whom goods were addressed. To prevent goods which it better suited the convenience of the consignee to receive at the office of the carrier, more especially when he had no residence or office at the particular place, from being sent out for delivery and possibly misdelivered and to insure their being kept at the office of the carrier ready for delivery. They were specially so addressed. There are still places at which railway companies send out goods from the station. The consignors of the goods now in question were probably unaware whether the defendant company did so at Wimborne or not. They no doubt knew that the plaintiff did not reside or carry on business there, except in passing. They were probably aware that he was going about the country with his goods, and that it was uncertain at what precise moment it would suit him to receive them. They, therefore, directed them to be left at the

station till called for, obviously for the plaintiff's convenience, not for that of the company.

No doubt some effect must be given to the words. Having contracted to carry the goods subject to the conditions of keeping them till called for, the company would be bound to keep them, possibly not for an indefinite, but at all events for a reasonable time. But in what capacity? As carriers or as warehousemen? In our opinion no change in the conditions and liability is introduced by these words. It would be in the highest degree unreasonable that the company, having agreed to keep the goods for the convenience of the owner, should be saddled with a more onerous liability than would otherwise have attached to them. It cannot be supposed that they undertook to keep the goods till it suited the convenience of the plaintiff to take them away, with the intention of prolonging their responsibility throughout the time, whatever it might be. In our opinion, as soon as a reasonable time for delivery had passed, the defendants were fully entitled to treat their responsibility as carriers as at an end, and as exchanged for that of warehousemen.

This brings us to the question of what under the circumstances would be a reasonable time from the fire happening on the morning of Mar. 27. One of these packages had been lying at the station since the 24th, the other since the 25th. If the plaintiff, who expected these goods, had called for them on the 26th, and had not had them delivered to him, and had sustained a loss in consequence, he would have had a good ground of complaint against the company, inasmuch as they would have had full time to unload the goods, and to have them ready for delivery. The reason he did not do so was that he was following his business elsewhere, but for which he would have fetched his goods away. It seems to us that there must be a corresponding obligation on his part, and that he must put up with the loss as resulting from his own delay instead of throwing it on the company. This view of the case receives support from the decision of the Court of Common Pleas, in *Re Webb* (3), which in principle is quite analogous to the present case, though the facts are not precisely the same. There the defendants, the carriers, in order to obtain the exclusive custom, had agreed with the plaintiffs to store all the goods arriving for them in the defendants' warehouse free of charge till it suited the plaintiffs to take them away. A fire having accidentally broken out, and the goods of the plaintiffs, which had been lying in the defendants' warehouse upwards of a month, having been destroyed, it was held that the goods having been in the keeping of the defendants for the convenience of the plaintiffs, were not liable for the loss. Here, too, the goods were equally in the keeping of the defendants for the convenience of the plaintiffs, and the same result must ensue.

Judgment for defendants.

Solicitors: *Clifton & Carter*, Bristol; *Hall.*

[*Reported by* M. W. McKellar, Esq., *Barrister-at-Law.*]

A

READ *v.* BAILEY

[House of Lords (Lord Cairns, L.C., Lord Blackburn and Lord Gordon), November 6, 7, 1877]

[Reported 3 App. Cas. 94; 47 L.J.Ch. 161; 37 L.T. 510; 26 W.R. 223]

B

Bankruptcy—Partnership—Bankruptcy of partnership firm and partner—Proof by partnership creditors against separate estate—Fraudulent conversion by partner of partnership assets.

As a general rule where there is the bankruptcy of a firm and the bankruptcy of an individual member of that firm the joint estate of the firm and the separate estate of the partner are kept distinct, and the creditors of the joint estate cannot prove against the separate estate in competition with the separate creditors, while, on the other hand, the separate creditors cannot prove against the joint estate in competition with the joint creditors. When in the one case the separate creditors are paid and in the other case the joint creditors are paid, the other creditors may come in and prove in the distribution of the assets, in the one case of the separate, and in the other case of the joint, estate. But this rule is not applicable where there has been a fraudulent conversion by one of the partners of the firm of the property of the one estate to the purposes of the other.

C

D

Notes. Considered: *Re Collie, Ex parte Adamson* (1878), 8 Ch.D. 807. Applied: *J. C. Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.*, [1927] All E.R.Rep. 97. As to proof of debts in bankruptcy as regards partners, see 2 Halsbury's Laws (3rd Edn.) 490 et seq.; and for cases see 4 Digest (Repl.) 503–506.

E

Cases referred to:

(1) *Re Goodchilds & Co., Ex parte Sillitoe, Ex parte Hunter* (1824), 1 Gl. & J. 374; 2 L.J.O.S.Ch. 137, L.C.; 4 Digest (Repl.) 497, *4374*.

F

(2) *Re Harding, Ex parte Smith* (1821), 1 Gl. & J. 74; sub nom. *Re Hay, Ex parte Smith*, 6 Madd. 2; 56 E.R. 988; 4 Digest (Repl.) 504, *4429*.

(3) *Fordyce's Case, Ex parte Cust* (1774), 1 Cooke's Bankrupt Laws, 8th Edn., p. 531; 4 Digest (Repl.) 504, *4426*.

(4) *Ex parte Assignees of Lodge and Fendal* (1790), 1 Ves. 166; 1 Cooke's Bankrupt Laws, 7th Edn., p. 505; 30 E.R. 283; 4 Digest (Repl.) 473, *4160*.

G

(5) *Re Ramsey and Aldrich, Ex parte Harris* (1813), 2 Ves. & B. 210; 1 Rose, 437, 35 E.R. 298, L.C.; 4 Digest (Repl.) 504, *4428*.

Also referred to in argument:

Ex parte Yonge (1814), 3 Ves. & B. 31; sub nom. *Re Slaney, Ex parte Young* (1814), 2 Rose, 40, L.C.; 4 Digest (Repl.) 503, *4423*.

H

Re Sikes and Wilkinson, Ex parte Watkins (1828), Mont. & M. 57; 4 Digest (Repl.) 504, *4433*.

Re Higginson, Ex parte Hinds, Ex parte Higginson (1850), 3 De G. & Sm. 613; 14 L.T.O.S. 449; 14 Jur. 286; 64 E.R. 629; 4 Digest (Repl.) 504, *4430*.

Appeal by a representative of the creditors of the separate estate of Sir Robert Harvey deceased, a former partner in the firm of Harvey and Hudson, bankers, from a decision of the Court of Appeal (James, Mellish and Baggallay, L.JJ.), reported sub nom. *Lacey* v. *Hill*, 4 Ch.D. 537, affirming a decision of Sir George Jessel, M.R., holding that the trustee in bankruptcy of Messrs. Kerrison, the surviving partners of Harvey and Hudson, was entitled to prove against the separate estate of Sir Robert Harvey in respect of the sum of £635,525 of partnership money which had been misappropriated by Sir Robert Harvey.

I

The sum claimed was made up of amounts which Sir Robert Harvey had from time to time abstracted from the bank by means of fictitious credits and forged

bills of exchange entered in the books of the bank by his directions. The money so obtained had been expended by him in losing speculations on the Stock Exchange. He had been the managing partner; and though Messrs. Kerrison occasionally attended at the bank, they took no part in the practical management of the business. Sir Robert Harvey committed suicide in July, 1870, and the next day the bank stopped payment, and was found to be utterly insolvent. The Master of the Rolls allowed the proof, and his decision was affirmed as above mentioned.

Benjamin, Q.C., *H. Davey, Q.C.*, and *Dundas Gardiner* for the appellant.
E. Kay, Q.C., and *Cozens Hardy* for the respondent.

LORD CAIRNS, L.C.—Authorities in the law of bankruptcy, which have been acted upon for nearly a century, which have become interwoven with, and actually part of the law of bankruptcy as administered in this country, ought not to be lightly disturbed; and it appears to me that your Lordships cannot arrive at the conclusion to which you are asked to arrive by the appellant, without entirely subverting authorities of that description.

The facts of the case are extremely simple. There is a banking firm consisting of Mr. Kerrison and Sir Robert Harvey. They continued their business for a period of about ten years, at the end of which time Sir Robert Harvey dies by his own hand. Sir Robert Harvey is the managing partner. Mr. Kerrison takes little or no part in the business of the bank. At the end of the partnership, terminating, as I have said, by the death of Sir Robert Harvey, it is discovered that very large sums of money have been drawn out from the partnership and applied by Sir Robert Harvey to his own use—sums amounting to about £600,000, or thereabouts. The question is, there being now a bankruptcy of the firm and a bankruptcy of the separate estate of Sir Robert Harvey can the assignees of the firm be admitted to prove as creditors against the separate estate in respect to these sums so drawn out.

If these sums had been drawn out from the firm by Sir Robert Harvey, and had been entered in the books of the concern as drawn out, however much it may have been against the duty of Sir Robert Harvey to have drawn out those sums as between himself and his partners, and however ignorant Mr. Kerrison might have been of those drawings, still the drawings would have taken place by the act of one who was the managing partner of the concern, and who, in taking those drawings, might have exceeded and abused his authority, but still it would be doing that which, by being entered in the partnership books, would have been before the notice and in the cognisance of his partners if they had chosen to attend to the details of those books. But if, on the other hand, those sums were withdrawn by Sir Robert Harvey, not merely in abuse of his authority, not merely contrary to the term of engagement between himself and his partners, but were withdrawn by him fraudulently, by which I mean in a way that was entirely concealed from his partners, and the concealment effected by fraudulent practices of Sir Robert Harvey, such as would have made it impossible for the partners by resorting to the books of the concern to know what he was doing, then a different state of things would arise.

As I understand, the rule in bankruptcy, which has been well settled on this point, is this: In this country, where there is the bankruptcy of a firm and the bankruptcy of an individual member of that firm, the joint estate of the firm and the separate estate of the partner are kept distinct, and the creditors of the joint estate, as a general rule, cannot prove against the separate estate in competition with the separate creditors, while, on the other hand, the separate creditors cannot prove against the joint estate in competition with the joint creditors. When in the one case the separate creditors are paid, when in the other case the joint creditors are paid, then the other creditors may come in and prove in the distribution of the assets, in the one case of the separate, and in the other case of the joint, estate.

But, that being the general rule, upon that an exception has been engrafted that, to use the expression of Lord Eldon in *Ex parte Sillitoe* (1) (1 Gl. & J. at p. 382), where there has been a fraudulent conversion of the property of the one estate to the purposes of the other, there the reason of the rule fails, and the rule itself is no longer applicable. I understand the principle of decisions like *Ex parte Sillitoe* (1) to be this. So long as you have separate estates, so long as you keep distinct the joint estate and the separate estate, if you allow the partnership concern to make contracts with its separate members, and to stand upon those contracts as affording a ground of proof against the separate creditors, you run the risk, to say the least—perhaps I might say you have the certainty—that contracts will be made between the firm and the individual members which in effect would defeat the rights of the creditors of the individual members. But where you have a conversion of the property of the firm to the purposes of the individual members, not by way of contract or agreement with the firm, not within the knowledge or the cognisance of the firm, but by the fraud of the individual partner to which the firm is no assenting party, which they cannot be cognisant of, there the reason for the rule ceases, and the firm whose assets have thus been fraudulently abstracted ought not to suffer, and ought not to be deprived of their right to proceed against the separate estate in competition with any other claims. Whether the separate estate has in the result been increased or not been increased, whether at the time you prove it is larger than it otherwise would have been, is a matter which does not concern the application of the rule; and it is sufficient that at one time the separate estate was increased when the property was thus fraudulently converted, and for the purpose of the separate partner.

The rule was extremely well expressed in a way which might almost be supposed to be addressed to the facts of the present case by Sir John Leach, in *Ex parte Smith* (2). The Vice-Chancellor said (1 Gl. & J. at p. 74):

> "As to the merits of the petition, if one partner be entrusted with the entire management of the partnership concern, and he withdraw moneys for his separate use, which he duly and openly enters in the partnership book, this is not a fraud which will entitle the joint estate to prove against the separate estate; otherwise, if by the entries in the books he disguises the transaction or wholly omits or conceals it."

The only remaining observation I have to make is this: What was the fact in this particular case with regard to the mode in which Sir Robert Harvey acted as to the books of the concern? I need not go into the details because there is no dispute with regard to the facts as to the whole of the sum for which proof is claimed, or at all events as to so large a part of it as makes any discrimination of the separate items insignificant and unnecessary. The course taken by Sir Robert Harvey was by creating fictitious accounts by the use of bills, which, I understand, were, as to some at all events, forgeries, by the entries in his own account of fictitious items. The books entirely conceal that which he is doing, and on the contrary present a state of things which would show that none of these fraudulent appropriations of the assets of the partnership had taken place. The case, therefore, is exactly the one contemplated by Sir John Leach, where the drawings are not openly confessed on the books, but are concealed by the way in which the books are kept, not only are omitted from the books, but are covered and distorted by entries in the books which are fraudulent.

These were the grounds upon which the Master of the Rolls proceeded in the case when it first came before him. These are the grounds and the decisions upon which the Court of Appeal acted when the case came before them. Your Lordships have the unanimous opinion, therefore, of the primary judge, and of the judges before whom the case was heard in the second instance; and I am bound to say, that but for the circumstance that a very large sum of money is at stake, I am at a loss to conceive how it could have been supposed that authorities so well settled, and law so well established, could be brought into question by an appeal

to your Lordships' House. I submit to your Lordships that the appeal ought to be dismissed with costs.

LORD BLACKBURN.—I am also of opinion that in this case the appeal ought to be dismissed with costs, and that there was no occasion to call upon the respondents to answer the argument of the appellant. In bankruptcy, where a firm becomes bankrupt, and the individual partners also become bankrupt, in LORD HARDWICKE'S time it seems to have been considered that they were to be treated as separate persons altogether, that the firm might prove against the estate of the individual bankrupt, and the assignees of the individual might prove against the estate of the firm. But more than a century since that was departed from. I do not think it would be proper to inquire whether it was rightly departed from or not. Since that time a century has elapsed in which the bankruptcy law has been repeatedly altered and re-enacted, and yet this has not been changed. I take it we must follow the rule which at least from 1770, and probably earlier, has been established, that the creditors of a bankrupt firm cannot prove in competition with the creditors of a separate estate against the separate estate, nor can separate creditors prove in competition with creditors of the firm against the joint estate. The reason of this was, I take it, not on any ground that there is a right of the private creditor to be paid out of the separate estate, or of the joint creditor to be paid out of the joint estate—I do not think any such rule applies—but it was considered partly upon the ground of convenience in administering the bankruptcy laws that you could not conveniently work it if these classes were to be mixed. Whether that was the right notion or not, I do not know. I believe in Scotland the practice has never been the same as in England, and I think no inconvenience has arisen from allowing the firm to prove against the individual, and the individual against the firm, just as if they were separate persons. How that may be I do not think it would be proper to inquire; the rule has been established, and we must follow it.

But upon that rule there has been established almost at the same time an exception. The first case that has been distinctly cited, in which an exception is referred to, is *Fordyce's Case* (3), in 1774, rather more than a hundred years ago. In that case the decision was, that where the firm was not creditor of the partner in consequence of a contract made between the firm and the partner, but was so in consequence of a fraudulent conversion, the firm might prove against his separate estate in competition with the separate creditors. On that one has to see what was the reason why the rule was departed from. The rule was partly founded, I have no doubt, on the notion that there would have been a tendency to fraud, that pretended contracts would be made with a view to fraud upon the bankruptcy laws. That reason, of course, will not apply where there is no contract at all, and where the right of claim arises not from a contract, but from a wrong, from a tort, a matter in which one of the parties was no sharer. The other reason, that there would be a difficulty in following it out, and there might be practical inconvenience in taking the accounts, which seems to have been relied upon by LORD THURLOW, could not probably apply either in a case of that sort, which would be an exceptional case; but, however, it may be, in 1774 there was this exception, that though the joint estate could not prove against the separate estate, nor could the separate estate prove against the joint estate in competition with the joint creditors in cases where the liability sought to be proved arose from contract, yet where it did not arise from a contract, it might.

Has that ever been departed from? I cannot find that it ever has. In the case which LORD THURLOW decided, of *Ex parte Assignees of Lodge and Fendal* (4) there arose this question, as I understand. The facts were these. It was said that the dormant partner had given the acting partner who carried on the business the amplest authority to invest the money in any way he pleased. He chose to invest it by lending it to himself to pay his private debts—a very wrong thing indeed. As LORD ELDON afterwards has expressed it, it was an abuse of his authority. The

conclusion which LORD THURLOW came to was, since it appeared that the partnership had authorised the partner, not merely given him an ostensible authority, but had actually given him, so that it would be good to third persons, an authority to lend, though he abused that authority, still the debt arose from a contract made with the authority of the firm, and, therefore, did not come within the exception. In *Ex parte Harris* (5), it was exactly the same thing. LORD ELDON, in very strong terms, lays down the rule that fraud would be an exception. He adds:

> "Cases of this kind, however, must be decided upon the particular circumstances, and the conclusion of law as to fraud must depend upon the nature of those circumstances."

He proceeded to show the nature of the circumstances in the case before him; and, as I understand it, he states that though the partnership agreement, if it had been followed out, would have made this to be a fraud; and though it was without authority altogether, yet in fact the way in which the firm carried on the business was such as to make this really an allowed matter, an acting upon authority, just exactly in the same way according to the view which I take of it, to *Ex parte Assignees of Lodge and Fendal* (4) which LORD THURLOW had previously decided. Both of these cases, I think, stand perfectly consistent. In both of these cases the exception was not applied, because it appeared that the debt which it was sought to prove did originate from authority, which was given by the firm, and that there was actually a contract, although that contract and authority were abused by him. Consequently, it was held that the case fell within the general rule and not within the exception.

What is the case here? It certainly seems to me that if ever there was a case in which it was clear that there was no authority given, and where an actual fraud, a wicked deceit was committed, it is in the present case. SIR JOHN LEACH stated very clearly in *Ex parte Smith* (2) one of the grounds on which it would appear that the thing was done by the authority of the firm: where there were no false books it would appear probably prima facie that it was done by the authority of the firm; where there were false books, prima facie the act was fraudulent. I take it that is one very correct and proper instance of the rule; but I rather think the real rule is what LORD ELDON states, that the circumstances of each case must be looked to. Those circumstances mentioned by SIR JOHN LEACH would, in my mind, be conclusive that there was a fraud. Many other circumstances might amount to a fraud, although they fell short of those mentioned by SIR JOHN LEACH; though I can imagine there might possibly be a case in which there was forgery, and yet it might appear that the debt was contracted by abuse of authority and not without authority. I take it the real principle running through all these cases is whether this debt, in respect of which the claim is said to be made upon the separate estate, was contracted by the authority, express or implied, of the firm, though that authority might be abused; or was it done by a fraud without any authority, and an absolute fraudulent conversion of the firm's property? When once it is brought to that, it seems to me it would be waste of time to go through the present case, for a grosser case of fraud without authority could not be found than appears to have been committed by Sir Robert Harvey in the present instance.

It was attempted to be argued that because he had carried on the fraud for ten years, that, therefore, the matter should not be able to be proved, though it might have been proved if the fraud had only been carried on one year. But it seems to me, if it was a question of equity between the separate creditors and the surviving partner, Mr. Kerrison, whatever might be the question of equity between them, that if it be a question of whether or no the debt was contracted by any authority of the firm, or was a fraudulent debt fraudulently created, as a wrongful act, it seems to me lapse of time is only a matter of evidence. I cannot conceive it makes any difference further than that. That it does make a difference in difficulty of proof is quite clear, but that has been overcome. It seems to me,

therefore, in the present case the decision below was perfectly right, and I need hardly say I say so with much more confidence in finding it is the decision of the Master of the Rolls confirmed by the Court of Appeal.

LORD GORDON concurred.

Appeal dismissed.

Solicitors: *Travers, Smith & Co.*; *Sole, Turners & Knight*, for *Coaks, Rackham & Cooper*, Norwich.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

WIMBLEDON AND PUTNEY COMMON CONSERVATORS *v.* DIXON

[COURT OF APPEAL (James and Mellish, L.JJ., Baggallay, J.A., and Bramwell, B.), November 26, December 1, 2, 1875]

[Reported 1 Ch.D. 362; 45 L.J.Ch. 353; 33 L.T. 679; 40 J.P. 102; 24 W.R. 466]

Easement—Burden on servient tenement—Increase by change in character of dominant tenement—Right of owner of dominant tenement—Right of way to open space—Building on open space.

No change in the character of a dominant tenement can be made where it would result in increasing the burden imposed on the servient tenement by an easement. A right to use the dominant tenement in whatever form into which, or for whatever purpose, that property may be changed cannot be inferred from evidence of the user of the property in its original state, e.g., if there be a right of way, however general, to a field, the owner of the field has no right to turn the field into a factory or a town and then use the way for the purpose of the factory or town.

Easement—Right of way—Common land—Immemorial user from one point to another by different tracks—Establishment of right.

Semble: If from a terminus a quo to a terminus ad quem persons have found their way from time immemorial across a common, going sometimes by one track and sometimes by another, a right of way across the common can be validly claimed by a user of the way.

Notes. Applied: *Bradburn* v. *Morris*, *Morris* v. *Bradburn* (1876), 3 Ch.D. 812. Distinguished: *Newcomen* v. *Coulson* (1877), 5 Ch.D. 133. Considered: *Finch* v. *Great Western Rail. Co.* (1879), 5 Ex.D. 254. Applied: *Milner's Safe Co.* v. *Great Northern and City Rail. Co.*, [1907] 1 Ch. 207; *R.P.C. Holdings, Ltd.* v. *Rogers*, [1953] 1 All E.R. 1029. Referred to: *Bolton* v. *London School Board* (1879), 40 L.T. 582; *Robinson* v. *Cowpen Local Board* (1893), 62 L.J.Q.B. 619; *Tyne Improvement Commissioners* v. *Imrie*, *A.-G.* v. *Tyne Improvement Commissioners* (1899), 81 L.T. 174; *Metropolitan Rail. Co.* v. *Great Western Rail. Co. and London Corpn.* (1901), 84 L.T. 833; *A.-G.* v. *Antrobus*, [1905] 2 Ch. 188; *Thames Conservators* v. *Kent*, [1918] 2 K.B. 272; *Weston* v. *Laurence Weaver, Ltd.*, [1961] 1 All E.R. 478.

A As to the burden on a servient tenement and as to rights of way generally, see 12 Halsbury's Laws (3rd Edn.) 521, 569–582; and for cases see 19 Digest (Repl.) 13–16, 100 et seq.

Cases referred to:

(1) *Allan* v. *Gomme* (1840), 11 Ad. & El. 759; 3 Per. & Dav. 581; 9 L.J.Q.B. 258; 113 E.R. 602; 19 Digest (Repl.) 124, *777*.

B (2) *Williams* v. *James* (1867), L.R. 2 C.P. 577; 36 L.J.C.P. 256; 16 L.T. 664; 15 W.R. 928; 19 Digest (Repl.) 116, *714*.

(3) *Cowling* v. *Higginson* (1838), 4 M. & W. 245; 1 Horn & H. 269; 7 L.J.Ex. 265; 150 E.R. 1420; 19 Digest (Repl.) 122, *754*.

(4) *Henning* v. *Burnett* (1852), 8 Exch. 187; 22 L.J.Ex. 79; 155 E.R. 1313; 19 Digest (Repl.) 30, *145*.

C

Also referred to in argument:

Goodson v. *Richardson* (1874), 9 Ch. App. 221; 43 L.J.Ch. 790; 30 L.T. 142; 38 J.P. 436; 22 W.R. 337, L.C. & L.JJ.; 28 Digest (Repl.) 340, *592*.

United Land Co. v. *Great Eastern Rail. Co.* (1875), 10 Ch. App. 586; 44 L.J.Ch. 685; 33 L.T. 292; 40 J.P. 37; 23 W.R. 896, L.JJ.; 19 Digest (Repl.) 116, *715*.

D

Re Metropolitan Public Carriage and Repository Co., Brown's Case (1873), 9 Ch. App. 102; 43 L.J.Ch. 153; 29 L.T. 562; 22 W.R. 171, L.C. & L.JJ.; 9 Digest (Repl.) 474, *3102*.

Jackson v. *Stacey* (1816), Holt, N.P. 455, N.P.; 19 Digest (Repl.) 121, *753*.

Skull v. *Glenister* (1864), 16 C.B.N.S. 81; 3 New Rep. 389; 33 L.J.C.P. 185; 9

E L.T. 763; 12 W.R. 554; 143 E.R. 1055; 19 Digest (Repl.) 119, *742*.

South Metropolitan Cemetery Co. v. *Eden* (1855), 16 C.B. 42; 25 L.T.O.S. 69, 100; 139 E.R. 670; 19 Digest (Repl.) 115, *710*.

Baxendale v. *McMurray* (1867), 2 Ch. App. 790; 31 J.P. 821; 16 W.R. 32, L.JJ.; 19 Digest (Repl.) 172, *1153*.

F **Appeal** by the defendant from a decision of Sir George Jessel, M.R., in an action by the plaintiffs, the Wimbledon & Putney Commons Conservators, for an injunction restraining the defendant, Dixon, from using a road for certain purposes.

The owner of a farm adjoining a common within the district of the plaintiffs to which access for horses and carriages had been obtained from time immemorial by ancient tracks over the common from one point to another, but by no clearly

G defined road, sought to erect houses on a portion of his farm, and to use a road, which had been made in substitution for the ancient tracks over the common, for the purpose of conveying building materials, intending also to use the road as a means of access to the houses when built. On the farm there were a farm-house and a cottage, and there was evidence that, in addition to using the ancient tracks for access to the farm for ordinary agricultural purposes, the owner or his

H predecessors in title had also drawn over the tracks building materials for adding a wing to the farm-house, and for converting a mud cottage into a brick cottage.

In April, 1875, the defendant began to build, and thereupon the plaintiffs filed a bill praying that the defendant, his servants, and agents might be restrained from drawing, or causing to be drawn along the road or any part of it, any bricks, stone, or other building materials to be used in the erection of houses or other buildings

I upon the farm or any part of it, and from otherwise using the road as a means of access to the farm lands in excess of the user to which the same was liable as a road made in substitution for the ancient tracks across the common. The defendant pleaded that he had a right to use the road for all purposes, and in support of his case he adduced evidence that the ancient tracks over the common had been used for the purpose of drawing building materials on one occasion to add a wing to the farm-house, and on others to turn a mud cottage into a brick cottage, for the purpose of taking away gravel which had been found and dug on the farm, and by persons going to the farm for the purpose of shooting. Sir George Jessel, M.R.,

granted an injunction in the terms of the first part of prayer of the bill, with the addition, "except for the ordinary farming purposes of the lands." The defendant appealed.

Miller, *Q.C.*, and *Bush* for the defendant.
Chitty, *Q.C.*, and *W. R. Fisher* for the plaintiffs.

JAMES, L.J.—I am of opinion that, subject perhaps to an alteration that may be made in the words of the injunction, the order of the Master of the Rolls ought to be affirmed.

The question between the parties is whether Mr. Dixon is entitled to convert a piece of land that has been uncultivated up to the present time, forming part of an estate or farm called Warren's Farm, into sites for several houses, the right which he claims being an unlimited right for himself and for Mr. Drax, in whose right he is claiming, to turn the whole of the farm into a town or towns if they should be so minded, and should be able to do so. As far as we have any evidence before us, the farm and lands in respect of which this right is claimed have been substantially in their present state from time immemorial, during which it is to be assumed that the right of way has been exercised—that is to say, there was a farm-house, farm lands, and a piece of woodland. The only alterations in the state of the property of which we have any evidence have been an enlargement of the farm-house to a small extent, the change of a mud cottage into a brick cottage, and the erection of or change in another cottage. That those changes may be material, and may be to some extent evidence of the general right, it is probably difficult to deny. But whether they amount to evidence sufficient to justify any inference of fact is another question.

I am of opinion that the mere fact that over a common some building materials were taken to build another house is not sufficient to justify the inference of fact that the right, whatever it was, that belonged to that house and property was a right for all purposes whatsoever to which the land might be applied. The other rights alleged are for agricultural purposes, for sporting, which seems to me the same thing as an agricultural purpose, and for taking gravel from a gravel pit in one of the fields. That is insufficient, as it seems to me, to raise any inference of fact from which to draw the right claimed. The property has been used practically for all purposes for which a farm may be used—for residential and farming purposes. We have to consider whether the character of the property can be so changed in substance as substantially to increase or alter the burden upon the servient tenement.

I said when this case was opened that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The dicta and observations, which are entitled to very great weight, of Lord Abinger and Parke, B., in the case which has been referred to induced me at first to think that the opinion I had formed was wrong. But when we consider those dicta and observations in connection with the very clear language of the Court of Queen's Bench in *Allan* v. *Gomme* (1), and of Bovill, C.J., and Willes, J., in *Williams* v. *James* (2), I am quite satisfied that the true principle is the principle laid down in these later cases—namely, that you cannot from evidence of user of property in its original state infer a right to use it in whatever form in which, or for whatever purpose, that property may be changed. That is to say, if there be a right of way, however general, for whatever purpose, to a field, the person who is the owner of the field cannot from that say: "I have a right to turn that field into a manufactory, or into a town or tan yard, and then use the right of way for the purposes of the manufactory or town so built."

I, therefore, think that the Master of the Rolls was right in the result at which he arrived in drawing an inference from the facts as well as in the law which he applied to those facts. But I am unable to agree with the view which he apparently formed that there could be no right of way at all in respect of what are called the

tracks over the common. I am not at all prepared to assent to that as a true statement of the law. If from one point, say from a gate to a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track, and sometimes by another, with such deviations as occur between the gate and the road, I am not prepared to say that a way across the common through those tracks may not be validly claimed, and may not be as good as any right over any formed road. But when the Master of the Rolls says that the way ought to be used only for the purposes for which it was used when the land was in a state in which it was formerly, and when we see the evidence of user, I think he is right, and concur in what he has said. The substance of the injunction is to restrain Mr. Dixon from erecting the new buildings, or using the road for the purpose of any new buildings, except agricultural buildings there. Then it goes on to say, "and from using the same except for agricultural purposes." Probably it should run in this way, if their Lordships agree with me: "except for the purposes to which the land has been heretofore applied."

MELLISH, L.J.—I am of the same opinion. The question is whether Mr. Drax and his tenants are entitled to use this right of way for the purpose of turning the land into building land and erecting new buildings upon it, and then using the way, after the buildings are erected, for the purposes of those buildings.

It was admitted in the bill and proved in point of fact, that the right of way did exist for some purposes; and I do not agree, as the lord justice has said, with what was thrown out by the Master of the Rolls as to the consequence of the track not being a perfectly definite track over the common, but being a track going in different directions previously to the time when the new road was made. No doubt it is perfectly correct that if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to approach, sometimes in one place and sometimes in another, and then went across the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus a quo and the terminus ad quem, the mere fact that the owner of the land does not go precisely along the same line for the purpose of going from one place to the other would not enable the owner of the servient tenement to dispute the right of way. Assume the owner of this common had a grant which stated that Mr. Dixon had the right to go from the gate leading out of Cæsar's Camp to the highway by the National School with carriages and horses, at his free will and pleasure, I cannot suppose that the grant would fail in point of law because it did not point out the precise definite track between the one terminus and the other by which he was to go in using the right. If the owner of the servient tenement did not point out the line of the right of way, then the owner of the dominant tenement must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a definite track, then he must point it out, and in that case the owner of the dominant tenement would not be entitled to go out of the way, strictly speaking, merely because the way is rough and there are ruts in it, and so forth.

In my opinion, the bill has properly admitted that the defendant has a right of way for some purposes. Then comes the question to what extent does that right of way go? That depends partly on a question of law, and partly on a question of fact, but mainly on a question of law. When the question of law is settled, there is no great difficulty in arriving at a proper conclusion as to the question of fact. The question of law is this. Assuming that it is made out that Mr. Drax and his tenants have used this way, not exclusively for agricultural purposes, but for all purposes for which they wanted it in the state in which the land was at the time of the supposed grant, when the right of way first began, and assuming that there has been no material alteration in the premises since the user of the way for all the purposes for which they required it began, does that entitle Mr. Drax to alter substantially and increase the burden on the servient tenement by building any number of houses he pleases on this property and say that the persons who inhabit those houses will have

a right to use the way for all purposes connected with the houses? I certainly was under the impression, when this case was opened, that the owner of a dominant tenement could not increase or alter the burden on the servient tenement in any such way as that.

Counsel for the defendant called our attention very pointedly to the language of PARKE, B., in *Cowling* v. *Higginson* (3), and that certainly did raise some doubt in my mind as to what the true rule of law is, but now that the other cases have been cited, I doubt whether PARKE, B., had the question now before us present to his mind; and I am of opinion that the true rule is that laid down by BOVILL, C.J., and WILLES, J., in *Williams* v. *James* (2), and I think by PARKE, B., himself, in *Henning* v. *Burnett* (4). That was with reference to a grant. I am now speaking merely with reference to user. In *Cowling* v. *Higginson* (3) LORD ABINGER is cautious in the way in which he lays down the rule. He says (4 M. & W. at p. 256):

> "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose, or for particular purposes only, an inference of general right would hardly be presumed."

If the owner of the dominant tenement has used the way only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes. I have a doubt whether PARKE, B., intended the contrary, although he says that the user of a way for several purposes implies its user for all purposes, because, if the facts in *Cowling* v. *Higginson* (3) are examined, it will be found that the mines had been opened seventy years before, and it was, therefore, a property with existing mines in it. The way, it is true, had not been used for those mines, but, it being a property with mines in it, it might be inferred that, if the owner was entitled to use the way for all the purposes for which he wanted it, that might include the user of it for the purposes of the mines, that being a reasonable occupation of the land in the condition in which it was.

However that may be, in my opinion the true rule is that laid down by BOVILL, C.J., in *Williams* v. *James* (2), that where a right of way to a piece of land is proved, that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. WILLES, J., evidently agrees with that view.

That being the rule, what are the purposes for which, according to the ordinary and reasonable use to which this land would be assumed to have been applied at the time of the grant, or supposed grant, this road may be used? We do not know when the grant was made. It is from time immemorial; Cæsar's Camp has existed from time immemorial; so have Wimbledon Common and the village of Wimbledon. When Warren Farm was first inclosed we do not know. But one cannot suppose that there was any notion of using it for general building purposes at that time, though no doubt the owner of that farm must always have required, first of all, the way to the cottages in one direction, and then a way to Wimbledon, which lies in another direction. Is there any such evidence of user for purposes beyond what was thus necessary and reasonably required for the occupation of the land in its existing state, as entitles us to hold that the right extends beyond that? I agree that, if we found that several houses had been built, that the owner of Warren Farm had exercised the right of building new houses, and that he had a road to those new houses, we might infer that it was not to be confined to those particular houses, because that was not the original grant. But for that conclusion it must be inferred that building generally was contemplated at the time of the original grant, and that that was included in it. I will not say that there is no evidence of that, but there is not sufficient evidence for us to act upon and say that there is a right of way beyond what is necessary and reasonable for the occupation of the

premises as they existed at the time of the supposed grant. The enlargement of Warren Farm-house did not go beyond the right for farming purposes. It would be a very narrow construction to hold that because a small farm-house with some small buildings was erected 200 or 300 years ago, the farmer could not enlarge his farm buildings for the purposes now required in agriculture.

With regard to the cottage, the changing of a mud cottage into a brick cottage is really the strongest piece of evidence in the case. But really it is very weak evidence, if it is evidence at all, because if a mud cottage became unfit for human habitation, the alteration of it, although there is the carrying of bricks for a short time, the burden of traffic on the way is not permanently increased. On the assumption that the owner and occupiers had a right of way to the mud cottage, the going to the brick cottage after it is once built, was no greater burden than the going to the mud cottage. The other acts of user that occurred in taking away gravel, and in going to the farm for the purposes of shooting, are acts of user reasonably connected with the occupation of the premises as they have been during the whole time that the right of way has existed, as far as we know.

I am, therefore, of opinion that it is not made out that there is any right to use this road for the purpose of erecting entirely new buildings, and, after those buildings are erected, using the road for the purposes of those buildings. I agree, therefore, that the appeal must be dismissed.

BAGGALLAY, J.A.—I am of the same opinion. It appears to me that there are two questions for decision in this case. The first is: What is the extent of the right of way which is proved by the evidence in the case; and the second is: If that right of way is established as limited to particular purposes, can it be extended consistently with the rule of law applicable to questions of the like kind? I think the judgment of PARKE, B., in *Cowling* v. *Higginson* (3) has been interpreted to an extent beyond what the learned baron intended. It is true that in one part of his judgment he uses this expression (4 M. & W. at p. 256):

> "If it is shown that the defendant and those under whom he claimed have used the way whenever they have required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right."

These words taken by themselves point in the direction of the argument for the defendant. But I think those wide words are qualified by this statement:

> "If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved that it has been used for a variety of purposes, then they might be warranted in finding a right for all."

Let us assume the case of an agricultural district where there has been a right of way to a certain piece of land exercised for agricultural purposes for a length of time, and then it appears that there is valuable gravel on the estate, and it is raised and sold from time to time and carried over the way previously used for agricultural purposes alone. Then assume that afterwards mineral produce is found on the estate and raised, and the way is used for carrying it away. One might imagine a variety of acts of user that would from time to time arise in the course of the occupation of the land. In such a case, with all this variety of acts of user established, I can understand that the jury might be directed to find from that that the original grant must be treated as a grant for all purposes. No such case arises here. If it is not proved by evidence, as I think it is, it is admitted that the right of way was used for agricultural purposes from time immemorial. We find in addition to that two or three kinds of user suggested as going beyond agricultural purposes which do not appear to do so, such as building a new barn, or adding a wing to the house, or even the shooting. But we have got two purposes for which this way has been used—the one for carrying materials for replacing a mud cottage upon a small portion of the property by a more substantial building, and the other for taking gravel and carting it away. If the matter came before me as a jury-

man to say whether I could infer a right to use the way for all purposes, I should answer, "No." It is not like a general user for all purposes, such as PARKE, B., contemplated. Therefore, to the first question it must be answered, that the right of way has been enjoyed merely for the purposes to which the land was applied at the date of the grant and no further.

The second question is whether the right to use this way, being limited to these particular purposes as to which there has been actual proof, can be extended to the purposes for which the defendant desires to use it? I think it cannot be so extended consistently with the rule of law from time to time enunciated, and particularly in *Williams* v. *James* (2) that the burden of the servient tenement must not be increased, nor can the nature of the user be substantially changed. Answering the questions that arise in this case in the way I have suggested, it appears to me that the judgment of the Master of the Rolls is correct, and that, subject to the modification which has been mentioned by JAMES, L.J., the injunction must stand.

BRAMWELL, B.—I agree.

Appeal dismissed.

Solicitors: *Dixon, Ward, Letchworth & Weld*; *Horne & Hunter.*

Re BOWES. Ex parte JACKSON

[COURT OF APPEAL (Baggallay, Cotton and Thesiger, L.JJ.), June 24, 25, 1880]

[Reported 14 Ch.D. 725; 43 L.T. 272; 29 W.R. 253]

Mortgage—Attornment clause—Validity—Provision of real tenancy at real and fair rent—Measure of fair rent—Invalidation of clause if device to enable mortgagee to distrain in event of mortgagor's bankruptcy.

To create the relation of landlord and tenant between mortgagee and mortgagor the attornment clause in the mortgage deed must provide for a real tenancy at a real and fair rent, the measure of which is the figure at which the property could be let and not the amount of the mortgage debt. Such a clause will be bad, and invalid against the trustee in bankruptcy of the mortgagor, where it appears that the transaction is a mere sham and a device to give the mortgagee, as a landlord, a right in the case of the mortgagor's bankruptcy to distrain on chattels which otherwise would belong to the creditors generally.

Notes. Distinguished: *Re Betts, Ex parte Harrison* (1881), 18 Ch.D. 129, n. Considered: *Re Knight, Ex parte Voisey* (1882), 21 Ch.D. 442. Referred to: *Re Willis, Ex parte Kennedy* (1888), 21 Q.B.D. 384; *Re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.*, [1897] 1 Ch. 373; *Re Halstead, Ex parte Richardson*, [1916] 2 K.B. 902.

As to attornment clauses in mortgage deeds, see 27 HALSBURY'S LAWS (3rd Edn.) 247, 248; and for cases see 35 DIGEST (Repl.) 372–376.

Cases referred to:

(1) *Re Stockton Iron Furnace Co.* (1879), 10 Ch.D. 335; 48 L.J.Ch. 417; 40 L.T. 19; 27 W.R. 433, C.A.; 35 Digest (Repl.) 373, *743*.

(2) *Re Thompson, Ex parte Williams* (1877), 7 Ch.D. 138; 47 L.J.Bcy. 26; 37 L.T. 764; 26 W.R. 274, C.A.; 5 Digest (Repl.) 1032, *8342*.

(3) *Morton* v. *Woods* (1869), L.R. 4 Q.B. 293; 9 B. & S. 632; 38 L.J.Q.B. 81; 17 W.R. 414, Ex. Ch.; 35 Digest (Repl.) 375, *756*.

(4) *Higinbotham* v. *Holme* (1812), 19 Ves. 88; 34 E.R. 451; sub nom. *Higginbotham* v. *Holme*, Mont. 479, n.; 5 Digest (Repl.) 706, *6169*.

A Also referred to in argument:

Re Roberts, Ex parte Hill (1877), 6 Ch.D. 63; 46 L.J.Bcy. 116; 37 L.T. 46; 25 W.R. 784, C.A.; 5 Digest (Repl.) 1027, *8312*.

Re Jordan, Ex parte Symmons (1880), 14 Ch.D. 693; 43 L.T. 106; 28 W.R. 803, C.A.; 5 Digest (Repl.) 824, *6954*.

B *Jolly* v. *Arbuthnot* (1859), 4 De G. & J. 224; 28 L.J.Ch. 547; 33 L.T.O.S. 263; 23 J.P. 677; 5 Jur.N.S. 689; 7 W.R. 532; 45 E.R. 87, L.C.; 35 Digest (Repl.) 368, *705*.

Pinhorn v. *Souster* (1853), 8 Exch. 763; 1 C.L.R. 99; 22 L.J.Ex. 266; 21 L.T.O.S. 92; 1 W.R. 336; 35 Digest (Repl.) 371, *736*.

Lehain v. *Philpott* (1875), L.R. 10 Exch. 242; 44 L.J.Ex. 225; 33 L.T. 98; 39 J.P. 584; 23 W.R. 876; 18 Digest (Repl.) 341, *887*.

C **Appeal** from a decision of the Chief Judge in bankruptcy ordering that trustees in the bankruptcy of a mortgagor should realise certain chattels and pay the proceeds to the mortgagees.

By an indenture, dated Feb. 27, 1877, and made between Joseph Bowes (thereinafter called the mortgagor), of the one part, and the Bank of Whitehaven, Ltd. (thereinafter called the said company), of the other part, after reciting that the D mortgagor had an account current with the bank under the name of Joseph Bowes & Co., and was indebted on that account in a considerable sum of money, and that the company had agreed to make further advances and grant other accommodation to the mortgagor, it was witnessed that the mortgagor granted and assigned to the company and their assigns certain land and buildings and the business of the mortgagor of a retail and manufacturing chemist, with all book debts, stock-in- E trade, and other effects, and fixtures, articles, and things then or thereafter during the continuance of the security belonging or to belong to the business, and all books of account of the business, together with full power and authority in the name of the mortgagor, his heirs and assigns, at any time or times thereafter during the continuance of the security to ask, demand, sue for, and recover and take possession of all or any of the premises, subject to a proviso for redemption F on payment of the balance of the current account with interest from the date of demand. The mortgage contained a power of sale and the following clause:

> "And the mortgagor doth hereby attorn and become tenant to the said company and their assigns of the hereditaments hereinbefore expressed to be hereby granted and assigned, or such part thereof as is in the possession of G the mortgagor, as tenant from year to year from the date hereof at the annual rent of £8,000 payable yearly in advance on Feb. 27 in every year, the first year's rent being now already due and payable, and the said tenancy to be determined by the said company or their assigns at one week's notice unless the aforesaid rent for the current year be fully paid before the giving of such notice, and the mortgagor doth hereby admit that he has paid to the said com- H pany the sum of one shilling on account of the said rent: Provided always that all rent which may be paid or recovered under or by virtue of the attornment hereinbefore contained shall be applicable in or towards payment or satisfaction of the principal moneys and interest intended to be hereby secured, and that any surplus shall be accounted for to the mortgagor."

The mortgage deed was stamped to cover a principal sum of £8,000. The amount I owing to the bank on the current account, at the date of the mortgage, was £7,090 7s. 3d. The admitted letting value of the property was between £140 and £150 per annum. On May 30, 1879, the bank distrained certain goods on part of the mortgaged premises for £6,530 11s. 1d., the amount then due to the bank on the current account.

On June 3, 1879, Bowes filed a petition in the Whitehaven County Court for liquidation. On the same day Jackson, who had acted as bailiff for the bank under the distress, was appointed receiver, and an order was granted restraining the bank from taking any further proceedings against the debtor for the alleged rent. It was

then arranged that Jackson should continue in possession until trustees were appointed. On June 24, 1879, a resolution was passed by the creditors for liquidation by arrangement, and that Jackson, one Brown, and one Nicholson, should be trustees. On June 25 it was agreed that the bailiff of the bank should withdraw from possession of the distrained goods without prejudice to the bank's claim or rights under the distress, and that the proceeds to the amount of the bank's claim should be paid to the bank if it should be determined that the distress was valid. The bailiff withdrew from possession, and some of the goods were realised, producing £1,626 18s. 10d. An application for an order that the trustees should realise the goods and pay the proceeds to the bank in satisfaction of its debt was dismissed with costs on Jan. 19, 1880. The bank appealed to the Chief Judge, who on Feb. 26, 1880, discharged the order of the county court. The trustees appealed.

Roxburgh, Q.C., and *T. A. Roberts* for the trustees.
Horton Smith, Q.C., and *Whitworth* for the bank.

BAGGALLAY, L.J.—At the time when the mortgage of Feb. 27, 1877, was executed, it was not unlawful to introduce into a mortgage deed that which is commonly spoken of as an attornment clause, and, the relation of landlord and tenant being thereby established between the mortgagee and mortgagor, the power of distress for rent in arrear became exercisable by the mortgagee, and, to the extent to which it was so exercised, the mortgagee was enabled to treat the chattels of the mortgagor as forming a portion of the security, and in a sense, as the law then was, to avoid the registration provisions of the Bills of Sale Act, 1854 [repealed by Bills of Sale Act, 1878]. I say as the law then stood, because in *Re Stockton Iron Furnace Co.* (1), it was held that such a clause was not a licence or authority to take possession of chattels within the intent and meaning of the Act of 1854, which was then in force, and by s. 6 of the Bills of Sale Act, 1878, a clause was introduced to this effect:

> "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress."

As was pointed out by Sir George Jessel, M.R., in *Re Stockton Iron Furnace Co.* (1), there was nothing unreasonable in the original introduction into mortgage deeds of attornment clauses in cases in which the mortgagor continued in possession of the demised premises. If the demised premises had been occupied by a stranger, the mortgagee could at any time have demanded payment of the rent in arrear. He could have applied any rent paid to him under such demand in discharge in whole or in part of the interest due in arrear on his mortgage, and if it was more than sufficient for the discharge of the interest due it could be applied in discharge or satisfaction pro tanto of the principal debt itself. So far as any inference can be drawn from the practice of inserting attornment clauses, it appears to me that the benefit to be derived by the attornment clause was intended to be an equivalent for that which the mortgagee would derive if the tenant had been a stranger. But what would the equivalent be? Would it not be a right to have payment of a fair and reasonable rent such as an ordinary tenant would be willing to give under ordinary circumstances for the premises? That, it seems to me, must be the rent for which a properly prepared attornment clause should make provision; not necessarily the exact amount which another tenant would pay for the property, but at any rate such an amount as a willing tenant would probably pay as a bona fide rent. If the rent so reserved is clearly in excess of what would be a

A fair and reasonable rent, it appears to me that, though you may call it rent, it is no longer a real rent, but it is a fictitious payment under the name of rent.

To pass from general propositions of that kind to the particular case now under consideration, I do not entertain any doubt as to the honesty and purpose of the bank in having their mortgage security prepared in the form in which it has been prepared. It appears that their mortgage deeds usually contain an attornment B clause of a similar character to that which occurs in the case we have now under consideration, and I should infer from this that they do not in their attornment clauses limit themselves to what would be a reasonable rent to be paid for the premises which are made the subject of it, but introduce an artificial sum sufficient to give them a reasonable and satisfactory security upon the chattel property of the mortgagor. They could always make themselves safe in a case like the present by C registering their mortgage as a bill of sale, but we know, as a matter of business, that that would be an inconvenient course to adopt. Debtors would be unwilling to give securities of that kind if they were to be subject to the registration of a bill of sale, the fact being made generally known through the medium of certain publications to traders and other persons, and suggesting that persons borrowing money under such circumstances were not in a flourishing condition. One can D easily understand why a bill of sale giving an assignment, or making an assignment of chattels, is not registered. No doubt it is more for the convenience and encouragement of trade, and for their own particular business, but, if traders choose to adopt courses of this kind, they must take the consequences of so doing. At the same time justice must be done to them, and if the law enables them to carry out transactions of this kind in this form by all means let them do it.

E The Chief Judge seems to have been influenced by the decision of the Court of Appeal in *Re Stockton Iron Furnace Co.* (1), which was not a bankruptcy case, but a case arising under the Companies Acts. In the *Stockton* case (1) the Chief Judge appears to have adopted the idea that all attornment clauses in mortgage deeds were necessarily frauds upon the bankruptcy law. I observe that in the introductory part of his judgment he says (10 Ch.D. at p. 344):

F "From the description which has been given to me in evidence, I should doubt whether there was anything unfair in the stipulation of £5,000 a year as the rent of these premises. But when I look at the deed I ask myself, to what end could this proviso have been inserted in a mortgage deed unless it was to avoid the provisions of the Bills of Sale Act, and to provide for the mortgagees a remedy which, when insolvency happened, they could put in force?"

G Therefore, in a case in which the rent reserved was not in excess of what would have been a fair and reasonable rent for the premises, he still regarded the introduction of such a clause as a fraud upon the bankruptcy law.

There was an appeal from that decision to the Court of Appeal. When it was brought before that court three points were raised, and I think it is important to bear in mind what those points were. The first was that the deed was a bill H of sale, and, as such, required registration. We are bound by the decision in that case, in which it was most distinctly held that an attornment clause such as we are now dealing with was not a licence or authority to take possession of chattels within the meaning of the Act of Parliament.

The next point raised was that any attornment clause was void as against trustees in bankruptcy. That was the view which the Chief Judge apparently took, on I the ground that the object was to enable the mortgagee, in case of the bankruptcy of the mortgagor, to distrain for the rent, and thus obtain a preference over other creditors. That was met by Sir George Jessel, M.R., in the following way (ibid. at p. 354):

"It was said that the object of the mortgagors becoming tenants was to do something which was repugnant to the bankruptcy law, for that the object was to enable the mortgagees in case of bankruptcy to distrain for the rent in arrear, and in that way obtain a preference. As regards one year's rent, which

is all we are now considering, s. 34 of the Bankruptcy Act, 1869, gives the landlord that preference [see now s. 35 (1) of Bankruptcy Act, 1914: 2 HALSBURY'S STATUTES (2nd Edn.) 321], and, therefore, there is nothing in the law of bankruptcy to prevent his obtaining the benefit of it if he is a real landlord, and he is not the less a real landlord because he is mortgagee."

That view was adopted by the other judges, and the second point was decided adversely to the official liquidator. The decision was, that an attornment clause creates the relation of landlord and tenant, where there is a real rent reserved, a real landlord, and a real tenant.

The third point raised was that the rent reserved in the particular case was so excessive, so much beyond the real annual value of the property that it never could have been intended that an actual tenancy should be created. In that case the rent was fixed at £5,000. On the evidence the judges all came to the conclusion that the rent was not in excess of the real annual value. The third ground upon which the appeal was pressed failed also. With reference to the point of excessive rent, *Ex parte Williams* (2) was relied on, and had the judges in that case been of opinion that the £5,000 reserved rent which was fixed by the attornment clause had been excessive in the sense in which the court would consider it excessive, I cannot for one moment doubt that the decision would have been in favour of the official liquidator upon the third point; though upon the other two points he would have failed. I think the observations of JAMES, L.J., at the commencement of his judgment, exactly show that. He says (ibid. at p. 356):

"As to the case of *Ex parte Williams* (2), which has been called to our attention, I entirely re-affirm, if it were necessary to re-affirm, everything that was there said. If the rent had, as in that case, been of such an absurd amount that it could never have been intended to have been a rent, but must have been intended as part of a device to enable the mortgagee to get something in bankruptcy which he would not otherwise get, the principle of that case would have been applicable."

What were the circumstances of *Ex parte Williams* (2), in which it was held that the rent was so absurdly in excess of the real value of the premises that it could not be regarded as the real rent, and that there could be no real attornment clause between the parties, but that it was a provision inserted to enable the mortgagee to get possession of the chattels of the mortgagor whenever, whether in consequence of the principal or interest getting into arrear or by reason of bankruptcy, it might be desirable so to do? In that case the amount of the debt was £55,000, and in order to give a better security to the mortgagee, and to enable him to take the chattels when it became necessary to do so, the rent was fixed at £20,000. There was no actual distress in that case, but application was made, after bankruptcy, for lease to distrain, and it was held that, though in a proper case, as is shown in *Re Stockton Iron Furnace Co.* (1), had there been a reasonable amount of rent provided for by the attornment clause, effect would have been given to it, and leave given to distrain, yet, inasmuch as, instead of there being a reasonable rent of £3,000 a year, there was a fictitious one of £20,000 placed upon the property, the court considered that a real intention to create a tenancy did not exist, but that the clause to create a tenancy was a mere device to enable the chattels to be taken by the mortgagee in preference to the other creditors.

It appears to me that when we have once arrived at the true view of *Ex parte Williams* (2), as explained by the decision in *Re Stockton Iron Furnace Co.* (1), we have only to apply the same principles to the present case, and what do we find here? We find that there was a debt of something like £7,000 which it was contemplated might be raised to £8,000, and a mortgage security was given upon certain property, including the chattels thereon, for the whole amount of the debt, whatever it might be, upon the balance of the mortgagor's current account. An attornment clause is introduced, fixing as a rent for the premises the full amount of the principal and interest, having regard to the stamp upon the mortgage deed,

namely £8,000, the annual value of the property being sworn to (and the evidence is not contradicted) as only £140 per annum. If a rent of seven times the real value, as in *Ex parte Williams* (2), was so excessive as to lead the court to consider it absurd, what shall be said when, as in this case, it is more than fifty times as much as the real value. It appears to me that this case comes clearly within the principle of *Ex parte Williams* (2), and that we cannot regard the attornment clause as having been introduced for the proper purpose of an attornment, viz., to create a reasonable tenancy between landlord and tenant, but that the clause was inserted for the purpose of enabling the mortgagees to put their hands upon chattels of considerable value, apparently far in excess of the annual value of the premises, whenever in the exigencies of the case it should be desirable to do so.

Morton v. *Woods* (3) has been referred to on behalf of the bank, and the view which I understand to have been presented by their counsel is that it is quite immaterial what the amount of rent is which you place upon the premises by an attornment clause; you are at liberty to make it as unreal as you choose to cover the whole principal and interest, if you think fit, and the court will not interfere with. But *Morton* v. *Woods* (3) does not decide that. It decides that, as a general rule, an attornment clause is not in itself unlawful, provided it is real. The rent need not be limited to the amount of interest from time to time becoming due upon the amount of the mortgage debt. It is not introduced for that purpose alone, although it is one way of securing the interest. The measure of the real rent is the lettable value of the property, but not the amount of the mortgage debt. In *Morton* v. *Woods* (3) there was no suggestion that the rent introduced in the attornment clause was other than the real and proper rent, and, as I read the case, all that the court decided was the general principle that effect will be given to attornment clauses where they are real and carry out the true intention of the parties, so far as that intention is limited to create the relation of landlord and tenant in the proper sense. In my opinion, the distress was clearly invalid, and the trustees are entitled to the proceeds of the chattels seized.

COTTON, L.J.—I am also of opinion that the order appealed from cannot be maintained. The question we have to decide is, who is entitled to the proceeds of certain chattels. Has the bank, by the seizure made, gained any title to the goods? It was argued by the bank that a reversal of the decision of the Chief Judge would be in contradiction of a number of cases which established the validity of an attornment clause as between mortgagor and mortgagee, and authorities were cited to us on the general proposition that there may be, as against assignees or trustees in bankruptcy, valid attornment clauses so as to give a right of distress to the mortgagee. Undoubtedly, there is a right as between a mortgagor and mortgagee to insert in their deed of mortgage a clause making the mortgagor attorn as tenant to the mortgagee, and thus by contract in the mortgage deed constituting the relation of landlord and tenant between the two. Under those circumstances, where it is a real and not a fictitious or sham arrangement, the ordinary consequences of the mortgagor being tenant of the mortgagee follow, and there can be distress for the rent agreed upon, valid and effectual in the case of bankruptcy. That is quite reasonable. The mortgagee has a right to take possession and to turn out the mortgagor, whether he is in possession by himself or by his tenant. If the mortgagor is in possession by a tenant, the rent which that tenant pays comes into the hands of the mortgagee. If the property is in possession of the mortgagor himself, the mortgagee may turn him out and let the property either to a stranger or to the mortgagor. Therefore, there is nothing unreasonable, or that can be called fraud on the law of bankruptcy, in allowing the parties to stipulate in the mortgage deed for that which they might afterwards validly and effectually make. If the mortgagee lets to a third party, no question can arise as to the amount of the rent; so if the clause is one really constituting the relation of landlord and tenant between mortgagor and mortgagee, the court will not be nice in considering whether the rent is too great for the mortgaged property.

But it is a very different question which we have to consider, viz., whether there is a real, or only a fictitious, ostensible, contract to constitute the position of landlord and tenant. On that question the amount of the rent created may be most material, and may be so excessive as to afford even of itself a probability, though that in itself is not to be relied upon, that that which was in form a contract to constitute the relation of landlord and tenant, and to reserve a fair return for the use of the land or the property, whatever it may have been, was not so in substance and fact, but a mere colour in order to cover something else. Nor is it material how the rent, if it be rent, is to be applied. No doubt the rent may be sufficient to cover the interest; but, if the rent is more than sufficient to cover the interest, and is received by the mortgagee, he must apply it in reduction of the capital, subject to the question whether the interest was in arrear at the time when he took possession, for, as against a mortgagee in possession, when the interest is not in arrear, an account would not be taken with annual rests. Therefore, the stipulation that the rent fairly reserved was the real rent, and is to be applied in paying the principal and interest, cannot avoid a contract, which in other respects is a real contract, and not a mere device to cover something else.

In the present case, what do we find? In the first place, the amount of the so-called rent is the whole sum which was covered by the stamp upon the mortgage deed, and it was about £1,500 in excess of the amount appearing due upon the mortgage. So that, if the power of distress had been effectually exercised, and there had been enough to satisfy the rent reserved by the deed, the relation between the parties of mortgagor and mortgagee would be entirely at an end. Can one suppose that this contract, entered into between mortgagor and mortgagee, stipulating for a tenancy from year to year upon the face of the mortgage deed, was really intended as a contract that the mortgagor should remain in possession as tenant to the mortgagee, giving a fair return for the land, when a distress for the so-called rent would at once have put an end to the security? There is another view of the case. All these chattels were comprised in the assignment, and, but for the Bills of Sale Act, they would no doubt have been an effectual security to the mortgagee, even in the event of the bankruptcy of the mortgagor. But, as the bill of sale was not registered, in the event of bankruptcy those chattels would not have been an effectual security at all. Must we not come to the conclusion that the stipulation for rent was an attempt to give to the mortgagee, as a legal incident of rent, a power of distress so as to cure that defect arising from the non-registration of the security as a bill of sale, and to make effectual as a security to a particular creditor of the bankrupt that which, but for the supposed legal incidence of distress for the so-called rent, would have gone to the general body of creditors?

Under these circumstances, the conclusion at which I arrive is that there was no real rent, though there was a sum stipulated for under the name of rent. But it was not rent in respect of which the legal incident of distress arises, and, therefore, on that ground there was no legal right of distraining, and the bank, under the seizure made, has not got any title to the goods, which, unless there has been an effectual distress, remain the property of the bankrupt. I go further than that. Although, no doubt, any distress which is exercised does give to a mortgagee, if he is landlord, something which he would not have got if he had not exercised it, that must be a distress for a real rent, to which real rent the law has annexed, as an incident, the power of distress. When there is no rent at all, but something called rent, which in fact is not rent, then, in my opinion, the clause which attempts to give a power of distress incident to rent in respect of that which is not rent, and thus to give to a mortgagee a right which he would only have as landlord and not as mortgagee—to give it to him as mortgagee and not as landlord—is an attempt to alter and disturb that which is a legal distribution of the property in bankruptcy; it is called a fraud upon the bankruptcy law. I do not for one moment suggest that any fraud was intended on the part of the bank, but it is something not allowed by the general policy of the law to attempt to avoid the provisions of the Bankruptcy Act, and in that sense it is a fraud upon the bankruptcy law.

Upon that ground, and the other ground I have stated, that, there being no real rent, or real relationship of landlord and tenant, no legal power of distress existed, the claim of the bank, in my opinion, fails. I would say one word as to the authorities. Where there is principle I do not require authority, but there ought to be no disturbance of recognised authority. I need not further observe upon the cases which have been referred to by BAGGALLAY, L.J. I do not rely upon the decision in *Ex parte Williams* (2) as governing this case, because I think, as the bank argued, that a great deal of that decision is attributable to the fact that, upon the very face of the deed, it was apparent that the clause was introduced to meet the case of bankruptcy. It was not restricted to that, but the principles laid down by JAMES and THESIGER, L.JJ., are principles which I think are right, which are good law and govern this case. JAMES, L.J., said (7 Ch.D. at p. 143):

> "It appears to me that the attornment clause was a mere sham, a mere contrivance, and device to give the mortgagee an additional benefit in the event of the mortgagor's bankruptcy."

In my opinion, calling the sum in this case a rent was a mere sham, and an attempt to give to the bank, as mortgagees, that which could only properly be given to them as landlords, which they were not really constituted by this clause. Therefore, the clause is bad, and, as THESIGER, L.J., said in *Ex parte Williams* (2):

> "Section 34 of the Bankruptcy Act refers to a real bona fide rent, and not to what is rent in name only."

The other case that was referred to, *Re Stockton Iron Furnace Co.* (1), is no authority against our decision, for the reasons which were pointed out by BAGGALLAY, L.J. I think the Chief Judge was induced to come to his decision by thinking that he was following the decision of the Court of Appeal in *Re Stockton Iron Furnace Co.* (1), although, in my opinion, the decision in that case was founded on the rent being a fair rent and constituting the relationship of landlord and tenant, and does not touch this case.

THESIGER, L.J. —The only question is whether a certain attornment clause contained in a mortgage deed is a valid and operative one, and capable of supporting, as against the trustee in bankruptcy, a distress which was put in before the bankruptcy.

I will deal first with the matter which has occupied a considerable portion of the argument, but which, as it appears to me, is not open to doubt, and certainly has not been made a matter of dispute in this case, namely, the principles relating to attornment clauses generally. There can be no doubt that such clauses contained in mortgage deeds are valid and operative in themselves, and that they may, and do ordinarily, create the relationship between mortgagee and mortgagor, of landlord and tenant, and, as attaching to that relationship, the right of distress which the law attaches to that relationship. More than that, it appears to me to be abundantly clear, upon both principle and authority, that attornment clauses will be valid and operative although the rent secured by them may be a rent considerably in excess of that which may be required to keep down the interest under the mortgage. I can even imagine a case in which the rent reserved may be sufficient to keep down or pay both principal and interest. But while that may be admitted, this must also be admitted, viz., that the object of the attornment clause is, while giving additional security to the mortgagee, to place him, as regards the mortgagor left in possession and in the matter of rent, in the same position as that in which he would have been if the mortgaged premises had been under-leased to a third party. Therefore, although it is clear that parties are open to bargain between one another as to the amount of rent, and the courts will not lightly interfere with bargains so made, obviously, looking to the nature of these attornment clauses and the object with which they are inserted in mortgage deeds, the amount of rent may, under certain circumstances, become a matter very important to be considered in determining whether they are real attornment clauses, whether the rent fixed

is a real rent, and whether a tenancy has really been created. That I understand to be the rule which has been laid down by the authorities which have been cited.

Granted that attornment clauses are valid and operative under ordinary circumstances, yet if, from the terms of the particular deed, or from the amount of rent which is fixed under a particular attornment clause in that deed, the court is satisfied that the rent is not a real rent but a mere sham rent; that the tenancy is not a real tenancy but a mere sham tenancy; and that the attornment clause is a mere device to give the mortgagee a hold, in the event of bankruptcy, on the goods and chattels of the mortgagor which would otherwise have been distributed among the general creditors; then the attornment clause is invalid and inoperative, because it is a fraud upon the bankruptcy law. That I understand to be the principle of the decisions in *Ex parte Williams* (2) and *Re Stockton Iron Furnace Co.* (1). There is no doubt that in their judgment in *Ex parte Williams* (2), JAMES and BAGGALLAY, L.JJ., did not, in terms, rely upon the disproportionate amount of rent reserved in that case, and that they did (certainly JAMES, L.J., did) rely as the main ground of their decision upon the principle laid down in *Higinbotham* v. *Holme* (4), that there was an arrangement by which a different distribution was to be made in the event of bankruptcy from that which would have been made between the parties if no bankruptcy had occurred. That was the main ground upon which JAMES, L.J., proceeded.

It is clear from the subsequent case of *Re Stockton Iron Furnace Co.* (1), that in the earlier case there was present in the mind of JAMES, L.J., the main, if not the only, element which led him to his conclusion, namely, the disproportion between rent and real value. At all events, in *Ex parte Williams* (2), upon that fact, coupled with the other circumstances, the court came to the conclusion that the rent was a mere sham one and could not support the distress. Certainly the judgment which I delivered in *Ex parte Williams* (2) does go very clearly to that point. I rested my judgment on the fact that the rent was a sham one. I used these words (7 Ch.D. at p. 144):

> "It seems to me that s. 34 is in no way inconsistent with the general law of bankruptcy, that, according to its true meaning, what the legislature intended to protect was a real bona fide rent, and that the section has no application to a case like the present where the rent is a mere device by which the mortgagee is, in the event of the mortgagor's bankruptcy, to obtain a security upon chattels which have not been assigned to him by any bill of sale, and which, but for this device, would be distributed among the other creditors of the mortgagor."

SIR GEORGE JESSEL, M.R., in *Re Stockton Iron Furnace Co.* (1), said (10 Ch.D. at pp. 353, 354):

> "The first question to be considered is, whether there was any tenancy at all, or, as it has been put in the argument for the respondents, any bona fide tenancy."

That being the question, let us compare for one moment the facts of the two cases which have been cited with the facts of this case. In *Re Stockton Iron Furnace Co.* (1) advances had been made, or were to be made, to the amount of £50,000, and the stamp upon the deed would allow of advances to that extent, and a mortgage to secure them. The rent secured by the attornment clause was £5,000, and although, no doubt, there was some evidence to the effect that that rent was more than the property would properly bear, there was, on the other hand, strong evidence that it was only a fair rent. Applying the principles laid down in *Ex parte Williams* (2), the court came to the conclusion that it was not a sham rent or a sham tenancy, but a real rent and a real tenancy. In *Ex parte Williams* (2), on the other hand, there was a rent of £20,000, and the advances did not exceed £55,000. The property was admitted to be worth not more than £3,000, or somewhere about one-seventh of the sum reserved in the shape of rent. That was considered so disproportionate to the value of the property that from that disppor-

A tion alone the court might infer that it was not a real rent, and it must not be forgotten in these cases that, in dealing with the question whether a tenancy is a real one or not, these are matters to be considered as to the rights of the mortgagee himself. Though, in the event of bankruptcy, it may be very pleasant to him to sweep off, as against the general creditors, all the goods and chattels of the debtor, questions might arise between the mortgagee and a second mortgagee, in B which might be included that of wilful default, when it might be very much to the disadvantage of the first mortgagee to contend that the rent was a real one.

Take the present case. Instead of the rent reserved by the attornment clause being seven times as great as the real value, we have a rent reserved fifty-seven times as great as the fair rental value. We find the rent reserved is the whole amount which the stamp upon the deed would allow to be secured by the mortgage, C namely £8,000. Consequently, it was open to the mortgagees, under such an attornment clause as this, to fold their hands, and to allow the debtor to go on obtaining credit upon the faith of his possession of his goods and chattels, subject to the ordinary right which exists in a landlord of distraining for rent which ordinarily is legitimate rent, and then when bankruptcy took place to step forward and sweep away by one year's rent (which under the circumstances was quite enough D for the purpose) the whole of the chattels found on the premises in order to pay their debt. It is in this respect that there is very great distinction between the harm that is done by an unregistered bill of sale and the harm that may be done by these attornment clauses. It is perfectly true that, if the grantee of an unregistered bill of sale can get hold of the goods of the debtor in proper time before bankruptcy, and can take them out of the possession and apparent possession of the E debtor, notwithstanding the want of registration, the mortgagee may hold the goods against the trustee in bankruptcy. But there is great danger that he will not be in time, and we find, day after day, that mortgagees under unregistered bills of sale are not in time; the bankruptcy may come too soon, or the possession taken may be too much of a formal character to allow the goods to be held, they being in the possession of the debtor. But under an attornment clause, as has been F pointed out, there is no necessity at all to take possession before the bankruptcy, if the mortgagee is only wise enough (in this case, as it turns out, foolish enough) to fix such a rent as will cover every possible amount of principal and interest, for he comes forward and says: "Section 34 of the Act says you must pay me my year's rent, and in that case you must pay me my principal and interest."

So much for the facts of the case and the general law. One word as to a distinc- G tion that has been attempted to be drawn between the present case and *Ex parte Williams* (2) and *Re Stockton Iron Furnace Co.* (1). It is said that in *Ex parte Williams* (2) the distress was not put in until after the bankruptcy, and that in *Re Stockton Iron Furnace Co.* (1), although in fact the distress was put in before the bankruptcy, the parties agreed to treat the question as depending on s. 34, and, therefore, the point was not actually decided by the court. I am bound to say H that, though in my judgment I alluded especially to s. 34, in the other judgments no allusion was made to that section, and the main question dealt with was not whether, by virtue of a distress before or a distress after bankruptcy, the goods and chattels could be obtained under the attornment clause, but whether the attornment clause was valid and operative. That seems to me to be the principle upon which the matter must be decided. The question is whether for any purpose I there was a real rent or a real tenancy. I give no opinion as to what might have been the result if there had been an express licence to take possession. Very possibly questions might have arisen under the Bills of Sale Act. But here the right of distress can only be supported upon the ordinary principles of law which attach the right of distress to a legitimate tenancy with a legitimate rent. If once you arrive at the fact that there is no tenancy and no rent, but that the attornment clause is only dealing with a sham tenancy and a sham rent for purposes which I have described, then it follows that there is no distress which by the ordinary principles of law can be attached to that tenancy in respect of such a rent. For

that reason it appears to me that no legitimate distinction can be drawn between a distress made before bankruptcy and distress made afterwards. It appears to me that the decision of the Chief Judge cannot be supported and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Johnston & Harrison*, for *Thomas Brown*, Whitehaven; *Helder, Roberts & Gillett*, for *Brockbank, Helder & Brockbank*, Whitehaven.

[*Reported by* Frank Evans, Esq., *Barrister-at-Law.*]

HORNE *v.* ROQUETTE

[Court of Appeal (Bramwell, Brett and Cotton, L.JJ.), February 1, 2, July 2, 1878]

[Reported 3 Q.B.D. 514; 39 L.T. 219; 26 W.R. 894]

Conflict of Laws—Bill of exchange—Bill drawn in England and endorsed to endorsee abroad—Rights and liabilities of endorser and endorsee governed by law of foreign country.

The rights and liabilities of the endorser and endorsee of a bill of exchange depend upon the law of the place where the contract of endorsement is made.

A bill of exchange was drawn in England in favour of the defendant, payable in Spain. The defendant endorsed the bill in London to the plaintiff who endorsed it to M. in Spain. M. endorsed the bill to C., and C. endorsed it to O'C., both transactions being in Spain. On May 1, 1874, the bill was presented for acceptance in Spain, was dishonoured, and was protested in Spain on May 2. Notice of dishonour was sent by M. to the plaintiff in a letter written by M. in Spain on May 13, which was received by the plaintiff in London on May 26, on which day the plaintiff gave notice to the defendant. By Spanish law notice of dishonour by non-acceptance was not necessary. The plaintiff paid the amount of the bill to M. and sued the defendant on the bill to recover the amount so paid. The defence was rested on the allegation of a want of notice of dishonour by the plaintiff in due time.

Held: the endorsement by the plaintiff to M. was governed by Spanish law, and, therefore, notwithstanding M.'s delay in giving notice of dishonour, the plaintiff had been liable to pay M., and was entitled to recover against the defendant.

Notes. Referred to: *Casanova* v. *Meier* (1885), 1 T.L.R. 213; *Alcock* v. *Smith*, [1892] 1 Ch. 238.

As to conflict of laws relating to bills of exchange, see 3 Halsbury's Laws (3rd Edn.) 235–238; and for cases see 6 Digest (Repl.) 401 et seq.

Cases referred to:

(1) *Rothschild* v. *Currie* (1841), 1 Q.B. 43; 4 Per. & Dav. 737; 10 L.J.Q.B. 77; 5 Jur. 865; 113 E.R. 1045; 6 Digest (Repl.) 407, *2888*.

(2) *Hirschfeld* v. *Smith* (1866), L.R. 1 C.P. 340; Har. & Ruth. 284; 35 L.J.C.P. 177; 14 L.T. 886; 12 Jur.N.S. 523; 14 W.R. 455; 6 Digest (Repl.) 407, *2889*.

(3) *Gibbs* v. *Fremont* (1853), 9 Exch. 25; 22 L.J.Ex. 302; 21 L.T.O.S. 230; 17 Jur. 820; 1 W.R. 482; 1 C.L.R. 675; 156 E.R. 11; 6 Digest (Repl.) 315, *2298*.

(4) *Aymar* v. *Sheldon*, 12 Wendall, 439.
(5) *Allen* v. *Kemble* (1848), 6 Moo.P.C.C. 314; 13 Jur. 287; 13 E.R. 704, P.C.; 6 Digest (Repl.) 408, *2898*.
(6) *Sichel* v. *Borch* (1864), 2 H. & C. 954; 33 L.J.Ex. 179; 9 L.T. 675; 10 Jur.N.S. 107; 12 W.R. 346; 159 E.R. 395; sub nom. *Sickel* v. *Borch*, 3 New Rep. 438; 6 Digest (Repl.) 434, *3050*.

Also referred to in argument:
Mellish v. *Simeon* (1794), 2 Hy. Bl. 378; 126 E.R. 605; 6 Digest (Repl.) 317, *2308*.
Bradlaugh v. *De Rin* (1870), L.R. 5 C.P. 473; 39 L.J.C.P. 254; 22 L.T. 623; 18 W.R. 931, Ex. Ch.; 6 Digest (Repl.) 404, *2878*.
Buckley v. *Hann* (1850), 5 Exch. 43; 19 L.J.Ex. 151; 155 E.R. 19; 6 Digest (Repl.) 432, *3044*.
Re Imperial Land Co. of Marseilles, Harris'-Case (1872), 7 Ch. App. 587; 41 L.J.Ch. 621; 26 L.T. 781; 20 W.R. 690, L.JJ.; 9 Digest (Repl.) 276, *1738*.
Chapman v. *Cottrell* (1865), 3 H. & C. 865; 6 New Rep. 237; 34 L.J.Ex. 186; 12 L.T. 706; 11 Jur.N.S. 530; 13 W.R. 843; 159 E.R. 774; 6 Digest (Repl.) 434, *3051*.
Dunlop v. *Higgins* (1848), 1 H.L.Cas. 381; 12 Jur. 295; 9 E.R. 805, H.L.; 12 Digest (Repl.) 86, *470*.
Re State Fire Insurance Co., Ex parte Meredith's and Conver's Claim (1863), 1 New Rep. 510; 32 L.J.Ch. 300; 8 L.T. 146; 9 Jur.N.S. 298; 11 W.R. 416; 6 Digest (Repl.) 315, *2299*.
Susé v. *Pompe* (1860), 8 C.B.N.S. 538; 30 L.J.C.P. 75; 3 L.T. 17; 7 Jur.N.S. 166; 9 W.R. 15; 141 E.R. 1276; 6 Digest (Repl.) 317, *2311*.
Pecks v. *Mayo*, 14 Vermont Rep. 33.
Rouquette v. *Overmann* (1875), ante, p. 501; L.R. 10 Q.B. 525; 44 L.J.Q.B. 221; 33 L.T. 420; 6 Digest (Repl.) 406, *2885*.
Thorp v. *Craig*, 10 Iowa Rep. 461.

Appeal by the defendant from a decision of LORD COLERIDGE, C.J., in favour of the plaintiff in an action brought in the Queen's Bench Division, and tried without a jury.

Benjamin, Q.C., and *Murphy, Q.C.* (*Edwyn Jones* with them), for the defendant.
J. Brown, Q.C. (*H. Cowie* with him), for the plaintiff.

Cur. adv. vult.

July 2, 1878. The following judgments were read.

BRETT, L.J.—The plaintiff, as endorsee, sued the defendant as endorser. The facts which it becomes material to consider are, that the bill was drawn on Mar. 19, 1874, at Newcastle, by Bryant, Foster & Co., on Chasserot, in Spain, in favour of the defendant, trading in Spain as Rouquette & Co., the bill being made payable in Spain three months after date. This bill was said to be purchased by the plaintiff in London from the defendant, who endorsed it in London to the plaintiff. The plaintiff, having written his name on the back of the bill, forwarded it to Monforte, in Spain, who there placed it to account under circumstances which, without referring further to them, we hold made the transaction between the plaintiff and Monforte an endorsement of the bill by the plaintiff to Monforte, in Spain. Monforte endorsed the bill in Spain to Clavero, who endorsed it, also in Spain, to O'Connor & Son. The bill was presented by the holders for acceptance in Spain on May 1, 1874, and was dishonoured. It was protested in Spain for such dishonour on May 2. Notice of the dishonour by non-acceptance was sent by Monforte to the plaintiff in a letter written by Monforte in Spain on May 13, and received by the plaintiff on May 26 in London. No clear explanation was given in evidence of the delay in Spain from May 2 to 13. The plaintiff gave notice to the defendant on May 26, so there was no delay by the plaintiff. The defence was rested on the allegation of a want of notice in due time to the defendant of the

dishonour by non-acceptance. It was found as a fact that by the law of Spain no notice of dishonour by non-acceptance need be given. Upon these facts, if all the transactions on this bill had occurred in England, the plaintiff could not have recovered, because of the delay of Monforte in forwarding notice to the plaintiff; but if all had occurred in Spain the plaintiff could have recovered, inasmuch as no notice of dishonour by acceptance is required in Spain.

The question is: What is the law here, where some of the transactions on a bill have occurred in England and some abroad? The bill in this case was what is called a foreign bill, because it was a bill drawn in England to be accepted and paid abroad. But this fact seems to be in this case immaterial, for the same question would have arisen in respect of the other facts if the bill had been an inland bill. The facts which raise the difficulty in this case are the endorsement to Monforte in Spain, the law of Spain, and the delay of Monforte in giving notice of the dishonour, while the first endorsement—that of the defendant to the plaintiff—the endorsement sued on, was made in London, was, therefore, an English endorsement, and raised an entirely English relation of endorser and endorsee between the defendant and the plaintiff.

To explain the grounds of my judgment, it seems to me useful to consider what the law is if every transaction on a bill occurs in England, and the reasons on which the law is founded. Then we must apply those reasons to the present mixed case. If all the transactions on a bill occur in England, there may be one or more endorsements. If there be only one, and the endorsee presents the bill for acceptance and it be refused, he gives notice to the drawer of dishonour by non-acceptance. He must give such notice at once; that is to say, if he lives in the same town he must give it so that it is to be delivered on the same day, or otherwise he must forward it by a post of the following day or the next practicable day [embodied in s. 49 (12) of the Bills of Exchange Act, 1882: 2 HALSBURY'S STATUTES (2nd Edn.) 505]. But there may be several endorsements, and the bill be presented for acceptance by the last endorsee. In such case, if the acceptance be refused, the last endorsee, the holder, must give notice of dishonour, but he may give it either only to his immediate endorser, or only to the drawer, or to these and to all the intermediate endorsers. Whatever notice he gives he must give at once, i.e., within the terms above described, and each endorsee as he receives notice must, if he would preserve his remedy over, give notice to his endorser or to all before him within a similar period after he has himself received notice. If all give due notice, each can recover against his immediate endorser, or against any endorser whose name is before his on the bill. But if anyone fails to give due notice, no one whose name is before his on the bill is liable to pay him, and none of them is liable to pay any other. If those below him who has failed to give due notice have only given notice to him, or to each other in succession up to him, they cannot recover from anyone above him. Otherwise, if they have given a direct notice to those above him.

The reasons of this law are these. The primary contract on a bill is that between the drawer and acceptor, if the drawee accept; the secondary contracts are those between the drawer and his endorser, and between the different endorsers and their endorsees. Each of these is a direct contract between the parties, and each such contract is governed by the common law. But by the law merchant all these contracts can be transferred—that is to say, the acceptor's with the drawer, the drawer's with his endorsee, and so on, so that any subsequent endorsee may under certain conditions sue not only his own endorser, but any prior endorser or the drawer, or the acceptor. What the contract is between a subsequent endorsee and any prior endorser other than his own immediate one, or between him and the drawer or the acceptor—whether it is the contract of such prior endorser, the drawer, or the acceptor transferred, or whether it is a new authorised contract between such endorsee and such prior endorser, or the drawer or acceptor—need not be determined in this case. Such a question may be material where the endorsement to a subsequent endorsee is made abroad, and he sues a prior endorser

A or acceptor, whose immediate contract was made in England. But in the present case the contract sued on is one between an endorsee and his immediate endorser.

It is necessary to examine what that contract is, and what are the consequences following from it. It is stated in BYLES ON BILLS (12th Edn.), p. 3:

"The effect of endorsing is a conditional contract on the part of the endorser to pay the immediate or any succeeding endorsee or bearer, in case of the B acceptor's or maker's default."

At p. 152:

"An endorser contracts that if the drawer shall not at maturity pay the bill, he, the endorser, will, on receiving due notice of dishonour, pay the holder the sum which the drawee ought to have paid, together with such damages as the C law prescribes or allows as an indemnity. He also contracts, in the case of a bill payable at a future date, that, if the drawee refuse to accept on presentment, he will in like manner pay."

Ibid. at p. 245:

"Suppose the bill to have been accepted and endorsed for value, the acceptor is D the principal debtor, and all the other parties are sureties for him, liable only on his default. But, though all the other parties are, in respect of the acceptor, sureties only, they are not as between themselves merely co-sureties, but each prior party is a principal in respect of each subsequent party. For example, suppose a bill to have been accepted by the drawee, and afterwards endorsed by the drawer and by two subsequent endorsers to the holder. As between E the holder and the acceptor, the acceptor is the principal debtor, and the drawer and endorsers are his sureties. But, as between the holder and the drawer, the drawer is a principal debtor, and the subsequent endorsers are his sureties. As between the holder and the second endorser, the second endorser is the principal, and the subsequent or third endorser is his surety."

All the contracts raised upon the bill, it is seen, except those with the acceptor, F are contracts of suretyship—that is to say, are contracts of indemnity. Probably from this, though perhaps from other more strictly mercantile circumstances, as for the purpose of making other preparations or modifications in business, notice of dishonour is by the law merchant made a condition of the liability of the surety.

The contracts of endorsement then between the immediate parties to them are conditional and are by way of indemnity. It follows from this last that there can G be no valid claim in respect of the endorsement where there is no liability in respect of it, and the two together are the reason why failure by any endorsee to give due notice of dishonour not only disables him from recovering against his immediate endorser, but disables a prior endorser to him from recovering against his endorsee as a prior endorser to him. The endorsee who has failed to give notice cannot recover because he has not fulfilled the condition of his contract. The others can- H not recover because, as they cannot be made liable, they do not require to be indemnified. For example, the endorser to him who has failed to give due notice is not liable to him, and, therefore, cannot claim against his own endorser, and, therefore again, such latter endorser cannot claim against his endorser, and so on. The description of the contract of the endorser cited from SIR JOHN BYLES's treatise may, therefore, be somewhat more strictly defined. It may be thus stated: An I endorser contracts that, if the drawee shall not on presentment accept, or at maturity pay the bill, he, the endorser, will, on receiving due notice of dishonour, pay to the person who has a right to claim as holder as against him, if such person, though he has given value for, has received no value on, the bill; or if such person, though he did receive value on the bill, is liable to pay on the bill the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Within that definition the ultimate endorsee will, if he has given due notice or notices, recover, because, though he has given value for the bill, he has received no value on it. Any intermediate endorser will recover

if the notices are in order, because, though he received value on the bill when he endorsed it, he is made liable on the bill by having to indemnify his endorsee or a subsequent endorsee. But such intermediate endorser will not be liable if the notices are not in order, because he received value on the bill when he endorsed it, and is relieved from liability by defect of notices, and, therefore, is entitled to no indemnity.

The law and its principles and its application where all the transactions on the bill are in England being thus worked out, it is necessary to apply them where some endorsement has been made abroad. Every party to a bill knows that by the law merchant it may be endorsed abroad. He cannot object to its being endorsed abroad. He by the law merchant undertakes some liability in respect of such endorsement abroad. The question is: How will he be affected by such endorsement abroad? Such an endorsement raises a contract between the immediate endorser and endorsee. Such an endorsement then raises a foreign contract, and that must be construed according to the law of the country in which it was made. The liability of each of those contracting parties to the other is to be determined by the law of the country in which the contract was made. In this case, therefore, the liability of the plaintiff to Monforte is to be measured by the law of Spain. The plaintiff then was liable to Monforte, though he gave no notice of the dishonour by non-acceptance. By an endorsement, of which the defendant has no right to complain, which by the law merchant he in effect authorised the plaintiff to make at pleasure, the plaintiff by reason of the default of the drawer, though he did once receive value on the bill, is liable to pay on the bill. He brings his case within the definition of the defendant's liability to him.

It follows that, by the law of England, applied to the English contract made between the plaintiff and the defendant, the defendant is liable to the plaintiff. The rules and their application thus deduced were applied in *Rothschild* v. *Currie* (1), and *Hirschfeld* v. *Smith* (2). In both those cases, as in this, the contract sued on was an English contract of endorsement, made immediately between the plaintiff's endorsees and the defendants' endorsees. In both cases there had been subsequent foreign endorsements. In both cases the plaintiffs were, according to the construction of the foreign contracts of endorsement by foreign law, liable to the foreign subsequent endorsees, though they would not have been liable if such endorsees had been English endorsees. In both cases the plaintiffs were held, and I think rightly held, to be entitled to recover. *Gibbs* v. *Fremont* (3) does not raise the same point. The only question was whether as against the drawer his contract was a Californian or a Washington contract, and it was held that it was Californian. *Aymar* v. *Sheldon* (4) seems to be in accordance with *Rothschild* v. *Currie* (1). I am of opinion that the judgment of Lord Coleridge was right, and that the appeal must be dismissed.

BRAMWELL, L.J. (read by Brett, L.J.)—I agree with my brother Brett that this judgment should be affirmed. The endorser of a bill of exchange is on its dishonour bound to pay it to the holder if he has received due notice from him, and if the holder was bound to pay it to some subsequent endorsee by the law merchant. I agree in thinking that it is immaterial that this was a foreign bill. But it was; and when the defendant endorsed it to the plaintiff he must have known that it would be sent to Spain, and probably transferred by a Spanish endorsement to an endorsee in Spain, with the rights and duties created by the law of Spain. I agree in thinking that the endorsement to Monforte was such an endorsement. There was a subsequent endorsement by Monforte in Spain, as to which there can be no doubt. On the dishonour being known to the plaintiff, he at once, and according to English law, gave notice to the defendant. Was the plaintiff bound to pay the bill to Monforte? He certainly was, because, according to Spanish law, no notice of dishonour is necessary to enable the holder to have recourse to an endorser. It may be that, before an action could be maintained in our courts against an endorser carrying on business and resident in England, some notice must be given. But as,

A by Spanish law, none is necessary, it follows that such notice, if necessary here, may be given at any time. As the plaintiff then was liable to Monforte, he is entitled to have recourse to the defendant. *Hirschfeld* v. *Smith* (2) was decided on this principle. There is nothing in STORY ON BILLS to the contrary, nor in *Aymar* v. *Sheldon* (4). *Rothschild* v. *Currie* (1) is a decision the same way, though certainly the reasoning there is not satisfactory.

B

COTTON, L.J., stated the facts and continued: There was evidence that by the law of Spain no notice of dishonour was necessary, and LORD COLERIDGE found as a fact that, having regard to the law of Spain, the notice of dishonour was given within a reasonable time, and the principal question argued was by what law the contract made by the endorsement of a bill of exchange is to be regulated. In my C opinion, this in no way depends on the place where the bill is made payable. That must regulate the contract made by the drawee if he accepts the bill, but an endorser does not contract to pay in the place where the bill is made payable, or where the drawee resides, and his liability on the contract which he enters into by his endorsement must, in my opinion, in accordance with the general rule, depend on the law of the place where that contract is made. This is not consistent with D the reasoning of LORD DENMAN, when giving judgment in *Rothschild* v. *Currie* (1), that the contract made by an endorser must be governed by the law of the country where the drawee resides and the bill is to be paid. The decision in that case has been doubted: see BYLES, J., in *Hirschfeld* v. *Smith* (2); *Allen* v. *Kemble* (5); and although the decision may be supported on other grounds, namely, that due notice is such as may be reasonably required under the circumstances of the case, and E that the notice was under the circumstances given in a reasonable time: see ERLE, C.J., in *Hirschfeld* v. *Smith* (2). I am unable to agree with the reasons given by LORD DENMAN in deciding the case.

In the present case the endorsement of the defendant was made in England, and, therefore, in my opinion, must be regulated by the law of England. What then is the contract made by the endorser of the bill with the endorsee? It is that, F if the bill is not accepted, or, after having been accepted, is dishonoured, he will pay him the amount of the bill if it has not been endorsed by him, or if it has been so endorsed, will indemnify him against any liability to a subsequent endorsee in respect of the bill; and, according to English law, this contract is subject to a condition that due notice of the non-acceptance or nonpayment be given to the endorser. There was no delay or default on the part of the plaintiff in giving G notice to the defendant; and the question really is whether, under the circumstances, the plaintiff was under any legal liability on the bill, or paid the amount in fact paid by him in respect thereof voluntarily and without legal liability. As there was no antecedent agreement on the part of Monforte to take and give credit for the bill remitted to him by the plaintiff, the contract with Monforte by the endorsement of the bill was not complete till the delivery of the bill to him in Spain: H see *Sichel* v. *Borch* (6).

Under these circumstances, where we have to ascertain what condition as to notice of dishonour is to be imported into the contract of endorsement, even if the contract of the plaintiff by his endorsement to Monforte is not to be treated as made in Spain—in which case, it must be governed by the law of Spain—in my opinion the law of Spain cannot be disregarded. If the plaintiff was entitled to I notice of dishonour, which is a condition implied by English law—as in my opinion he was—I think that, in ascertaining what was due notice, regard must be had to the law of Spain. LORD COLERIDGE has found as a fact, and the evidence supports his finding, that, having regard to the law of Spain, the notice of dishonour to the plaintiff was given within a reasonable time. The consequence, in my opinion, is that the plaintiff was liable to Monforte on his contract of endorsement, and was liable to make the payments in fact made by him, and he is, therefore, entitled to recover, on the ground that he, the plaintiff, has performed the condition to which, by the law of England, the defendant's contract of endorsement is subject, and

was liable to make the payment in respect of which he claims to be indemnified. This in no way decides that one who has in England endorsed a bill to a person resident in this country would be liable to the holder of it, who took it by subsequent endorsement in another country, if the English endorser received from this holder such notice only as is required by the law of the foreign country, and not such as is required by the law of England. That question does not arise in the present case.

Appeal dismissed.

Solicitors: *Kearsey, Son & Hawes*; *Lowless & Co.*

[*Reported by* P. B. Hutchins, Esq., *Barrister-at-Law.*]

FULTON AND OTHERS *v.* ANDREW AND ANOTHER

[House of Lords (Lord Cairns, L.C., Lord Chelmsford, Lord Hatherley and Lord O'Hagan), February 9, 16, 1875]

[Reported L.R. 7 H.L. 448; 44 L.J.P. 17; 32 L.T. 209; 23 W.R. 566]

Will—Testator—Capacity—Presumption—Testator of sound mind, memory, and understanding—Knowledge of contents of will.

There is no rule of law that, in judging of the validity of a will, if the court finds that the testator was of sound mind, memory, and understanding, and that the will was read over to him or was read by him, the court must assume that he was aware of the contents of the will and no evidence against that presumption can be received.

Notes. Considered: *Parker* v. *Duncan* (1890), 62 L.T. 642. Applied: *Brown* v. *Fisher* (1890), 63 L.T. 465. Considered: *In the Goods of Boehm*, [1891] P. 247; *Lawford* v. *Allen* (1892), 9 T.L.R. 145. Applied: *Tyrrell* v. *Painton*, [1891–4] All E.R.Rep. 1120. Considered: *Garnett-Botfield* v. *Garnett-Botfield*, [1901] P. 335. Applied: *Wilson* v. *Bassil*, [1903] P. 239; *Finney* v. *Govett* (1908), 25 T.L.R. 186. Considered: *Gregson* v. *Taylor*, [1917] P. 256; *In the Estate of Philpot, Gregson* v. *Taylor*, [1917] 117 L.T. 318; *In the Estate of Musgrove, Davis* v. *Mayhew*, [1927] P. 264; *Re R.*, [1950] 2 All E.R. 117. Referred to: *Re Simpson, Ex parte Morgan* (1876), 2 Ch.D. 42; *Re Harrison, Fulton* v. *Andrew* (1876), 24 W.R. 979; *Morrell* v. *Morrell*, [1881–5] All E.R.Rep. 642; *Collins* v. *Elstone*, [1893] P. 1; *Farrelly* v. *Corrigan*, [1899] A.C. 563; *Briscoe* v. *Baillie Hamilton*, [1902] P. 234; *Karunaratne* v. *Ferdinandus*, [1902] A.C. 405; *Baudains* v. *Richardson*, [1906] A.C. 169; *Low* v. *Guthrie*, [1909] A.C. 278; *Wintle* v. *Nye*, [1959] 1 All E.R. 552.

As to testamentary capacity, see 39 Halsbury's Laws (3rd Edn.) 854–859; and for cases see 44 Digest 570, 571.

Cases referred to:

(1) *Barry* v. *Butlin* (1838), 2 Moo.P.C.C. 480; 1 Curt. 637; 12 E.R. 1089, P.C.; 23 Digest (Repl.) 131, *1357*.

(2) *Paske* v. *Ollat* (1815), 2 Phillim. 323; 161 E.R. 1158; 23 Digest (Repl.) 131, *1354*.

(3) *Ingram* v. *Wyatt* (1828), 1 Hag. Ecc. 384; 162 E.R. 621; 44 Digest 221, *454*.

A (4) *Billinghurst* v. *Vickers* (*formerly Leonard*) (1810), 1 Phillim. 187, 199; 161 E.R. 1382; 23 Digest (Repl.) 138, *1425.*

(5) *Baker* v. *Batt* (1838), 2 Moo.P.C.C. 317; 12 E.R. 1026, P.C.; 23 Digest (Repl.) 131, *1356.*

(6) *Atter* v. *Atkinson* (1869), L.R. 1 P. & D. 665; 20 L.T. 404; 33 J.P. 440; 44 Digest 570, *3873.*

B (7) *Guardhouse* v. *Blackburn* (1866), L.R. 1 P. & D. 109; 35 L.J.P. & M. 116; 14 L.T. 69; 12 Jur.N.S. 278; 14 W.R. 463; 44 Digest 626, *4564.*

Also referred to in argument:

Allen v. *McPherson* (1847), 1 H.L.Cas. 191; 11 Jur. 785; 9 E.R. 727, H.L.; 23 Digest (Repl.) 79, *740.*

C *Earl of Newburgh* v. *Countess Dowager of Newburgh* (1820), 5 Madd. 364.

Mitchell v. *Thomas* (1847), 6 Moo.P.C.C. 137; 13 E.R. 636; sub nom. *Michell* v. *Thomas*, 5 Notes of Cases, 600; 11 L.T.O.S. 90; 12 Jur. 967, P.C.; 23 Digest (Repl.) 132, *1362.*

Harter v. *Harter* (1873), L.R. 3 P. & D. 11; 42 L.J.P. & M. 1; 27 L.T. 858; 37 J.P. 583; 21 W.R. 341; 23 Digest (Repl.) 136, *1402.*

D *In the Goods of Duane* (1862), 2 Sw. & Tr. 590; 31 L.J.P.M. & A. 173; 6 L.T. 788; 26 J.P. 663; 8 Jur.N.S. 752; 164 E.R. 1127; 44 Digest 229, *540.*

Appeal by the defendants from a decision of the learned judge of the Probate Court (LORD PENZANCE) granting probate of the will of one Hugh Harrison, of Appleby, Westmoreland, who died in July, 1870.

The testator gave the residue of his property entirely to the respondents, Andrew E and Wilson, who were appointed executors. The appellant Fulton, as guardian ad litem of his children, the other appellants, who were the nephew and nieces of the testator, entered a caveat, for the purpose of contesting the validity of the will. A trial of fact before a jury was ordered, and six issues were directed: First, whether the will was duly executed; secondly, whether the deceased was of sound mind and understanding at the time of executing it; thirdly, whether the execu- F tion was obtained by the undue influence of the plaintiffs [the present respondents]; fourthly, whether the execution of the residuary clause was obtained by their undue influence; fifthly, whether at the time of the execution of the will the deceased knew and approved of the contents thereof; and, sixthly, whether the deceased, at the time of the execution, knew and approved of the contents of the residuary clause. These issues were tried before MELLOR, J., at the Westmoreland G Spring Assizes, 1872. The jury found the first and second issues in the affirmative; the third and fourth in the negative; as to the fifth, they found that the testator did know and approve of the contents of the will; and as to the sixth, that he did not know and approve of the contents of the residuary clause. The verdict was accordingly entered for the plaintiffs on the five first issues, and for the defendant [the present appellant] on the sixth. A motion was made in the Court of Probate H to set aside this verdict and have a new trial, or to set aside the verdict on the sixth issue, on the ground of misdirection. The judge made the rule absolute to enter the verdict for the plaintiffs, and probate was granted of the whole will, including the residuary clause. From this decision the present appeal was brought.

Herschell, Q.C., and *Edwards, Q.C.*, for the appellants.

I *Sir John Holker, Q.C.*, and *Fooks, Q.C.*, for the respondents.

Their Lordships took time for consideration.

Feb. 16, 1875. The following opinions were read.

LORD CAIRNS, L.C.—This appeal arises out of a proceeding in the Court of Probate instituted for the purpose of challenging the validity of the will of Hugh Harrison, of Ivy House, Appleby, in the county of Westmoreland, who died on July 11, 1870, his will being dated the 11th of the previous June.

On examination of the case it appeared to be accompanied by peculiar circumstances. For the purpose of determining the questions which had been raised with regard to the validity of the will, certain issues were directed by the Court of Probate, which were tried before MELLOR, J., at the Westmoreland Assizes. The issues were these: First, whether the will was duly executed; secondly, whether the testator was of sound mind, memory, and understanding; thirdly, whether the execution of the will was obtained by the undue influence of the respondents; fourthly, whether the execution of the will so far as it related to the residuary clause was procured by the undue influence of the respondents; fifthly, whether the deceased at the time of the execution of the will knew and approved of the contents of the will; sixthly, whether the deceased at the time of the execution of the will knew and approved of the contents of the residuary clause. The respondents were the persons propounding the will; they were the two executors named in it, and they were also the residuary legatees, and they were not related in any way to the testator. The jury upon these issues found the first four in favour of the respondents, that is to say in favour of the will. With regard to the fifth and sixth issues, they found that the testator knew and approved of the contents of the will with the exception of the residuary clause; but that as to the residuary clause, he did not know and approve of its contents.

I may point out to your Lordships that, the Court of Probate having decided in the first instance that this was a case in which it was proper to take the opinion of a jury with regard to the residuary clause as distinct from the rest of the will, and the jury having found that the testator did not know or approve of the contents of the residuary clause, it is clear that the mode of ascertaining that question of fact which has been adopted by the Court of Probate was satisfied. The verdict of the jury was returned, and that verdict must stand unless it can be set aside on a ground which must have gone either to the fact that improper evidence had been received, or that proper evidence had been rejected, or that the verdict was against the evidence, or that the learned judge had misdirected the jury. Upon those grounds the finding of the jury might have been challenged, and a new trial directed; but, no qualification having been made at the trial, no leave to take any other course having been reserved, or indeed having been asked for, it would, as it appears to me, have been quite impossible in this state of things to have changed the verdict found by the jury against the residuary clause into a verdict sustaining it.

In that state of things this notice of motion was given by the respondents in the Court of Probate:

> "The court will be moved by counsel for the plaintiffs for a rule nisi calling upon the defendants [the present appellants] to show cause why the verdict should not be entered for the plaintiffs, and the probate of the will of the said Hugh Harrison deceased should not be delivered out, notwithstanding the finding of the jury upon the fifth and sixth issues, upon the ground that by reason of the particulars delivered by the defendants under these issues the jury have upon the second issue determined the only material question raised under the said fifth and sixth issues in favour of the plaintiffs, or why a new trial should not be granted on the ground that the verdict was against the weight of the evidence, and for misdirection."

That is a notice for a rule nisi branching in two directions, the one to enter the verdict in favour of those who propounded the will, the other for a new trial. That having come before the learned judge, I find that this order was made.

> "The judge having read this notice of motion, and heard counsel, ordered that the plaintiffs do on the first day appointed for hearing motions in this court in Trinity term, show cause to the satisfaction of the court why the verdict of the jury empanelled to try the issues raised by the pleadings in this cause should not be set aside, and a new trial granted thereof, or why the verdict of the said jury on the issue whether the deceased in this cause knew and

A approved of the contents of the residuary clause in the said will propounded should not be set aside by reason of misdirection."

The rule applied for having gone to the entering a verdict against the verdict of the jury, the rule, which was granted, does not adopt that view, but it is granted merely to show cause why there should not be a new trial either on the ground of B the verdict being against evidence, for that must be the meaning of the first part of the rule, or, secondly, upon the ground of misdirection.

I will not pause at this moment to consider what was done on the argument of that rule, but the result was that the order of the Court of Probate was made which is now under appeal before your Lordships:

C "The judge having heard counsel on behalf of the defendants and plaintiffs made the rule absolute to enter a verdict for the plaintiffs and pronounced for the validity of the last will and testament of Hugh Harrison the deceased in this cause, bearing date June 11, 1870, of which probate was granted in August, 1870, and made no order as to costs, and directed that probate should be given to the executors."

D I own, my Lords, that I have great difficulty in understanding how this order came to be made. It appears to me to have been made under some forgetfulness or misapprehension as to what was the purpose for which the rule nisi had been granted. Even if the learned judge had been satisfied that there was a verdict against evidence, or that there was misdirection, either of those considerations ought to have resulted in an order for a new trial, and not in the entering of a verdict for the E plaintiffs. In point of form, therefore, I should submit to your Lordships that it would be impossible to maintain this order.

Then arises the question: What course ought now to be taken by your Lordships? I apprehend that your Lordships will ask yourselves the question what opinion, if you had been sitting upon the argument of this rule, you would have arrived at with regard to the allegation that there was here a verdict which was F against evidence, or that there was here a verdict which had been obtained after a direction had been given by the learned judge which was erroneous in point of law. I certainly found myself, and I think that your Lordships found yourselves under some difficulty in dealing with that question, having regard to the fact that there was not submitted to your Lordships upon the papers before you any note of the direction of the learned judge, or of the summing-up of the evidence G given before him. The parties, however, were permitted by your Lordships to supply a copy of the shorthand writer's notes of what passed at the trial, and those notes have been considered, I think, by all your Lordships.

Looking at those notes, which I have read with great care, it appears to me that nothing whatever fell from the learned judge on the occasion of the trial which could be said to amount to a misdirection of the jury upon any question of law. H I find that the learned judge with great care went through the whole of the evidence; he pointed out to the jury what had been deposed in the evidence before them, and what had been the arguments of the learned counsel on each side; he remarked upon the matters connected with the making of this will, and connected with the instructions which had been given for the will upon two different occasions; upon the form which those instructions had assumed; upon the circum- I stance that one of the persons propounding the will, one of the residuary legatees, had employed his brother, a solicitor, for the purpose of preparing the will from these instructions; he remarked upon the variance which occurred between the instructions which were stated to contain the directions of the testator, and the will as submitted to the testator for execution; and he, having directed the attention of the jury to all these matters, and pointed out to them that the Court of Probate desired to hear from them their opinion as to the consciousness of the testator with regard to the contents of the whole of the will, and also separately with regard to the contents of the residuary clause, the jury returned the verdict to which I have

already referred. I should be of opinion that in that there was nothing which could be called misdirection in the proper sense of the term.

But it appears to have been argued in the Court of Probate, and it was argued very strongly at your Lordships' Bar, that there occurred at the trial a misapprehension on the part of the learned judge as to what was stated to be an absolute and fixed rule of law, and that because the learned judge had not laid down before the jury that absolute and fixed rule of law, with regard to the judging of the validity of a will, there was a species of non-direction on the part of the learned judge, which amounted to misdirection, or, if it was not so, still that there was a finding of the jury in the face of evidence which ought to have led to a different conclusion. The rule of law which is said not to have been sufficiently considered is this. It is said that it has been established by certain cases to which I will presently refer, that in judging of the validity of a will, if you find that the testator was of sound mind, memory and understanding, and if you find further that the will was read over to him, or read by him, there is an end of the case, and you must at once assume that he was aware of the contents of the will, and that there is a positive and unyielding rule of law that no evidence against that presumption can be received.

I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the legislature has imposed that rule in the shape of an Act of Parliament. But now let us see what is the authority for the imposition of such a fixed and unyielding rule of law. Before looking at the two cases which were cited I will take the liberty of reminding your Lordships of the law which has been laid down in general terms as to the mode of dealing with testamentary instruments like the present, where persons who are strangers to the testator, and who themselves have obtained or conducted the making of the will, are the persons benefiting by it. In the well-known case of *Barry* v. *Butlin* (1), PARKE, B., delivering the opinion of the Judicial Committee, said this (2 Moo.P.C.C. at p. 482):

> "The rules of law according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal; and they have been acquiesced in on both sides. These rules are two; the first that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. These principles, to the extent that I have stated, are well established. The former is undisputed; the latter is laid down by SIR JOHN NICHOLL in substance in *Paske* v. *Ollat* (2), *Ingram* v. *Wyatt* (3), and *Billinghurst* v. *Vickers* (4), and is stated by that very learned and experienced judge to have been handed down to him by his predecessors, and this tribunal has sanctioned and acted upon it in a recent case."

That recent case was *Baker* v. *Batt* (5).

Bearing in mind the general principles there enunciated, let me direct your Lordships' attention to the two cases occurring in the Court of Probate, and heard before the very learned judge from whose decision the present appeal comes, which were referred to in the argument of this case. The one is *Atter* v. *Atkinson* (6), in which there is a report of a charge of LORD PENZANCE to a jury. In that case the jury, it appears, could not agree upon a verdict and were discharged, but this is the portion of the charge which was referred to. I should state that that was a

A case in which, as here, a solicitor who was, I think, a stranger to, at least not a relative of, the testatrix, was the residuary legatee under the will, but the will was prepared, and the execution of it obtained from the testatrix by another solicitor. LORD PENZANCE there addressed the jury in these terms (L.R. 1 P. & D. at p. 670):

> "The question of fact is, Did Mrs. Newcome really ever read over the contents of this document? If you are satisfied that she read it, then as a proposition of law I feel bound to direct you that she must be taken to have known and approved of its contents. If, being of sound mind and capacity, she read this residuary clause the fact that she afterwards put her signature to it is conclusive to show that she knew and approved of its contents. Reflect on the contrary proposition. Suppose that a long will with a number of complicated arrangements is read to a competent testator and is executed by him, if we were permitted some time after his death to enter into a discussion as to how far he understood and appreciated the bearings of all the different parts of the will, we should upset half the wills in the country. Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the real question whether he knew and approved of the contents is answered."

Although I do not think it is necessary in the present case to determine the question, I do not know that there is anything in that direction taken as a whole to which I could venture to make any objection, but your Lordships will observe the very important qualification. I say "taken as a whole." In the first place the jury must be satisfied that the will was read over, and in the second place they must also be satisfied that there was no fraud in the case. Applying these observations to the present case, I will ask your Lordships to observe that we have no means of knowing what was the view which the jury in the present case took with regard to the reading over of the will. The only witnesses upon the subject were those persons who themselves were propounding the will. No person else was present, no person else knew anything upon the subject. It appears that those witnesses stated either that the will was read over to the testator, or that it had been left with him overnight for the purpose of being read over. The jury may have believed that statement. It by no means follows that the jury thought even if there had been some reading of the will that that reading had taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effect of the residuary clause. It may well be that the jury, finding the clearest expression of the intention of the testator in the instructions for the will, were not satisfied that there was any such proper reading and explanation of the will as would apprise the testator of the change, if there was a change, between the instructions and the will. Moreover, how does the qualification that there must be no fraud bear upon the present case? It is very difficult to define the various grades or shades of fraud; but it is a very important qualification to engraft upon the general state of things, that the reading over of a will by a competent testator must be taken to have apprised him of the contents. If your Lordships find a case in which persons who are strangers to the testator, who have no claim upon his bounty, have themselves prepared for their own benefit a will disposing in their favour of a large portion of the property of the testator, and if you submit that case to a jury, it may well be that the jury may consider that there was a want, on the part of those who propounded the will, of the execution of the duty which lay upon them, to bring home to the mind of the testator the effect of his testamentary act, and that that failure in performing the duty which lay upon them amounted to a greater or less degree of fraud upon their part. The qualifications of LORD PENZANCE in the charge I have read may entirely apply to such a case.

The other case which came before the same learned judge is *Guardhouse* v. *Blackburn* (7). In that case the learned judge laid down certain propositions which he said commended themselves to his mind as rules which since the statute ought to

govern his action in respect of a duly executed paper; and the statement of those rules was this (L.R. 1 P. & D. at p. 116):

> "Thirdly, although the testator knew and approved the contents, the paper may still be rejected, on proof establishing beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that, subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved, as well as knew the contents thereof."

Therefore, my Lords, I come to the conclusion that even if these rules, laid down in this way by LORD PENZANCE, are to be accepted as rules which should be applied to the case of every testamentary instrument, still, with regard to the present case, they do not carry to my mind any persuasion that there was a non-direction on the part of the learned judge in a matter which he ought to have laid before the jury. It appears to me that consistently with the rules mentioned by LORD PENZANCE, the jury here may not have been satisfied that there was a proper reading of the will to the testator, or they may have been satisfied after hearing all the facts submitted to them by MELLOR, J., that there was on the part of those who propounded this will such a dereliction of duty, such a failure of duty, on their part as amounted to that degree of fraud to which LORD PENZANCE refers in the rules I have mentioned. I, therefore, arrive at the conclusion that there was no positive misdirection on the part of MELLOR, J., that there was no failure on his part to lay down some unyielding and absolute rule of law, such as was suggested at the Bar, and that there was no finding of the jury which could be called a finding in opposition to evidence; for it was suggested that when once the jury had before them uncontroverted evidence that the will was read over, any verdict on their part that the residuary clause was not known to the testator, would be opposed to their finding upon the issue that he was of sound and disposing mind. That was a question for the jury, and it might well be that they would not believe the evidence with regard to the reading over of the will. Upon those grounds I feel myself obliged to say that there was nothing which could be alleged against this verdict of the jury, requiring the court to direct a new trial. It was eminently a question for the jury, and I see no reason whatever to be dissatisfied with the verdict at which they arrived.

[HIS LORDSHIP dealt with a matter which does not now call for report, and concluded:] The result of the whole is this. I move your Lordships to allow the present appeal, and, making now the order which ought to have been made in the Court of Probate, to discharge with costs the rule obtained for a new trial; to reverse the order of the Court of Probate giving out probate, and with that direction to remit it to the Court of Probate to do what is right with regard to qualified probate of this will.

LORD CHELMSFORD, LORD HATHERLEY and **LORD O'HAGAN** concurred.

Appeal allowed.

Solicitors: *J. Whitehouse*; *Hughes & Sons.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

DE BUSSCHE *v.* ALT

[COURT OF APPEAL (James, Baggallay and Thesiger, L.JJ.), December 10, 11, 1877, January 14, 15, 18, March 12, 1878]

B [Reported 8 Ch.D. 286; 47 L.J.Ch. 381; 38 L.T. 370; 3 Asp.M.L.C. 584]

Agent—Delegation of obligations to third person—Appointment of sub-agent or substitute—Necessity owing to business exigencies—Usage of trade—Unforeseen emergency.

As a general rule the maxim "delegatus non potest delegare" applies to C prevent an agent from establishing the relationship of principal and agent between his own principal and a third person, but this maxim merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be D implied as an ordinary incident of the contract. But the exigencies of business from time to time render necessary the carrying out of the intentions of a principal by a person other than the agent originally instructed for the purpose. Where that is the case the rule is relaxed so as to enable the agent to appoint a sub-agent or "substitute" and to constitute in the interests and for the protection of the principal a direct privity of contract between him and E the substitute. An authority to that effect should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise which impose on the agent the necessity F of employing a substitute. When such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him as if he had been appointed agent by the principal himself. A case like the present, where a shipowner employs an agent to effectuate the sale of a ship at any port where the ship G may from time to time in the course of her employment under charter happen to be is pre-eminently one where the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity and must reasonably be presumed to be in the contemplation of the parties.

Agent—Principal—Ratification of act of agent—Purchase by agent of property which he was employed to sell—Non-repudiation by principal of transaction H *for considerable time—Need to show full knowledge by principal—Proof of waiver of right to be clear and cogent.*

It is competent to a principal to ratify or adopt the act of his agent in purchasing that which the agent was employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the profits derived by him from it. I The non-repudiation for a considerable length of time of what has been done would at least be evidence of ratification or adoption, or might possibly by analogy to the Statute of Limitations constitute a defence, but before the principal can properly be said to have ratified or adopted the act of his agent, or waived his right of complaint in respect of such act, it should be shown that he had full knowledge of its nature and circumstances—in other words, that he has had presented to his mind proper materials on which to exercise his power of election, and it by no means follows that because he does not repudiate the whole transaction after it has been completed he has lost a right actually

vested in him to the profits derived by his agent from it. Looking to the dangers which would arise from any relaxation of the rules by which in agency matters the interests of principals are protected the evidence by which it is sought to prove that the principal has waived the protection afforded by those rules should be clear and cogent.

Estoppel—Estoppel by conduct—Acquiescence—Acquiescence while act alleged to be acquiesced in is in progress—Act not known to plaintiff—Vesting of right of action.

For a plaintiff to be precluded by "acquiescence" from taking proceedings to enforce a right the acquiescence must be shown to have occurred while the act alleged to be acquiesced in was in progress, and the plaintiff must be shown to have stood by in such a manner as really to induce the person committing the act, who might otherwise have abstained from it, to believe that he assented to its being committed. But when once the act is completed without any knowledge or assent on the part of the person whose right is infringed a right of action is vested in him which, at all events as a general rule, cannot be diverted without accord and satisfaction or a release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away that right, although under the name of laches it may afford a ground for refusing relief in some particular circumstances.

Notes. Applied and Considered: *The Fanny, The Mathilda* (1883), 48 L.T. 771. Distinguished: *Meyerstein* v. *Eastern Agency Co.* (1885), 1 T.L.R. 595. Considered: *Allcard* v. *Skinner*, [1886–90] All E.R.Rep. 90. Applied: *Powell and Thomas* v. *Jones*, [1905] 1 K.B. 11. Distinguished: *Harris* v. *Fiat Motors* (1906), 22 T.L.R. 556; *Re Joicey, Joicey* v. *Elliott*, [1915] 2 Ch. 115. Applied: *Tarn* v. *Scanlan, Neilsen & Co., Anderson* v. *Collins, Muller (London) Ltd.* v. *Lethem, Muller* v. *I.R.Comrs.* (1927), 44 T.L.R. 53. Considered: *Calico Printers Association, Ltd.* v. *Barclays Bank* (1931), 145 T.L.R. 51. Referred to: *Re Pepperell, Pepperell* v. *Chamberlain* (1879), 27 W.R. 410; *Blake* v. *Gale* (1885), 31 Ch.D. 196; *Northumberland* v. *Bowman* (1887), 56 L.T. 773; *Prager* v. *Blatspiel, Stamp and Heacock, Ltd.*, [1924] All E.R.Rep. 524.

As to delegation of an agent's authority and ratification of his acts, see 1 Halsbury's Laws (3rd Edn.) 169 et seq.; and for cases see 1 Digest (Repl.) 444 et seq.

Case referred to:

(1) *Duke of Leeds* v. *Earl of Amherst* (1846), 2 Ph. 117; 16 L.J.Ch. 5; 10 Jur. 956; 41 E.R. 886, L.C.; 21 Digest (Repl.) 451, *1539.*

Also referred to in argument:

Tickel v. *Short* (1751), 2 Ves. Sen. 239; 28 E.R. 154; 1 Digest (Repl.) 448, *1008.*

Lockwood v. *Abdy* (1845), 14 Sim. 437; 5 L.T.O.S. 122; 9 Jur. 267; 60 E.R. 428; 1 Digest (Repl.) 449, *1017.*

Fawcett v. *Whitehouse* (1829), 1 Russ. & M. 132; 8 L.J.O.S.Ch. 50; 39 E.R. 51; 1 Digest (Repl.) 545, *1691.*

Re Canadian Oil Works Corpn., Hay's Case (1875), 10 Ch. App. 593; 44 L.J.Ch. 721; 33 L.T. 466; 24 W.R. 191, L.JJ.; 20 Digest (Repl.) 256, *46.*

Dunne v. *English* (1874), L.R. 18 Eq. 524; 31 L.T. 75; 1 Digest (Repl.) 536, *1645.*

Appeal by the defendant from a decision of Hall, V.-C., in an action by the plaintiff, Edward Munster de Bussche, a merchant and shipowner of Ryde, Isle of Wight, against William John Alt, a member of the firm of Alt & Co., merchants in Japan, in which the plaintiff sought to make the defendant liable to account, as the plaintiff's agent, for profits made by him in the purchase and sale of a steamship called the *Columbine.*

In 1868 the plaintiff was the registered owner of two composite screw steamers, called the *Nymph* and the *Columbine*, subject to a mortgage to Messrs. John Willis & Son, merchants in London, to secure an account current. Each of the steamers was intended by the plaintiff, according to his usual course of business, for sale in some port in India, China, or Japan, and in the summer of 1868, by arrangement between the plaintiff and his mortgagees, who were pressing for payment of the mortgage debt, the vessels were consigned for sale to Gilman & Co., a firm of merchants carrying on business at Hong Kong and Shanghai in China, and at Yokohama in Japan. It was admitted that the relationship of principal and agent in the transaction was constituted between Gilman & Co., and the plaintiff. The consignment was announced by Willis & Son to Gilman & Co. in a letter of July 3, 1868, in which occurred the following passages:

> "The *Columbine* is now at Bombay, and if she cannot be sold will take cotton round to China, where, if a sale does not take place, we must beg you to send her with a freight to Shanghai, Nagasaki, or Yokohama, or all three ports if necessary, so as to get her sold as soon as possible. We understand that you have no establishment at Nagasaki, but no doubt you can appoint some good agent to do the business; but we have to caution you that great care should be taken in appointing an agent where a sale is likely to be effected, as Mr. De Bussche will naturally look to us for the proceeds."

At that time the defendant was a partner in the firm of Alt. & Co., an English mercantile house which traded in Japan, having three different branches in that country—one at Nagasaki, another at Osaca, and a third at Hiogo—and had been from time to time employed by the plaintiff as agent for the sale of merchandise. The defendant was the managing partner at Osaca and Hiogo, and a Mr. Hunt was the manager of the Nagasaki branch. The defendant hearing that the two steamers had been consigned for sale, and having better opportunities than Gilman & Co. for disposing of them in Japan, suggested to that firm that he should be allowed to do so, and the plaintiff also, having been informed that the defendant's house and another Japanese house could sell composite steamers, forwarded the information to Gilman & Co., in a letter of Sept. 10, 1868. In the result, Gilman & Co. authorised the defendant to sell the vessels, or, in the event of their not being sold, to find employment for them. The defendant undertook the duty, and the plaintiff corresponded with the defendant's manager at Nagasaki, on the footing of the defendant having so undertaken it. On Oct. 23, 1868, the plaintiff wrote to Gilman & Co. confirming a limit which he had previously mentioned for the price of each of the vessels, viz., 90,000 dollars net proceeds in England.

For some time prior to the defendant's employment in connection with the two steamers he had business relations with a prince of a Japanese district called Geyshien. The prince had become indebted to him in certain moneys, some of which were payable in the year 1868 and some in 1869. He was desirous of becoming the purchaser of a steamer, and the defendant appeared very early to have conceived the notion of selling either the *Nymph* or the *Columbine* to him. Early in 1869 it appeared that the defendant had brought his negotiations with the officers of the Prince of Geyshien for the sale of the *Columbine* by him to the prince to a close, and on Feb. 24, 1869, an agreement in writing, purporting to be made between the defendant's firm and the prince's officers, was signed at Osaca, under which the defendant was to receive 160,000 dollars for the vessel, payable as to 75,000 dollars in cash, and as to the balance in two equal instalments in the fourth and eighth months (Japanese) of the year, that is, in May and September, 1869. On Mar. 17, 1869, two final agreements were concluded, which were in substance to the same effect, by which possession of the vessel was to be given on payment of the 75,000 dollars, while the bill of sale was to be retained until payment of the whole purchase money. Upon these agreements being executed the crew of the *Columbine* was discharged, possession of the vessel was

given to the prince, and on Mar. 25 a formal transfer to a trustee for the prince and the defendant was executed by the defendant.

On June 3, 1869, Gilman & Co. wrote to the plaintiff to the following effect:

> "We have now to ask you for our commission on the sale of the *Columbine*. You are aware that the steamer was worked by Messrs. Alt & Co., in Japan, who afterwards took her over for your limit of 90,000 dollars."

Before the plaintiff was informed by Gilman & Co. that the defendant himself had become the purchaser of the vessel, he appeared to have received some intimations from Japan which aroused suspicions as to the conduct of the defendant in the matter of the sale, and he, therefore, placed himself in communication on the subject with a Mr. Pitman, who had been captain of one of his vessels, and with Messrs. Walsh & Co., a firm of merchants at Nagasaki, with whom at the time he had business relations. On April 17 Pitman wrote from Yokohama to the plaintiff as follows:

> "I am given to understand from the best authority that the *Columbine* and *Nymph* have been sold for about 160,000 dollars each on credit; what price you have received I cannot find out."

On April 29 Pitman wrote again:

> "I find the *Columbine* price was 175,000 dollars on long credit. I still trust that Alt's have known their interests better than to do what report accuses them of, viz., of only crediting you with 90,000 dollars."

Upon the information so received the plaintiff, reluctantly, treated the sale to the defendant as an accomplished fact. The 90,000 dollars were paid or accounted for by the defendant to Gilman & Co., and through them the amount was paid to the plaintiff or his mortgagees. The *Nymph* was subsequently sold, and the matter slept, so far as the plaintiff and Gilman & Co. were concerned, until shortly before the original bill in the present suit was filed on April 10, 1873. In the meanwhile the defendant received the agreed price for the *Columbine* from the Prince of Geyshien in the following manner. He received 75,000 dollars in various payments extending from Feb. 9 to April 13, 1869; 4,000 dollars on Sept. 18, and the balance of principal and interest, amounting to 93,750 dollars, in December, 1869, in rice which the prince had entered into an agreement to transfer to him. The defendant, in December, 1870, dissolved his connection with the firm of Alt & Co., and returned to England, where from time to time he met the plaintiff without hearing from him any complaints upon the subject of the sale of the *Columbine*. It was proved, however, that the plaintiff did not receive from him or any other person any further information as to the terms of such sale.

The plaintiff instituted no proceedings until March, 1873, when he required the defendant to account, as his agent, for the purchase-money received by him for the *Columbine*, and on April 10, 1873, he filed this bill praying that the alleged purchase by Alt & Co. of the *Columbine* on their behalf was fraudulent and void, and that the defendant might be ordered to account to him for all moneys paid to him or to his firm in respect of the sale of the vessel. The defendant, in his answer, alleged that, as regarded the dealings of agents abroad, it was the common practice, where ships or other articles of commerce were consigned by merchants residing in England to their foreign agents for the purpose of sale, for the principal or consignor to fix a limit or reserved price as the minimum amount for which such ship or other article was to be sold, or (as to merchants in Japan) at the minimum at which such might be taken over and purchased by the agent. HALL, V.-C., gave judgment for the plaintiff, ordering the defendant to account to the plaintiff for the moneys received by him. The defendant appealed.

Butt, Q.C., *Bristowe, Q.C.*, and *T. A. Roberts* for the defendant.
Dickinson, Q.C., and *W. Barber* for the plaintiff.

Cur. adv. vult.

Mar. 12, 1878. **THESIGER, L.J.,** read the following judgment of the court.—The question raised by this appeal is as to the liability of the defendant to account as agent for profits made by him in the purchase and sale of a steamship, which he was, as alleged by the plaintiff, employed to sell for him. The learned vice-chancellor decided that the plaintiff's claim to receive any profits made by the defendant out of the transaction of the sale of the *Columbine* was well founded, and decreed the necessary account for the purpose of ascertaining those profits. Against that decree this appeal is brought. In support of the appeal it has been contended on the part of the defendant, first, that the relationship of principal and agent was not constituted between the plaintiff and the defendant; secondly, that, even if it were at one time constituted, the relationship ceased before the sale of the *Columbine* took place; and thirdly, that assuming the defendant to have been at one time constituted, and to have continued throughout the transaction of sale, the agent of the plaintiff, the latter has lost by acquiescence any right to follow the profits made by the defendant out of it.

The first contention raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt, the maxim 'delegatus non potest delegare'' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident of the contract. But the exigencies of business do from time to time render necessary the carrying out of the intentions of a principal by a person other than the agent originally instructed for the purpose. Where that is the case the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a ''sub-agent'' or ''substitute'' (the latter of which descriptions, although it does not exactly denote the legal relationship of the parties, we adopt for lack of a better, and for the sake of brevity), and, on the other hand, to constitute in the interests and for the protection of the principal a direct privity of contract between him and such substitute. We are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that, when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself.

A case like the present, where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be, is pre-eminently one where the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, and must reasonably be presumed to be in the contemplation of the parties. In the present case we have, over and above that presumption, what cannot but be looked upon as express authority to appoint a substitute and a complete ratification of the actual appointment of the defendant in the letters which passed between Willis & Sons and the plaintiff, on the one side, and Gilman & Co., on the other. We are, therefore, of opinion that the relationship of principal and agent was, in respect of the sale of the *Columbine*, for a time at least constituted between the plaintiff and the defendant.

Next arises the question whether that relationship ceased before the actual sale of the vessel, and upon this question also we are of opinion that the contention of the defendant must fail. In the first place, it is clear that down to the time of the sale the plaintiff was no party to any termination of the defendant's agency, and we think that Gilman & Co. could not, after having once appointed and allowed the defendant to act as agent for the plaintiff in connection with the proposed sale of his vessel and without any authority from the plaintiff, change the defendant's position in the transaction from that of an agent to that of a purchaser from the plaintiff. All the reasons which would apply to prevent the original agent from changing his position without the assent of his principal would equally apply to the case of the substitute, and if such a transaction were held to be valid, so as to entitle the substitute to make a profit out of it, it would open the door in a variety of cases to agents who could not themselves directly become purchasers, indirectly doing the same thing through the intervention of substitutes, and to the commission of serious frauds upon principals. In the present case we are also satisfied, by the evidence to which attention has already been directed, that Gilman & Co. themselves never assented to the termination of the defendant's employment as agent for the sale of the *Columbine*, and never assented to the defendant's taking the vessel himself until after the agreement for her sale to the Prince of Geyshien was complete. When that agreement was concluded, the de-defendant was still, in fact and in law, the plaintiff's agent, and on and from the conclusion of the agreement the plaintiff was entitled to have the benefit of it, and, as a consequence, has a right to maintain the present suit unless in some way by his conduct he has deprived himself of that right.

This brings us to the consideration of the contention of the defendant founded upon what has been termed "acquiescence" on the part of the plaintiff. It has been urged that the plaintiff ought not to be allowed to impeach the validity of the transaction in question or to follow the profits made out of it, after having, with knowledge that the defendant had become the purchaser of his vessel, assented to the transaction being completed on that footing, received by himself or his mortgagees through the hands of Gilman & Co. the purchase-money, allowed the defendant to incur risk and expense, which as agent he could not have been called upon to incur, in obtaining payment from the Prince of Geyshien, and, finally, to dissolve his connection with the firm of Alt & Co. upon—as it is suggested but not proved—the footing of his freedom from all outstanding claims, and to return to England and there reside for a considerable period without any intimation of proceedings being taken against him by the plaintiff.

It is necessary, however, to bring these circumstances to the test of legal principles. It is competent no doubt to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the profits derived by him from it. The non-repudiation for a considerable length of time of what has been done would at least be evidence of ratification or adoption, or might possibly by analogy to the Statute of Limitations constitute a defence, but before the principal can properly be said to have ratified or adopted the act of his agent, or waived his right of complaint in respect of such act, it should be shown that he has had full knowledge of its nature and circumstances, in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows that because in a case like the present he does not repudiate the whole transaction after it has been completed he has lost a right actually vested in him to the profits derived by his agent from it. It appears to us also that, looking to the dangers which would arise from any relaxation of the rules by which in agency matters the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by those rules should be clear and cogent.

In the present case, so far from the plaintiff having had full knowledge of the nature and circumstances of the transaction relating to the sale of the *Columbine*, or the evidence of ratification or adoption being clear and cogent, it is apparent that he was kept in entire ignorance of the amount of purchase-money payable by and the terms of the credit given to the Prince of Geyshien, and of the important fact that the defendant had abstained from binding himself as a purchaser of the vessel until he had obtained the contract for her re-sale. It is to be observed also that while the plaintiff did not in terms repudiate the transaction by which the vessel was sold, and appears to have grumblingly submitted to it as something which he could not help, he at the same time made no statement and did no act from which is to be inferred any condition, or stipulation, or promise that, on becoming better acquainted with the circumstances of the transaction, he would not enforce his legal rights against the defendant by claiming from him any profits made out of the transaction. We are of opinion, therefore, that there is no such evidence of ratification or adoption on the part of the plaintiff of the acts of the defendant as is sufficient to show that he waived the protection given him by the law, and dealt with the agent quoad these acts as a person discharged of his agency.

It still remains to be considered whether, short of such ratification or adoption the plaintiff can be held to have by his conduct in any way precluded himself from taking the present proceedings. The term "acquiescence," which has been applied to his conduct, is one which, as was said by LORD COTTENHAM in *Duke of Leeds* v. *Earl of Amherst* (1), ought not to be used; in other words, it does not accurately express any known legal defence; but if used at all, it must have attached to it a very different signification according to whether the acquiescence alleged occurs while the act acquiesced in is in progress, or only after it has been completed. If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as LORD COTTENHAM said in the case cited, is the proper sense of the term "acquiescence," and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be diverted without accord and satisfaction or a release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and, therefore, not binding.

Applying, then, the principles above enunciated to the present case: First, it is clear that there was no acquiescence on the part of the plaintiff in the defendant becoming the purchaser of the *Columbine*, and obtaining the profit of the sale to the Prince of Geyshien at any time before the sale to the prince was a complete transaction. He said nothing, did nothing, and there was nothing which he abstained from saying or doing, by which he induced the defendant to do or abstain from doing anything, or to alter his position before the transaction with the Japanese prince was completed. Prima facie, therefore, the plaintiff was entitled to bring his action to recover the profit derived by the defendant from the transaction. Secondly, there has been no release by the plaintiff of his right of action, or anything which could be held to amount to accord and satisfaction. Thirdly,

assuming that under certain circumstances a person might by his conduct, whether constituting laches or amounting to an estoppel, entirely preclude himself from enforcing a vested right of action, yet in the present case no conduct having that effect can properly be imputed to the plaintiff. He made no representation to the defendant that he would not take proceedings. Even if his conduct could under any circumstances be held to have been equivalent to such representation or to constitute laches, it was pursued, as already pointed out, in ignorance, due to the defendant's own concealment of the terms of the sale to the Prince of Geyshien, and especially of the fact that such sale preceded the purchase by the defendant. Lastly, the principal element of an estoppel by conduct, viz., that it should have been pursued with the intent or so as to induce the person relying upon the estoppel to act in a particular manner, is here wholly wanting, for the plaintiff was quite unaware, until after the defendant's answer to the suit was put in, that the defendant had run any risk or incurred any expenses in obtaining payment of the price stipulated to be paid by the Japanese prince. We are of opinion, therefore, that the plaintiff has not by his conduct in any way precluded himself from taking these proceedings.

In dealing with the case we have put aside one topic which was discussed in the argument for the defendant, but which is beside the real questions between the parties, viz., the righteousness or unrighteousness of the transaction impugned. The law under which an agent is prevented from making a profit out of his employment by acting as a principal instead of as an agent is wholly independent of considerations of this kind, and it is most important in the interest of commercial honesty in general that the honesty of the agent concerned in the particular transaction should not be inquired into as a question upon which its validity depends, for by this strictness the temptation to embark in what must always be a doubtful transaction is removed. If the defendant could have made out by the most conclusive evidence that 90,000 dollars in cash was a full and more than full equivalent for the bargain which he got from the Japanese prince, it would be wholly irrelevant. At the same time we must add that the present case is one which comes very clearly within the mischief which the law is intended to obviate. Looking to the large price which the defendant stipulated to receive upon his sale of the *Columbine*, and the amount which was to be paid in cash, one cannot but feel some doubt whether his purchaser might not possibly, if the defendant's own interest had been out of the way, been induced to give, instead of 160,000 dollars, partly in cash and partly on credit, a sum down in cash exceeding, at least to a small amount, the limit of 90,000 dollars fixed by the plaintiff. But even if that were not so, it is at all events highly probable that, if the offer of the Japanese prince had been submitted to the plaintiff, he would have been willing to sell direct to him upon the terms of the contract made by the defendant with him.

It is urged, no doubt, by the defendant that the terms were mixed up with the terms of the contemporaneous contract by which the defendant gave the prince further time for payment of debts then due while hastening the period of payment for those coming due; but when those terms are looked at more closely it becomes apparent that, under any circumstances, the prince was prepared to give a large sum of money with a considerable cash payment for the plaintiff's vessel; and when it is asked, as it has been in argument, "what was the defendant to do in the face of the alleged positive prohibition to sell for anything but cash?" the answer is plain. He might have said, and ought to have said: "I cannot get all cash, but I can get so much cash and so much credit from a customer of mine, and if you do not like that, let me accept his offer for myself, and I will give you your limit in cash." Full opportunity for taking this course, either through the post or by means of the telegraph, was open to the defendant, but instead of taking it he thought proper to conceal altogether from the plaintiff, from Gilman & Co., and even from his own manager at Nagasaki, the real nature of the transaction in which he was engaged; and, although he may have acted without any fraudulent

or improper motive, he cannot reasonably be said to be free from blame or to have a right to complain of consequences which a more due regard to his duty towards his principal could easily have obviated. In conclusion, we are of opinion that, although some hardship may have been caused to the defendant by the delay of the plaintiff in taking these proceedings, he has nevertheless most properly been made liable in them, and that the decree of the vice-chancellor should in all respects be affirmed, and this appeal be dismissed with costs.

Appeal dismissed.

Solicitors: *Tatham, Oblein & Nash*; *G. Badham.*

[*Reported by* S. S. ROCHE, ESQ., *Barrister-at-Law.*]

SWIRE AND ANOTHER *v.* REDMAN AND ANOTHER

[QUEEN'S BENCH DIVISION (Sir Alexander Cockburn, C.J., and Blackburn, J.), June 29, 30, July 4, 1876]

[Reported 1 Q.B.D. 536; 35 L.T. 470; 24 W.R. 1069]

Partnership—Dissolution—Effluxion of time—Partnership debt—Arrangement for one partner to take over stock—Liability of retiring partner as joint debtor.

R. and H., in partnership as merchants and manufacturers, were in the habit, through the plaintiffs' firm, of consigning goods to a firm in China for sale. The proceeds of sale were remitted to the plaintiffs in London. By an agreement between the parties, the remittances were held specially to meet any liability the plaintiffs might have incurred by advances to R. and H. effected by accepting their bills, and any balance was to be paid to R. and H. When these acceptances became due R. and H. were bound to pay the plaintiffs any deficiency, and if sales were delayed so as to prevent the remittances from arriving in time to meet the acceptances the plaintiffs were accustomed to accept fresh bills which R. and H. negotiated for that purpose and handed the proceeds to the plaintiffs, who thereby were enabled to take up the first bills and so let R. and H. have the benefit of the advance for a further time. In 1873, by efflux of time, the partnership of R. and H. expired, and at the time of the dissolution, of which the plaintiffs had notice, there were acceptances of the plaintiffs due on goods being then unsold, and these were met by fresh bills drawn in the name of "R. and H. in liquidation" and accepted by the plaintiffs. Subsequently H. informed the plaintiffs that he had taken over all the stock of the old firm and the plaintiffs agreed at his request to accept fresh bills in his name alone. The plaintiffs brought an action against R. and H. to recover the balance due to them on the acceptances in the plaintiffs' hands, some of which were received before and some after the plaintiffs had notice that H. had taken over all the stock. R. contended that by the agreement between R. and H. for H. to take over the stock, R. had become a surety for H. instead of a principal joint debtor, and that the plaintiffs, by giving H. time after notice of this, had discharged R.

Held: the plaintiffs could not be deprived, by an internal arrangement between R. and H. without their (the plaintiffs') assent, of their right to treat both R. and H. as principal debtors, and, therefore, the plaintiffs were entitled to recover from both R. and H.

Notes. As to discharge of bill of exchange of party liable as surety, see 3 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 6 DIGEST (Repl.) 380 et seq. As to liability of retired partner, see 28 HALSBURY'S LAWS (3rd Edn.) 515; and for cases see 36 DIGEST (Repl.) 486 et seq.

Cases referred to:

(1) *Pooley* v. *Harradine* (1857), 7 E. & B. 431; 26 L.J.Q.B. 156; 28 L.T.O.S. 367; 3 Jur.N.S. 488; 5 W.R. 405; 119 E.R. 1307; 6 Digest (Repl.) 382, *2733*.

(2) *Greenough* v. *McClelland* (1860), 2 E. & E. 429; 30 L.J.Q.B. 15; 2 L.T. 571; 6 Jur.N.S. 772; 8 W.R. 612; 121 E.R. 162, Ex. Ch.; 6 Digest (Repl.) 382, *2736*.

(3) *Oriental Financial Corpn.* v. *Overend, Gurney & Co.* (1871), 7 Ch. App. 142; 25 L.T. 813; affirmed sub nom. *Overend, Gurney & Co.* (*Liquidators*) v. *Oriental Financial Corpn.* (*Liquidators*) (1874), post p. 1269; L.R. 7 H.L. 348; 31 L.T. 322, H.L.; 6 Digest (Repl.) 301, *2191*.

(4) *Pasheller* v. *Hammett* (1832), 2 Coop. temp. Cott. 522; 10 Bli.N.S. 576, n.; 1 L.J.Ch. 204; 47 E.R. 1284; on appeal sub nom. *Oakeley* v. *Pasheller* (1836), 10 Bli.N.S. 548; 4 Cl. & Fin. 207; 6 E.R. 202, H.L.; 26 Digest (Repl.) 187, *1402*.

(5) *Wilson* v. *Lloyd* (1873), L.R. 16 Eq. 60; 42 L.J.Ch. 559; 28 L.T. 331; 21 W.R. 507; 26 Digest (Repl.) 206, *1588*.

(6) *Maingay* v. *Lewis* (1870), I.R. 5 C.L. 229; 26 Digest (Repl.) 181, **546*.

(7) *Oakford* v. *European and American Steam Shipping Co., Ltd.* (1863), 1 Hem. & M. 182; 2 New Rep. 103; 9 L.T. 15; 1 Mar.L.C. 370; 71 E.R. 80; 26 Digest (Repl.) 180, *1335*.

Rule Nisi for an order for a new trial obtained by the defendant Redman in an action to recover advances alleged to have been made by the plaintiffs to the two defendants upon consignments of goods made by the defendants to China, the proceeds of the sale of which were to be forwarded to the plaintiffs. The defendant Holt allowed judgment to go by default, and the defendant Redman's defence was that his partnership with Holt was dissolved and that the plaintiffs had accepted the whole liability of the defendant Holt. The case was tried at the Easter Sittings in London, before BRAMWELL, B., who ruled that the facts opened by the defendant Redman's counsel were no defence on his part, and entered judgment against both defendants for £5,479 5s. 11d., the amount claimed.

The defendant Redman subsequently obtained an order nisi calling upon the plaintiffs to show cause why there should not be a new trial on the ground of misdirection of the judge in holding that, assuming all the facts alleged by the defendant to be proved to the satisfaction of the jury, the plaintiffs were nevertheless entitled to a verdict.

Cohen, Q.C., and *Gainsford Bruce* for the plaintiffs.
Benjamin, Q.C., and *Wills, Q.C.*, for the defendant Redman.

July 4, 1876. **BLACKBURN, J.** (read by **SIR ALEXANDER COCKBURN, C.J.**)—In this action tried before BRAMWELL, B., the defendant Holt made no defence, and the action was tried between the plaintiffs and the defendant Redman, who defended. After the evidence for the plaintiffs had been completed counsel stated the defendant Redman's case, but the judge ruled that, supposing that the facts opened should be proved, there was no case for the defendant to go to the jury, and he directed a verdict for the amount claimed, which was £5,479 5s. 11d.

The facts proved on the evidence for the plaintiffs, so far as it is necessary to state them, were that the defendants, Redman and Holt, had been in partnership as spinners and manufacturers at Haworth, and also as stuff merchants at Bradford. They were in the habit, through the plaintiffs' firm, of consigning goods to Messrs. Butterfield and Swire, in China, for sale, the proceeds of which were to be remitted by Butterfield and Swire to the plaintiffs' firm in London. By an agreement in

writing dated Dec. 29, 1868, between the plaintiffs' firm and the defendants, these remittances were to be held specially to meet the liability the plaintiffs might have incurred by advances to the defendants, effected by accepting their drafts, and any balance was to be paid to the defendants. The mode in which the advances were made was that the defendants drew on the plaintiffs drafts proportioned to the invoice value of the goods consigned. These drafts the plaintiffs accepted and the defendants discounted their acceptances. When the acceptances became due, if the remittances did not put the plaintiffs in funds to meet the acceptances, the defendants were bound to pay the plaintiffs the deficiency. There seems to have been no express agreement at any time as to what was to be done in case the goods were not sold before the maturity of the acceptances, but in practice the plaintiffs in such cases accepted a fresh draft, which the defendants negotiated, and thereby obtained funds which they handed to the plaintiffs, who were thereby enabled to take up the first acceptances and so to let the defendants have the benefit of the advance for a further time without being under cash advance. There could be no doubt that this was so constantly done that Redman and Holt would have felt aggrieved if the plaintiffs had suddenly refused to prolong the advances in this way, and would have had a right in such case to say that the plaintiffs were treating them harshly. Whether the plaintiffs would by so doing have committed a breach of contract on which an action would have lain, is, to say the least, doubtful, and from the way in which the case was disposed of, without actually taking the opinion of the jury on any question, the defendants' counsel are probably entitled to argue that any points left doubtful must be taken to have been found in the way most favourable to him.

The course described was pursued for five years, till, on Dec. 31, 1873, the partnership between Redman and Holt expired by efflux of time, and of this the plaintiffs were then informed. At this date there were goods to a large amount consigned to Butterfield and Swire, and in their hands unsold, on the security of which the plaintiffs had, by accepting the drafts of Redman and Holt, made advances to the extent of many thousand pounds, for which the plaintiffs were liable, though they had been kept out of cash advances. Holt, who had always managed the foreign trade, continued to manage the outstanding affairs of the late firm. He procured the renewal of the advances on many of the goods in the manner already described by procuring the plaintiffs to accept fresh drafts which he negotiated, and thereby obtained the funds necessary to keep the plaintiffs out of cash advances. These fresh drafts were drawn in the name of "Redman and Holt in liquidation." This continued till Nov. 16, 1874, up to which date the plaintiffs had no notice or knowledge that Redman and Holt were not equally interested in winding-up the affairs of the late firm and realising the proceeds of their consignment. On that day Holt, by a letter of Nov. 16, 1874, informed the plaintiffs that it had been finally arranged between him and Redman that he, Holt, should take over the whole of the stock of the old firm, and Holt suggested for that reason that future drafts should be signed in his own name instead of that of Redman and Holt. This was acceded to, and several of the advances originally made to the old firm of Redman and Holt on goods consigned by them and then their property, though now Holt's property, were continued in the manner described, the drafts by the discount of which the plaintiffs were kept out of cash advance being drawn on the plaintiffs by Holt in his own name.

The date of the writ in this action was Dec. 3, 1875. Before that time the goods originally consigned by Redman and Holt had been sold and the proceeds received by the plaintiffs. These proceeds were not sufficient to repay the advances made to Redman and Holt; the deficiency was the amount for which the verdict was taken. Part of this deficiency, £2,000 and upwards, in respect of advances on which there had been renewals prior to Nov. 16, 1874, by means of drafts of Redman and Holt in liquidation, but in respect of which there had been no renewals after the day on which the plaintiffs were affected with notice that the defendants Redman and Holt had agreed that Holt should take the stock of the old firm, and

consequently that as between themselves Holt should be bound primarily to discharge the liabilities on that property, including the advances which the plaintiffs had made on their security to Redman and Holt jointly. The remainder of the claim, £3,000 and upwards, was in respect of advances on goods not sold on Nov. 16, 1874, and on which the advances had been continued, the plaintiffs being kept out of cash advances by means of acceptances of Holt's drafts discounted in the manner described.

The question in the cause is whether Redman is still liable for either of these sums. It seems to us clear that the original advances were money lent to Redman and Holt for which they were debtors, and that the drawing of fresh drafts, which were accepted as described, was not in any way a satisfaction of that debt but only machinery by which it was provided that the time for payment should be extended without the plaintiffs coming under any cash advance. Part of the ruling of BRAMWELL, B., was that there was no evidence that there had been any taking by the plaintiffs of Holt's sole liability in accord and satisfaction of the liability of Redman and Holt. And this, when the rule was moved, was thought so clearly right that no rule was granted on that point. But the effect of the transactions was to grant an extension of time. For during the interval between taking up of one of the drafts and the maturing of the substituted draft by means of which it was taken up, the plaintiff could not have sued.

One point made by counsel for the defendant Redman in his opening was that the effect of this giving of time, as he said, to Holt alone, was to discharge Redman. So far as regards the £2,000 odd, as to which there had been no renewal after Nov. 16, 1874, this seems to us absolutely untenable. For we think it clear law that a creditor, who has two principal debtors, may bind himself to one of them, in any way short of an absolute release, to give him time, or even not to sue him, without in the least prejudicing his right of recourse against the other. By suing that other debtor a recovery from him entitles him to recover contribution from his co-debtor, and consequently the creditor may, by his suit against the one debtor, bring about such a state of things as renders him, the creditor, liable to an action by the co-debtor who has been forced to make contribution, when by the bargain between the creditor and himself he ought not to have been; but this forms no defence for the other debtor. The law says that the party injured shall have compensation in damages adequate to the injury he has received, but that this shall form no defence to the party who has received no injury at all. If no damage at all has been received there is no compensation due to anyone. This, we cannot but think, is consistent with sound sense and clear justice. Therefore, so long as the plaintiffs had no notice that the relation between Redman and Holt had been changed from that of joint principal debtors to something else, the plaintiffs might bind themselves to Holt in any way they pleased to give him time, without thereby affecting in any way their remedy against Redman, the co-debtor; and this we apprehend is clear, not merely in justice and sense, but on all decisions both at law and equity.

But where the two who become liable for a debt are not joint principal debtors, but from the beginning one of them is a principal and the other a surety, the case is different. The relation of principal and surety gives to the surety certain rights. Among others, the surety has a right at any time to apply to the creditor and pay off, and then, on giving proper indemnity for costs, to sue the principal in the creditor's name. We are not aware of any instance in which a surety ever in practice exercised this right; certainly the cases in which a surety uses it must be very rare. Still the surety has this right, and if the creditor binds himself not to sue the principal debtor, for however short a time, he does interfere with the surety's theoretical right to sue in his name during such period. It has been settled by decisions that there is an equity to say that such an interference with the rights of the surety, in the immense majority of cases not damaging him to the extent even of a shilling, must operate to deprive the creditor of his right of recourse against the surety, though it may be for thousands of pounds. But though this seems, if it

may be permitted to speak in such terms of the doctrine sanctioned by very great lawyers, consistent neither with justice nor common sense, it has been long so firmly established that it can only be altered by the legislature. As it depends on the supposed inequity of interfering with the rights which the surety has as between him and the principal debtor, it is not material that the knowledge on the part of the creditor that the surety was from the beginning such, and, therefore, had such rights, was not acquired till after the surety had become liable to the creditor: *Pooley* v. *Harradine* (1); *Greenough* v. *McClelland* (2); and *Oriental Financial Corpn.* v. *Overend, Gurney & Co.* (3). This rule, whether it was originally right or not, is no doubt well established. But when, as in the present case, the two debtors are both principals, there is no such right. Redman never could have paid off the plaintiffs and sued Holt in their name, for by the very act of paying off the plaintiffs the cause of action in their name would be gone, and the right which Redman would have had to sue Holt for contribution would be in no way affected by any bargain which the plaintiffs had made with Holt alone to give him further time.

The contention is that the two, Redman and Holt, had a right, without the knowledge or consent of the plaintiffs, to create a new state of things, and then, by giving notice, to prevent the plaintiffs from doing what they lawfully might before —to create a right in themselves, which, if observed, must derogate from the plaintiffs' right, and then to say that it is inequitable in the plaintiffs to act in derogation of this right so created. Surely the inequity begins earlier, and is in the defendants' derogating from the plaintiffs' right without their consent. It was however argued, that however much this might be contrary to principle, it was established by the House of Lords in *Oakeley* v. *Pasheller* (4). We do not think that any such point either arose or was decided in that case. The case is very imperfectly reported, and the judgment seems to have been very meagre. The case is abstracted in LINDLEY ON PARTNERSHIP (3rd Edn.) 463. The decision appears to us to have proceeded on the ground that, by an arrangement to which the creditor Sir Charles Oakeley was a party, Kynaston, who was Sir Charles's son-in-law, became a partner in the house which was indebted to Sir Charles, and then, by arrangement between the three parties, Kynaston became a principal debtor to Sir Charles, and the outgoing partners became sureties to Kynaston. There was ample consideration for Sir Charles Oakeley agreeing to this change, and whether the conclusion of fact that he did so agree was right or wrong, the case did not and could not decide that it could be done without his consent. That such was the ground of the decision of the Lords we think sufficiently appears from both reports, ill as they are reported. The facts clearly were that Kynaston made himself a new debtor to Sir Charles Oakeley; and, if he was so, the respondents could not be liable for his default except in consequence of some arrangement by which they became his sureties.

In the very meagre report of the judgment of SIR JOHN LEACH, M.R., (10 Bli.N.S. at p. 578), he bases his judgment on the fact that "Sir Charles Oakeley well knew, in 1817, that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors," that is, to Sir Charles, which Kynaston could not be without Sir Charles's consent, "and Sherard's estate surety only." During the argument in the House of Lords, LORD LYNDHURST (ibid. at p. 586) points out the difficulty in converting a joint debtor into a surety without the creditors' assent. He seems to have relied on this objection until the fact that Kynaston became a new debtor was brought to his notice (ibid. at p. 587). And, finally, in the judgment he says (ibid. at p. 589): "An arrangement was made between Sir Charles Oakeley and Kynaston." This would have been quite irrelevant unless Kynaston had become a new debtor, and the other parties, by agreement with Sir Charles, sureties for him. It is impossible to suppose that if LORD LYNDHURST had been delivering a judgment of the House of Lords on a case of the first impression, and on which he knew (ibid. at p. 586) there was no previous decision he would have done it in so perfunctory a manner as he appears to have

done. It was not right in deciding on the special facts of the particular case to give so little information to the parties, but it would have been an incredible neglect of duty to say so little. It is, however, true that in *Wilson* v. *Lloyd* (5), BACON, V.-C., in citing *Oakeley* v. *Pasheller* (4), takes no notice of the very important fact that the new partner was introduced as a new member of the firm, and as a fresh debtor to the creditor by an arrangement between the three.

No English case has actually decided this point if *Oakeley* v. *Pasheller* (4), does not. But there is an Irish case cited by counsel for the defendant Redman, which should be noticed. It is that of *Maingay* v. *Lewis* (6). There was a plea there on equitable grounds raising this very defence. The Irish Court of Queen's Bench, on demurrer, unanimously held the plea to be bad. But, on appeal before seven judges, four reversed this decision, three being for affirming it. But it is worth while to notice the reasons on which LAWSON, J., based his judgment, which turned the scale. After stating the point, he says (I.R. 5 C.L. at p. 231):

> "To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies of a creditor by an arrangement entered into between his debtors to which he was no party, seems to me to be an interference with contracts very contrary to the spirit of our law."

So far we quite agree with him; but he adds: "I feel myself bound to come to the conclusion that the case is governed by the decision of the House of Lords in *Oakeley* v. *Pasheller* (4), and that I ought to follow it implicitly." Had LAWSON, J., thought, as we do, that the decision in *Oakeley* v. *Pasheller* (4) proceeded on the ground that the creditor was a party to the arrangement, he would have decided in conformity with the opinion of the dissentient three in the Irish Court of Appeal.

We think, therefore, that the rule in this case should be discharged on this ground. There is another point which it is not necessary for us to decide, but which it is as well to mention. Redman and Holt had when in partnership requested the plaintiffs to give time under the circumstances and in the way which they did after the dissolution to Holt alone. If the plaintiffs were not under a legal obligation to do so, there was a strong moral claim on them so to do. It seems strange justice to relieve Redman because the plaintiffs in dealing with Holt after the dissolution in winding-up a partnership debt, pursued the very course which Redman had sanctioned and requested, if he had not stipulated for it; and *Oakford* v. *European Shipping Co.* (7) seems an authority for saying it is not equity. Our judgment will be in favour of the plaintiffs.

Rule discharged. Judgment for plaintiffs.

Solicitors: *Flux & Co.*; *Field, Roscoe & Co.*, for *Taylor & Co.*, Bradford.

[*Reported by* M. W. MCKELLAR, ESQ., *Barrister-at-Law.*]

A

FAIRCLOUGH *v.* MARSHALL

[COURT OF APPEAL (Bramwell, Brett and Cotton, L.JJ.), November 12, 1878]

[Reported 4 Ex.D. 37; 48 L.J.Q.B. 146; 39 L.T. 389; 27 W.R. 145]

B

Mortgage—Mortgagor—Mortgagor in possession—Powers—Right to injunction to restrain injury to mortgaged property—Need to join mortgagee.

A mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee.

C **Notes.** Followed: *Bennett* v. *Hughes* (1886), 2 T.L.R. 715. Applied: *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (1890), 44 Ch.D. 374. Considered: *Matthews* v. *Usher* (1899), 68 L.J.Q.B. 988; *Turner* v. *Walsh*, [1908–10] All E.R.Rep. 822. Referred to: *Allen* v. *I.R.Comrs.*, [1914] 2 K.B. 327.

As to the enforcement of covenants by a mortgagor on possession, see 27 HALSD BURY'S LAWS (3rd Edn.) 250; and for cases see 35 DIGEST (Repl.) 391, 392.

Cases referred to:

(1) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774*.

(2) *Western* v. *MacDermott* (1866), 2 Ch. App. 72; 36 L.J.Ch. 76; 15 L.T. 641; 31 J.P. 73; 15 W.R. 265, L.C.; 40 Digest (Repl.) 360, *2886*.

E

Appeal by the plaintiff from a decision of MANISTY, J., in an action for an injunction.

In December, 1868, a person named Fowler, who held certain copyhold land, executed a conveyance by which, in consideration of a sum of money paid to him, he covenanted to stand seised of a plot of such land in trust for a person named F Steel, his heirs and assigns, subject to an annual rentcharge issuing out of the land, payable to Fowler. By the same deed Steel covenanted that a beerhouse should not be opened on the plot of land. Steel's interest in the land afterwards became vested by assignment in the defendant, who had notice of Steel's covenant not to open a beerhouse. In November, 1876, a deed was executed to which Fowler and the plaintiff and a person named Briggs were parties, and which recited that G Fowler had contracted with the plaintiff for the absolute sale to the plaintiff of the annual rents and the benefits of all the powers and remedies for securing the advantage and benefit of the covenants and conditions contained in the deed of December, 1868. Briggs had advanced money to the plaintiff, and the conveyance was, at the plaintiff's request, made to Briggs as security for the advance. The benefit of the covenants was also assigned to Briggs. After this the plaintiff H managed the property, and Briggs did not interfere. The defendant having opened a beerhouse on the plot of land in question, the plaintiff commenced this action against him for so doing, and sought to obtain an injunction. The trial took place at Durham before MANISTY, J., who thought that the plaintiff, as mortgagor, was not entitled to maintain the action, and gave judgment for the defendant. The plaintiff appealed.

I

Hemming, Q.C. (*Wildey Wright* and *Granger* with him), for the plaintiff.

Herschell, Q.C., and *McClymont* for the defendant.

BRAMWELL, L.J.—With the greatest respect for my learned brother MANISTY I am of opinion that this judgment cannot be supported. The question in the first place is this, if the conveyance had been made to Fairclough in the terms in which it was made to Briggs, and there had been no borrowing of money on mortgage nor any question of legal and equitable estate, it is admitted that the plaintiff could have maintained proceedings for the breach of this covenant; but it

is said that, because the conveyance is made as it is, Fairclough cannot maintain the action, and secondly it is said that he cannot maintain it without joining Briggs as a plaintiff.

First, there is counsel for the defendant's point. He says that this is not a case of mortgagor and mortgagee, because here the mortgagor has no estate; but it is recited that he purchased the property, the conveyance is made to Briggs as mortgagee, and there is a covenant to pay the mortgage money: in substance it is the same as a mortgage. Then can the plaintiff sue? Briggs has never interefered in any way with the management of the property, and it is not suggested that his security is in any danger or would be impaired by what the plaintiff seeks to do in this action. As far as any substantial difficulty is concerned it is only suggested by surmise. The plaintiff is the beneficial owner subject to an encumbrance to Briggs, and it is conceded that the action could be maintained if Briggs were joined. Before the coming into operation of the Judicature Acts need the plaintiff have joined Briggs as a party to a suit in equity? COTTON, L.J., says he undoubtedly need not, and on principle I am clearly of opinion that he need not have joined him. He need not join Briggs as a plaintiff, and he clearly need not join him as a defendant. I think that R.S.C., 1875, Ord. 16, r. 13 [now R.S.C. (Revision), 1962, Ord. 15, rll. 6, 8], would justify an order on Marshall, which would bind him, and I see no necessity for joining any other party before proceeding against Marshall. If there were any such necessity I think Ord. 16, r. 13, supersedes it. I think it is a case of a sole plaintiff and a sole defendant.

Then as to s. 25 (5) of the Supreme Court of Judicature Act, 1873 [now s. 98 of Law of Property Act, 1925], I think it only applies to cases where the mortgagor could not, either in his own name or with the mortgagee, have brought an action; but, if so, it follows that the mortgagor may sue for rent or for damages for trespass or other wrong, but could not sue for breach of covenant to insure or keep in repair. But, however that may be, I think this is a wrong independent of contract or duty. I am, therefore, of opinion that the action was properly brought by Fairclough alone, and the case ought to go back to MANISTY, J.

BRETT, L.J.—This is a suit for an injunction on the ground that the defendant is using the land inconsistently with the contract of the vendor, and it is not disputed that the original contract was made between Fowler and Steel, and that the defendant holds by devolution from Steel; but it is said that the plaintiff is not the owner by devolution from Fowler, but that Briggs is. It goes to this, that the plaintiff is the wrong plaintiff.

In my opinion this objection cannot be sustained. Fowler was the owner of an interest in the land, and the contract of sale was made by him to Fairclough. It was made and completed as a contract, but it is said that, at the request of the plaintiff, the conveyance was made out in form as a conveyance direct to Briggs; but Briggs, Fowler, and Fairclough are all parties to the conveyance. There is the recital that the money was borrowed by Fairclough from Briggs, and the conveyance is made to Briggs in consequence. The original contract is clear, and the right to redeem is clear. Therefore the plaintiff is equitable owner by devolution from Fowler, and the defendant holds by devolution from Steel. Therefore, if there were not a mortgage, on the authority of *Tulk* v. *Moxhay* (1), the defendant is rightly made a defendant, and the plaintiff would be entitled to the relief he asks; but it is said that because he has mortgaged to Briggs he must join Briggs. Now it is stated that it was the undoubted practice of the Court of Chancery not to require that the mortgagee should be joined. Counsel for the defendant said he could find no authority as to the practice, and on that we could not act. But we have the very highest authority, for COTTON, L.J., says that it has been the positive practice that the mortgagee need not be joined, and on principle he need not. I think the principle rests on this important doctrine, that, where the mortgagee leaves the land in the hands of the mortgagor, the mortgagor has a right to put in force all remedies and rights as if the land were not mortgaged. Then it is obvious that, if

A the mortgagee does not interfere, but leaves the mortgagor in possession, on principle the mortgagee need not be a party. But even if it could be made out that he need, it is not a case of the plaintiff being a wrong party, but a case of want of right parties who ought to be joined, which would come within Ord. 16, r. 13. The judgment must be wrong if the objection is only for want of parties.

Therefore, dealing with the case as if s. 25 (5) of the Supreme Court of Judicature B Act, 1873 [now s. 98 of Law of Property Act, 1925], were not applicable, the plaintiff is the right party to sue. Section 25 (5) is an enabling and not a disabling clause, and, therefore, if the plaintiff could have sued before that clause came into operation, he can sue now. Therefore, I am of opinion that MANISTY, J., was wrong in deciding the case as he did, and it ought to go back so as to enable him to consider the other matters in contest.

C **COTTON, L.J.**—In this case, MANISTY, J., decided in favour of the defendant on the ground that the plaintiff had not enough interest to sue, and the question is whether that is correct. It is urged that the action is wrongly brought because the plaintiff is not the mortgagee; in my opinion, there is no ground for that objection. A court of equity has always considered the mortgagor as owner subject to the security. Here the plaintiff is in the position of mortgagor, and he institutes D this suit on the ground that the defendant, having purchased with notice that a restriction existed as to the way in which the land might be used, was not in a position to use it contrary to such restriction, and any person entitled to the land would sue, not on a contract, but for the defendant's wrongful act.

That disposes of the grounds on which the case was decided in the court below, E for the plaintiff clearly has a right of action. Ought he then to have joined the mortgagee? If the court thought that the mortgagee should be joined an order should be made under R.S.C., 1875, Ord. 16, r. 13 [now R.S.C. (Revision), 1962, Ord. 15, rll. 6, 8], or r. 17 [now r. 16 (1)]. Under these rules the court may order parties to be added, and should not give judgment for the defendant on the ground that the proper parties are not joined. Two grounds are suggested why the F mortgagees should be made parties: First, that all persons interested should be joined; but *Western* v. *MacDermott* (2) is a decision which shows that this is not necessary in equity. Then it is said that, having regard to the interest of the mortgagee, he is entitled to decide what steps are to be taken for the protection of his security; but where the mortgagee does not assert his title, and the mortgagor is left in the management of the property, he is the person to protect it. If the mortgagee G is not satisfied he can assert his title. If he does not do so the mortgagor is the person to assert rights connected with the property. The suggestion that the interest of the mortgagee was likely to be affected rests on the merest surmise, and we cannot say that the mortgagee ought to be brought before the court. I am, therefore, of opinion, without saying that in no case ought the mortgagee to be made a party, that here is is not necessary.

H *Appeal allowed.*

Solicitors: *J. Scott & Clarke*; *Belfrage & Middleton*, for *W. M. Skinner*, Sunderland.

[*Reported by* P. B. HUTCHINS, ESQ., *Barrister-at-Law.*]

A

LEYMAN *v.* LATIMER AND OTHERS

[Court of Appeal (Bramwell, Brett and Cotton, L.JJ.), January 24, 1878]

[Reported 3 Ex.D. 352; 47 L.J.Q.B. 470; 37 L.T. 819; 26 W.R. 305; 14 Cox, C.C. 51]

B

Libel—Defamatory words—"Convicted felon"—Justification—Need to prove actual commission of felony, not merely conviction.

In an action by a newspaper editor for libel by printing and publishing of him in another newspaper that he was "a convicted felon" and "a felon editor" the defendants pleaded justification, alleging that the plaintiff had in fact been convicted of felony and sentenced to twelve months' hard labour. The plaintiff replied that the conviction had taken place many years previously, that he had suffered the punishment for it, and had thereby become in the same situation as if a pardon under the great seal had been granted to him. At the trial the judge held that the alleged libels merely meant that the plaintiff had been convicted of felony, and that, this being true, the plaintiff could not recover.

C

D

Held: upon demurrers to the justification the plaintiff was entitled to judgment, and there should be a new trial.

Per Bramwell, L.J.: Before the defendants can justify the words "felon editor" they must show that the plaintiff actually committed a felony; to show merely a conviction on a charge of felony is not enough.

Per Brett and Cotton, L.JJ.: The question as to the meaning of the alleged libels ought to have been submitted to a jury. Moreover, by the Civil Rights of Convicts Act, 1828, a person convicted of felony is in law no longer a felon once he has endured the punishment. Accordingly, the justification in the present case was bad for not alleging that the plaintiff was then enduring the punishment.

E

Cuddington v. *Wilkins* (1) (1615), Hob. 81, approved.

F

Notes. Applied: *Yates* v. *Kuffin-Taylor and Wark*, [1899] W.N. 141. Doubted: *In the Estate of Crippen*, [1911] P. 108. Considered: *Ingram* v. *Ingram*, [1956] 1 All E.R. 785. Referred to: *Hay* v. *Tower Division Justices* (1890), 59 L.J.M.C. 79; *Monson* v. *Madame Tussaud, Ltd.*, [1891–4] All E.R.Rep. 1051; *Hollington* v. *Hewthorn & Co.*, [1943] 1 K.B. 587.

G

As to imputations on criminals who have been pardoned or who have served their sentence, see 24 Halsbury's Laws (3rd Edn.) 32; and for cases see 32 Digest (Repl.) 59.

Cases referred to:

(1) *Cuddington* v. *Wilkins* (1615), Hob. 81; Moore, K.B. 863, 872; Owen, 150; 80 E.R. 231; sub nom. *Coddington* v. *Wilkin*, 1 Brownl. 10; 32 Digest (Repl.) 59, *659*.

H

(2) *Searle* v. *Williams* (1618), Hob. 288; 80 E.R. 433; 32 Digest (Repl.) 59, *660*.

Appeal from a decision of the Exchequer Division (Cleasby and Pollock, BB.), reported 3 Ex.D. 15, making absolute a rule nisi for a new trial obtained by the plaintiff, and giving judgment for the plaintiff on his demurrer in an action for libel brought by the plaintiff, the proprietor and editor of a newspaper published at Dartmouth, called the "Dartmouth Advertiser," against the defendants, the proprietors, printers, and publishers of a newspaper published at Plymouth, called the "Western Daily Mercury." The alleged libels, two in number, appeared in the latter paper, and were shortly as follows:

I

"The history of the 'Advertiser' too must stand over . . . its present editor is a convicted felon."

A This appeared in defendants' paper of April 24, 1876. The second libel appeared on May 1, 1876:

> "There still remain to be recorded Mr. Foster's controversies with the town council of Dartmouth . . . and the facts regarding his newspaper and its bankrupt and felon editors."

B By their defence the defendants denied that the word "bankrupt" in the quotation from their newspaper was intended to, or did refer to the plaintiff, and they further said that the plaintiff had been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers. To that last plea the plaintiff demurred.

Cole, Q.C., and *Bullen* for the defendants.
Collins, Q.C. (*Pitt Lewis* with him), for the plaintiff.

C

BRAMWELL, L.J.—I am of opinion that this appeal must fail; and I come to that opinion on a careful investigation of the allegations contained in the alleged libels, and of the way they are dealt with in the pleadings. I am aware that may seem a very narrow ground on which to arrive at a conclusion, and I do not myself like to decide a question on what looks like mere technicalities, but if I do so, it is D not my fault; the law is technical.

The reason I come to this opinion is because I cannot agree with BLACKBURN, J., that the whole alleged libel (whether it was rightly for the judge or the jury) merely amounted to a statement that the plaintiff had been convicted of a felony, and meant nothing more. If that was all it meant, I should agree with him that the justification was made out. But, to come to that conclusion, it is clear BLACKBURN, J., E could not have had his notice attracted to the second allegation in plaintiff's statement of claim—the alleged libel of May 1—where the plaintiff is called "a felon editor." How does the matter stand before us? As to all the facts that it was on the plaintiff to make out, he has done so. The allegation that the statements were "false" it was not necessary that he should specifically make out for this purpose; nor the allegation of damage in his claim. The defendants, on the other F hand, fail to make out all they must make out before they can win; in the defence they allege, by way of showing the truth of their allegation, that "the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour." That plaintiff in his reply admits; but defendants have not alleged, and plaintiff consequently has not admitted—nay expressly guarded himself from admitting—that the plaintiff was actually guilty of the felony. Therefore, so far as it is necessary to G decide the issues of fact, plaintiff is entitled to have them found for him.

As to the issues in law, how do they stand? The plaintiff's reply contains his demurrer, which demurs to the paragraph of the statement of defence, which simply alleged that he had been convicted of felony. As to the first alleged libel, perhaps the demurrer means that it is no justification of a libel which says of a man that he is a convicted felon, to show merely that he was at some time past H convicted of felony. But if that is all the demurrer means, then, as to that portion of the libel, I am inclined to the opinion it does not show enough, and should fail. But as to the other portion of the libel, that of May 1, I think it is not met by the defence, and as to it at any rate the demurrer is good. The words are "felon editor." Before the defendants can justify the words "felon editor" they must show that plaintiff actually committed a felony; to show merely a conviction on a I charge of felony is not enough. I was of that opinion in the course of the argument, and I find authority for it in TAYLOR ON EVIDENCE (6th Edn.), vol. 2, p. 1449:

> "It has been determined that a judgment in a criminal prosecution—unless admissible as evidence in the nature of reputation—cannot be received in a civil action to establish the truth of the facts on which it was rendered."

That is, such a conviction is no evidence of the commission of a felony in a civil suit like this, and, being "res inter alios acta," is not admissible. All the dictionaries, too, that have been cited support this view; therefore, it is no sufficient

justification of such a libel to show merely conviction. And on the broad ground of good policy, too, it is desirable to come to this conclusion; for, if a man will bring charges of this sort against others, he should be required to fully prove them; and it should always be open to a man, so attacked, to show his innocence, if he can. As to this portion of the libel, therefore, plaintiff's demurrer is clearly good.

Then, there is defendants' demurrer. The plaintiff says he has been convicted, it is true, but he has endured the punishment; and to that defendants demur. I am of opinion that defendants fail on that demurrer too; but that part of the libel having been wisely abandoned by counsel for the plaintiff, it is of no importance to consider whether I am right in that opinion.

As yet, it will be seen, I have not said a word on the question whether, where a man is called a felon, and he owns that he was prosecuted and convicted on a charge of felony, but says he has suffered the punishment awarded him, he can rightly say, "I was a felon, but am one no longer." On that point, I myself express no opinion at all, as it seems to me to be in the present case, as I view it, unnecessary to do so. If one were to consider it, there would be a good deal to be said on either side. On the one hand, there is the great desirability that a man, who has been unfortunate or unhappy enough to commit a criminal offence of this sort, should, at some time or other, be so far freed from the stigma and disgrace which inevitably follow on such an act as to make it an offence in others wantonly to cast the fact in his teeth; but then, again, on the other hand, it certainly cannot entirely be put out of sight that a part of a man's natural punishment is the future opprobrium consequent on his guilt. However that may be, this, at least, is certain, that lightly and for personal reasons to publish such a charge of another man, whether it be true or false, is an act of gross and unwarranted cruelty. I do not say that was the case here. I do not know whether it was so or not, but often it is so; and, where it is, I should be glad if it could be punished.

BRETT, L.J.—There are two things here for our consideration, the rule for a new trial, and the demurrers; and, as they require different treatment, they must not be confused.

On the rule for a new trial, I think the point which BRAMWELL, L.J., has not decided did arise, and that, therefore, we must consider and decide it. It is clear that this case was not tried at all, but when it was called on BLACKBURN, J., said he knew all the facts, and if a jury were sworn he should direct them to find a verdict for the defendants. But if a jury had been sworn, and the facts proved as we must take them to stand upon the pleadings before us now, he would have had no right to direct the jury to find such a verdict. What are the facts? The libels set out in the pleadings are published. It is undeniable that their meaning is a question for the jury; but BLACKBURN, J., in effect, says: "Whatever they may find their meaning to be, I shall still direct a verdict for the defendants." Therefore, to test the learned judge's right to so direct them, we must take the extreme possible finding of the jury. The jury might find the first libel to mean, "is a convicted felon now," and not merely that plaintiff was one at some past time. And if they had found so, then the same question would have arisen on this libel as on the second; for, on that certainly they might have found very easily that a "felon editor" implied plaintiff was a felon then, at the time the libel was published. Then supposing the jury to have found so, on both libels, how does it stand? The plaintiff does not and could not dispute the conviction. I assume the facts most strongly against the plaintiff; I assume he was rightly convicted, in all probability it was so. But still I am of opinion that, even on these facts, the plea would show no justification, if the punishment had been proved to have been served. After that, the man was no longer a "felon," and he would have an action against whomsoever called him one. For that proposition there is distinct authority.

I think *Cuddington* v. *Wilkins* (1) is good law, and is distinctly an authority for saying that a pardon, granted to a man who has committed a felony, purges him subsequently of the character of a felon. And the reason is good—it is founded on

A public policy, which will do all in its power to disfavour men who choose to commit such wicked and malignant acts as these. *Searle* v. *Williams* (2) is an authority for the same proposition; and so is HAWKINS' PLEAS OF THE CROWN (bk. 2, c. 37, s. 48), a most direct authority. If any were wanting, public policy would be an ample ground for upholding those decisions. Since the passing of the Civil Rights of Convicts Act, 1828, the case is much stronger against the defendants. It is B not true that that Act was passed merely for the purpose of effecting some alterations in the law of evidence; it was drawn up, I have no doubt at all, with these very authorities full and immediately in view, and amounted to a deliberate adoption of that view of the law by the legislature. I say it was the deliberate intention of the legislature, when it passed that Act, to put a stop to these unwarrantable acts, and to debar men from continuing to crucify their fellows in this unjustifi- C able manner. It was felt that such acts were abhorrent to justice and totally opposed to any view of the policy of peace. On the second libel, at all events, this is clear; and so far from the judge being entitled to direct a verdict for the defendants on it, it would have been his duty, in my opinion, if the jury had found it to mean what I am supposing they would have found it to mean, to have directed them to find a verdict for the plaintiff.

D As to the demurrers, I must first say that they are both bad, as being against the spirit, if not the letter, of the Judicature Acts. Demurrers are now an idle waste of time, and if warranted in any shape, it is only when they are in the largest and most general form, and demur to the whole of the opponent's case. But if these demurrers are to be considered, we must take the facts as the jury might have found them—i.e., we must take the libels to mean now a felon. But even if they E should be taken to mean merely that plaintiff had been a felon, still the defence is bad, since it does not allege guilt in fact. But if the libels mean "at present a felon," the defence must be bad, because it does not allege that the past felony was not since purged. To be a good defence it should have gone on to add, "and plaintiff is now undergoing the punishment for the same," or to say that the plaintiff had not undergone the punishment awarded. Therefore, even technically F on the demurrers, we must find for the plaintiff.

I agree most fully with CLEASBY, B., that public policy is all against people who make such unjustifiable statements as these; but, in doing so, I wish to guard myself against being supposed to say there is anything which should prevent inquiry into a man's past conduct and character on a proper and justifiable occasion. There are many such, and in those cases, both in motive and reason, the inquiry is justifi- G able. But people who will rake up all that is against a man in his past history, for their private purposes, and to gratify personal or professional spite, have nothing whatever to be said on their behalf.

COTTON, L.J.—I am of the same opinion. The first question is whether there should be a new trial. It is clear what occurred at the trial. BLACKBURN, J., when H the case was called on, informed plaintiff's counsel that he knew all the facts, and that if a jury were to be sworn he should still direct a verdict for the defendants; and that being so, and there being, moreover, no jury to be got that evening, the plaintiff's counsel determined on not incurring the delay and expense of waiting for a jury and having them sworn. But it is not the case that the learned judge was both judge and jury in deciding the matter; he never tried it at all.

I Therefore, the question arises, if there had been a trial before a jury, would the learned judge have been right in so directing the jury? Clearly in my opinion he would not. "Libel or no libel" is a question for the jury, except in the case where it is impossible that the words used should amount to a libel. If that could be said of the first libel here, certainly it could not be said of the second; therefore, clearly on that ground there ought to be a new trial. For myself, I should be inclined to say that the first libel meant that the plaintiff had been, at some time previous, convicted of felony; and, therefore, on that point, I should be inclined to differ from the court below; but I am clear that the second libel might mean—if

indeed it can be read otherwise than meaning—that the plaintiff was then, at the time the libel was published, a felon. That being so, the question arises, what is the effect of a punishment undergone, or a pardon granted? We must refer to the Civil Rights of Convicts Act, 1828, s. 3, which has been cited. It begins by reciting that "it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies, etc.," from which recital it is clear that the section was not passed solely to affect the law of evidence in certain cases, but to affect also the "civil rights" of persons in the position of the plaintiff here. Therefore, notwithstanding its primary object being alien to the plaintiff's case, the Act does entitle the plaintiff, in my opinion, to say, "Having suffered my punishment I am in all respects as though pardoned"; i.e. (on the authority of the passage in HAWKINS and the other authorities cited), "I am an entirely new man, and you cannot justify a libel that calls me a felon." The arguments to be derived from considerations of public policy strengthen this view. A man should not make these statements unless he is under the obligation of some duty public or private to do so, and in such case he is fully protected as the law at present stands. In other cases he deserves no protection.

As to the demurrers, I entirely concur with what BRETT, L.J., has said as to the present procedure with regard to demurrers. There should be no demurrer except to the whole pleadings, and to the entire action; otherwise a demurrer does no good, but only embarrasses. They ought only to be used where the entire question can be so decided.

Appeal dismissed.

Solicitors: *Coode, Kingdon & Cotton*, for *John Daw & Son*, Exeter; *Surr, Gribble & Bunton*, for *J. W. Wilson*, Plymouth.

[*Reported by* P. B. HUTCHINS, ESQ., *Barrister-at-Law.*]

OVEREND, GURNEY AND CO. *v.* ORIENTAL FINANCIAL CORPORATION

[House of Lords (Lord Cairns, L.C., Lord Chelmsford and Lord O'Hagan), July 17, 1874]

[Reported L.R. 7 H.L. 348; 31 L.T. 322]

Guarantee—Discharge—Time given to creditor by debtor—Notice by surety to creditor after accrual of right of action—Giving of additional security.

Four bills of exchange for £10,000 drawn by D. on the respondents and accepted by them were taken by McH. to the appellants to be discounted. McH. was the agent of an American company, and the bills had been given, drawn and accepted for the benefit of McH. and his principals. The appellants discounted the bills, and at the same time McH. gave his own guarantee and that of the American company to pay the bills on maturity, i.e., April 6, 1866. The bills were not paid on April 6, 1866, and notice of this fact was given to all parties on April 9. On that day the respondents told the appellants of the relationship in which they stood to McH., namely, that they were sureties and he the principal. On April 27 McH. gave the appellants as additional security bills for £38,000 drawn by L. but not accepted, the agreement being that "... the £10,000 bills should be held over during the currency of the bills on L. for £38,000." L.'s bills were not paid and after an interval of some 18 months the appellants brought an action against the respondents on the original bills. The respondents filed a bill to restrain the action on the ground that the giving of time to the principal, McH., had the effect of discharging them, the sureties.

Held: (i) if, after a right of action had accrued to a creditor against one or more persons, he was informed that one of them was a surety only and after that he gave time to the principal debtor without the knowledge and consent of the surety, the rule as to discharge of the surety applied; (ii) the giving of an additional security did not of itself discharge the surety but if such security was given on a contract to give time in consideration of the giving of the security then the time given was a discharge of the surety's liability.

Notes. Applied: *Searles* v. *Finch and Day* (1891), 7 T.L.R. 253. Considered: *Rouse* v. *Bradford Banking Co.*, [1894] A.C. 586. Referred to: *Swire* v. *Redman* (1876), ante p. 1255; *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880), 6 App. Cas. 1; *Clarke* v. *Birley* (1889), 41 Ch.D. 442; *Mahant Singh* v. *U. Ba Yi*, [1939] A.C. 601.

As to agreement to give time to a principal debtor, see 18 Halsbury's Laws (3rd Edn.) 508–512; and for cases see 26 Digest (Repl.) 181 et seq.

Case referred to:

(1) *Oakeley* v. *Pasheller* (1836), 10 Bli.N.S. 548; 4 Cl. & Fin. 207; 6 E.R. 202, H.L.; 26 Digest (Repl.) 187, *1402.*

Appeal from a decision of Lord Hatherley, L.C., reported 7 Ch. App. 142, reversing a decision of Malins, V.-C.

The appellants, Overend, Gurney & Co., had discounted, at the instance of one, McHenry, certain bills of exchange, McHenry giving a guarantee for the payment in the name of himself and a foreign company for which he acted as agent in this country. The bills were not paid at maturity. At the time of discounting the appellants did not know the real character of the parties to the bills, except as appeared from the bills themselves. They afterwards became informed that the respondents, the Oriental Financial Corporation, who were the acceptors, were in fact only sureties, the real principal being McHenry for himself, and as agent of the foreign company. After the bills became due, the appellants pressed for

payment, but McHenry had an interview with two of the directors, and deposited other bills as a collateral security; the appellants consented not to sue on the original bills during the currency of these latter bills. Afterwards they did sue upon them, and this giving of time to the principal was set up in an action to restrain the action as discharging the sureties. MALINS, V.-C., held that it had not that effect, but his decision was reversed by LORD HATHERLEY, L.C., as above mentioned, and from this latter decision the present appeal was brought.

Sir J. B. Karslake, Q.C., Cole, Q.C., and *Ferrers* for the appellants.
Cotton, Q.C., and *Jason Smith* for the respondents.

LORD CAIRNS, L.C.—The bills of exchange in which these proceedings arise were four in number, and amounted in value to £10,000, and I ask your Lordships in the first place to observe the position of the persons who are liable on the face of them. In form they were drawn by a person of the name of Deschamps upon the respondents, and were accepted by them. They were drawn for the purpose of being used by a gentleman in this country, who was a defendant to the original suit, of the name of McHenry, who appears to be the agent for a Transatlantic Railway Co. These bills were obviously drawn and their acceptance was obtained, for the purpose of having them used in the financial arrangements of that company. The bills so drawn and accepted were taken to the appellants for the purpose of discount, and they were discounted by them. But at the time of the discount and along with it there was given by Mr. McHenry to the appellants a guarantee to the wording of which I will now direct your attention. It is signed by procuration by McHenry, and it is addressed to the appellants:

> "Gentlemen.—In consideration of your agreeing to discount the drafts of Emile Deschamps on and accepted by the Oriental Financial Corporation (Ltd.) for £10,000 due as per list at foot, I hereby agree to guarantee and indemnify you for all loss that you may incur by so doing, and in event of same not being paid at maturity, I hereby engage to pay the amount of said bills on demand, and for the above mentioned consideration I hereby give the guarantee of the Atlantic and Great Western Rail. Co. for the said bills, for the said terms and conditions."

This guarantee was given to the appellants on the occasion of the discounting of the bills.

Now my Lords, I will assume that at this time the appellants were not aware of any relationship between the parties to the bills which would impart to them a knowledge that McHenry was a principal, and the respondents sureties; but in point of fact, that was the relationship between the parties—the giving, the drawing, and the acceptance of the bills were for the benefit of McHenry and his principals, and he was bound to provide the funds for the payment of the bills as between himself and the acceptors, and the relationship of principal and surety clearly existed between them. That being the position of the parties, the bills became due on April 6, 1866, and they were not paid at maturity. Notice of this fact was given to all the parties concerned, apparently on April 9, and on that day the respondents informed the appellants of the exact position in which they stood as to McHenry, and the evidence on that point is not contradicted or disputed. Therefore, my Lords, at this time, which was three days after the maturity of the bills, the appellants were distinctly and clearly informed that upon and in respect of these bills, the respondents were sureties only, and that the person primarily liable was McHenry. As your Lordships will have observed it was not merely a formal intimation of this kind which was given to the appellants, it was information which was accepted and acted upon by them, because the managing director stated that he intended to see McHenry on the same day on the subject. and your Lordships have it in evidence that from that day, April 9, 1866, until Nov. 5, 1867, no application whatever on the subject was made to the respondents.

The appellants seem thoroughly to have understood the position in which McHenry stood as the person who was bound to provide for the payment of the bills.

That relationship having existed between the parties, and having thus been clearly brought to the notice of the appellants, you will, I think, find that the position of this case will turn on a very short examination of certain facts which took place on a subsequent day, April 27, 1866. On that day there was a meeting between McHenry and two of the directors of the appellants' firm, and apparently no person else was present. It is admitted on all sides that on this day there were given to the appellants by McHenry bills for the amount of £38,000; these were bills drawn by one Lillo, but not accepted, and it is also admitted that certain other arrangements were made at the same time which resulted in a part payment of the demand which the appellants had against McHenry. Now, my Lords, what is the meaning of these words, which must be taken as the agreed narrative between the parties of what took place, "The agreement was that the £10,000 bills should be held over during the currency of the bills on Lillo for £38,000"? If these words mean that the agreement between McHenry and the appellants was that the bills for £10,000 should not be put in suit as against the parties to them, namely the acceptors and the drawer, but that the appellants should be left perfectly free to proceed against McHenry on his guarantee, then I should be of opinion that there was nothing in an agreement of that kind which in any way discharged the sureties for the debt, but that the creditor remaining at liberty to sue the principal debtor, there was nothing in the transaction of which the sureties could complain. On the other hand, however, if the meaning of those words is that the agreement was that no proceeding should be taken either on the bills or on the guarantee given for the payment of the bills, then it appears to me that the agreement would be one entered into to sue neither principal nor surety, but entered into not at the instance of the surety but of the principal, and it would, therefore, be open to all the vice of an agreement to give time to the principal debtor.

My Lords, in point of fact the names on the bills no doubt were the names only of the drawer and acceptors, but as I just now observed to your Lordships, there cannot be a doubt that those bills were discounted by the appellants not merely on the faith of the names on the bills, but on the faith of the guarantee which I have already read. To all intents and purposes with regard to the appellants, McHenry was in exactly the same position as to these bills as if his name had been put on them as a party. He had promised to pay them on demand when they had reached maturity, he had given that promise not on the face of the bills, but on a collateral writing, and to all intents and purposes he was bound whatever might be the form of the bills. Now when your Lordships found that the agreement, which is admitted, was come to not at the instance of the surety on the bills, not at the instance of the respondents, or of Deschamps, but at the instance of McHenry, and that during this period of eighteen months, the sureties were taking no steps to shelter themselves from proceedings under the bills, but the only person who was taking steps to prevent the bills being put in suit was McHenry, and that there was obviously the important end to be gained by him just as much with regard to himself as with regard to the parties to the bills, namely that the Transatlantic Rail. Co. should not have its credit endangered by proceedings being taken against him, their agent. When your Lordships consider those circumstances it appears to me you cannot do otherwise than arrive at the conclusion that the agreement which clearly was entered into that the bills should be held over during the currency of the bills of Lillo, was an agreement that no proceedings should be taken in respect of those bills either against McHenry or against the respondents. Moreover, I think that if, after that agreement was entered into, any proceedings had been taken against McHenry on the guarantee, it would have been open to him to defend himself against the claims on that guarantee by alleging that whereas the guarantee was a guarantee that he would pay the amount of the bills on demand when they reached maturity, the holders of those bills had, at his instance, agreed to defer taking any proceedings on them, and had agreed that they should be held

over during the currency of Lillo's bills. I need not point out to your Lordships that that is a perfectly valid agreement. It was an agreement for good and valuable consideration, and the only question which can arise is as to the construction of those words to which I have referred.

In my opinion, the agreement to hold over the bills had the effect of protecting, during the continuance of that agreement, both the names on the bills and also McHenry himself from any proceedings. It was said that this case was not sufficiently alleged in the pleadings. It appears to me that it was the supposition of the present respondents when the bill was first filed that the effect of what was done on April 27, 1866, was at once to put an end to the £10,000 bills by an arrangement under which Lillo's bills and other securities were accepted as payment. It was found out as the suit proceeded, that that was not the view taken by the appellants, although it was the view of McHenry. On the other hand, the appellants alleged that what took place was not an agreement to terminate the bills, or to pay them, but an agreement to hold over the bills in the way I have described, and thereupon the bill was amended in a manner which is, as it appears to me, sufficient for the purpose in view.

Then, my Lords, it was said that the knowledge that McHenry was surety was not obtained by the appellants until after the bills became due, and inasmuch as the contract arising out of and connected with the bills was made before they had any knowledge of the suretyship, their rights and their power of proceeding under that contract ought not to be interfered with by knowledge and consequences of knowledge subsequently obtained. My Lords, it appears to me that after the case referred to at the Bar of *Oakeley* v. *Pasheller* (1) it is impossible to contend that if after a right of action accrues to the creditor against one or more persons he is informed that one of them is a surety only, and if after that he gives time to the principal debtor without the consent and knowledge of the surety, the rule as to the discharge of the surety does not apply.

It was then said that the agreement that was come to implied that all rights were reserved against the sureties, and that inasmuch as the words with regard to Lillo's bills are that they were given as additional security, the giving of additional security does not in any way discharge the surety. It is quite true that the giving of additional security will not of itself discharge a surety, but if such security is given on a contract to give time in consideration of the giving of the security, then the time given under these circumstances is, apart from the consent of the surety, a discharge of his liability. My Lords, I cannot find in words any reservation of right whatever as against the surety. If I am right in the construction I have put upon it, it was an unqualified agreement entered into with McHenry, to sue no person at all for a definite period of time, and if that is so, that is an agreement not to sue the surety, and there is no reservation of right as against him. I certainly think that the conclusion at which Lord Hatherley, L.C., arrived in this case is entirely correct, and I submit to your Lordships that the appeal should be dismissed with costs.

LORD CHELMSFORD.—The only question in this case is one of fact, whether the agreement by the appellants with McHenry to hold over the bills on which he was the principal, and the respondents sureties, during the currency of the bills drawn by Lillo, involved a giving time to the principal.

The agreement was that the four bills should be held over during the currency of Lillo's bills for £38,000 given as additional security. Certainly during the course of the argument I entertained very great doubt as to what was the construction of this agreement, but on consideration I am disposed to concur with the view which has been taken by Lord Cairns, L.C., that it amounted to this, that they would not, during the currency of Lillo's bills, place McHenry in the position of being sued. That being so it was quite clear that it was a giving time to the principal, and on this short ground I agree with my noble and learned friend, that the decree of Lord Hatherley, L.C., ought to be affirmed.

A **LORD O'HAGAN.**—I entirely concur in the view taken by LORD CAIRNS, L.C., and I can really add nothing to the reasons on which that view has been grounded.

The question is very short, and in my opinion very clear. It is a question about the construction of a contract, which is contained in a very few words, and is presented to us with no conflict of evidence; it is a case without contest of law or confusion of fact. The matter stands simply thus. McHenry, the person who B entered into this contract, was the person who had an interest in the contract either for himself or for those whom he represented, the Transatlantic Rail. Co. He was the person by whom the contract was made. He entered into it for good consideration, for he gave additional security and on giving that security the parties with whom he dealt determined that they would not for a certain period sue on the bills which were at that time in their hands. The result appears to me not to have been C a limited operation for protecting only the persons who were the sureties in the case, but plainly the intention of the parties was to suspend all action on the bills, directly or indirectly, for the period during which Lillo's bills were to be current. That was the plain meaning of the parties, and it would have been a complete breach of that contract between the appellants and McHenry if, during the period of the currency of those bills, they had taken any steps directly or indirectly for D the purpose of raising the amount of those bills. If the guarantee which McHenry gave, to which LORD CAIRNS, L.C., has referred, had been sued on at any time during the continuance of the currency of the bills, it would have been impossible to have enforced that guarantee, or to have answered a plea presenting to the court the case that there had been for good consideration a contract to suspend any action for the purpose of recovering the money which was sought, or would be sought, in E that action on the guarantee.

For these reasons I am clearly of opinion that the judgment of LORD HATHERLEY, L.C., ought to be sustained.

Appeal dismissed.

Solicitors: *Maynard & Son*; *Farmer & Robins.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

CUMMINS *v.* FLETCHER

[Court of Appeal (James, Cotton and Thesiger, L.JJ.), June 7, 8, 1880]

[Reported 14 Ch.D. 699; 49 L.J.Ch. 563; 42 L.T. 859; 28 W.R. 772]

Mortgage—Consolidation—Two mortgages—Default on one mortgage—Right of mortgagee to consolidate.

A mortgagee of two properties from the same mortgagor is not entitled to consolidate his securities unless there has been default as to both.

A building society had taken two mortgages, dated respectively May 12, 1871, and Nov. 21, 1874, for distinct debts which were to be repaid by monthly instalments extending over a period of twelve years. The mortgagor had become bankrupt, and as to the mortgage of 1874 default had been made. The mortgage of 1871 had passed into the hands of a bank, who had paid all the monthly instalments already due, and had offered to compound the instalments still to fall due by an immediate payment. On a Special Case Hall, V.-C., had made a declaration that the building society was entitled to resist the redemption of the bank's mortgage alone, and had a right to consolidate and foreclose the two mortgages.

Held (reversing the decision of Hall, V.-C.): the doctrine of consolidation could not be applied to a case where there had been no default with respect to one of the two existing securities.

Selby v. *Pomfret* (1) (1861), 3 De G.F. & J. 595, explained.

Per James, L.J.: The whole doctrine of consolidation arises from the power of the court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor.

Per James, L.J. (Thesiger, L.J., reserving his judgment on this point): With regard to *Beevor* v. *Luck* (2) (1867), L.R. 4 Eq. 537, where it was decided that one could consolidate a security given by two or more partners for a partnership debt, I am bound to say I am unable to see myself upon what principle that could be done.

Notes. Considered: *Harris* v. *Tubb* (1889), 60 L.T. 699. Referred to: *Harter* v. *Colman* (1882), 19 Ch.D. 630; *Hayes Bridge Estate* v. *Portman Building Society*, [1936] 2 All E.R. 1400.

As to the doctrine of consolidation of mortgages, see 27 Halsbury's Laws (3rd Edn.) 320 et seq.; and for cases see 35 Digest (Repl.) 480 et seq.

Cases referred to:

(1) *Selby* v. *Pomfret* (1861), 1 John. & H. 336; 30 L.J.Ch. 770; 9 W.R. 398; affirmed, 3 De G.F. & J. 595; 4 L.T. 314; 7 Jur.N.S. 835; 9 W.R. 583; 45 E.R. 1009, L.C.; 35 Digest (Repl). 486, *1709*.

(2) *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L.R. 4 Eq. 537; 36 L.J.Ch. 865; 75 W.R. 1221; 35 Digest (Repl.) 483, *1686*.

Also referred to in argument:

Bonham v. *Newcomb* (1684), 2 Vent. 364; 1 Vern. 232; 86 E.R. 488; sub nom. *Newcomb* v. *Bonham*, 1 Eq. Cas. Abr. 313; affirmed (1689), 1 Vern. 233, n., H.L.; 35 Digest (Repl.) 408, *1036*.

Brown v. *Cole* (1845), 14 Sim. 427; 14 L.J.Ch. 167; 5 L.T.O.S. 2; 9 Jur. 290; 60 E.R. 424; 35 Digest (Repl.) 414, *1082*.

Burrowes v. *Molloy* (1845), 2 Jo. & Lat. 521; 8 I.Eq.R. 482; 35 Digest (Repl.) 589, **1040*.

Ramsbottom v. *Wallis* (1835), 5 L.J.Ch. 92; 35 Digest (Repl.) 401, *966*.

Watts v. *Symes* (1851), 1 De G.M. & G. 240; 21 L.J.Ch. 713; 18 L.T.O.S. 216; 16 Jur. 114; 42 E.R. 544, L.JJ.; 35 Digest (Repl.) 485, *1699*.

Neve v. *Pennell*, *Hunt* v. *Neve* (1863), 2 Hem. & M. 170; 2 New Rep. 508; 33 L.J.Ch. 19; 9 L.T. 285; 11 W.R. 986; 71 E.R. 427; 35 Digest (Repl.) 486, *1706*.

Baker v. *Gray* (1875), 1 Ch.D. 491; 45 L.J.Ch. 165; 33 L.T. 721; 24 W.R. 171; 35 Digest (Repl.) 488, *1739*.

Provident Permanent Building Society v. *Greenhill* (1878), 9 Ch.D. 122; 38 L.T. 140; 42 J.P. 775; 27 W.R. 110; 7 Digest (Repl.) 507, *183*.

Appeal from a decision of HALL, V.-C., upon a Special Case in an action brought by the trustees of a building society at Bishop Auckland against the National Provincial Bank of England and others, for foreclosure of two mortgages, dated May, 1871, and November, 1874.

In 1871 T. Vaughan mortgaged lands in Middlesbrough and Escomb to the plaintiffs to secure £15,000; in 1875 he again mortgaged part of these premises to the bank, subject to the former mortgage. In 1874 Vaughan and Neesham (who were partners in trade under the firm of Vaughan & Co.) mortgaged to the building society lands at Lanchester to secure £5,500. The bank having given notice of their mortgage to the building society, and the affairs of both Vaughan and of his firm having become the subject of liquidation by arrangement, an inquiry was made in February, 1878, from the building society by the bank what was the amount due on the mortgage for £15,000. The society replied: "If this mortgage were redeemed this month, the amount to be paid would be £6,449 1s. 5d.," that being, in fact, the amount owing on the mortgage of 1871 alone. In July, 1878, the bank gave notice, according to the building society's rules, of their wish to redeem the mortgage of 1871, but the society refused to allow them to do so without their also redeeming the mortgage of 1874; and in their present action for foreclosure the society asked for a declaration that neither the bank nor Vaughan's trustee was entitled to redeem one mortgage without the other. The plaintiffs' mortgage provided for cesser of the security after due payment of monthly instalments for a certain period, and of fines, etc. With regard to the mortgage of 1871, no default had been made up to the time of bringing the action.

In the court below HALL, V.-C., though not disposed to extend the doctrine of consolidation, was of opinion that he could not refuse judgment in favour of the plaintiffs, the building society, without departing from the principles enunciated in the authorities which had been referred to in argument. The rule, in the absence of special circumstances, was that, when two properties became securities for two debts to the same person, each portion of each was a security for both debts, and neither security could be withdrawn by any one claiming under the mortgagor. There was nothing special in the circumstance that with regard to one of the mortgages no default in repayment had been made, or that the debt secured thereby was not presently payable, to displace the operation of the general rule; and the plaintiffs were accordingly entitled to consolidate the mortgage of 1874 with that of 1871, and neither Vaughan's trustee nor the bank was entitled to redeem the mortgage of 1871 until payment had been made to the plaintiffs of the moneys due and payable under both mortgages. From this decision the National Provincial Bank appealed.

Joshua Williams, *Q.C.*, and *A. T. Watson* for the bank.

Graham Hastings, *Q.C.*, and *P. N. Smith* for the plaintiffs, the building society.

JAMES, L.J.—In my opinion the order of the vice-chancellor in this case cannot be sustained. I cannot agree with him that this is not a very considerable extension of the doctrine of consolidation as it has ever been applied in this court. It is the first time it ever has been applied to a case where in one of the mortgages sought to be consolidated there has been no default whatever. It appears to me that that of itself concludes the question.

The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the

power of the court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor. At law, independently of a legal estate, when the power of redemption given by original contract is gone, then a person comes into equity to have assistance from the courts of equity and asks to redeem upon what are called equitable considerations, and then the court of equity says, "This is the price upon which we give you the relief you seek, namely, on your paying all that is due." Then the converse of that, where a mortgagee comes with a bill of foreclosure, is no extension of that, because a bill of foreclosure (it is an action now) never gave and never was intended to give the mortgagee any active remedy. A bill of foreclosure in substance was this: "You have a right to redeem, and you may exercise that right at any time within twenty years, according to the usual practice of the court, but I do not want to be kept in a state of uncertainty as to whether I am or am not to be redeemed, and therefore, if you want to redeem me, redeem me now." A mortgagee has a right to say, "Redeem me upon the terms upon which you would be entitled to redeem if you filed your redemption suit." That is all. If you do not redeem, your equity of redemption is gone. The only result, therefore, of a bill for foreclosure is to deprive a man of his opportunity of filing a bill of redemption at some future time. If a man does not want to redeem property A. in respect of which he has made default, he may be barred as to that; but if he does not require to redeem property B. in respect of which he has made no default, he has no occasion to come into the court of equity. The court of equity has nothing to foreclose him of, and has no right to deprive him of his legal right to redeem at the proper time.

In this particular case the mortgagor says, "You may foreclose the 1874 mortgage as much as you like. I do not care for foreclosure. I do not care what terms you impose upon me with regard to the foreclosure of that mortgage. But with regard to the 1871 mortgage I have made no default. I do not want to come into the court of equity. I have not the remotest necessity for coming into the court of equity. I have as much legal right in the property as if I had a lease or a licence to work minerals or any other legal right." And it appears to me that because he owes money upon the 1874 mortgage the court cannot say, "You owe that money, and you owe it upon insufficient security, therefore, I will take some other property from you"—because that is what it comes to—"which is the subject of some other contract." The Court of Chancery has no more right, because there was an insufficient security given for the one debt, to take the sufficient security as to which there is no default at all and no occasion to apply to the court of equity, than a man has the right to go and take another man's stock-in-trade or chattels, or horses, or anything else. If he owes the money he must pay it, and if a creditor takes an insufficient security, he may bring an action to recover judgment, and enforce that judgment in any way in which the law allows it upon any other property. But it seems to me that where a man has a legal right in property A. and an equity of redemption in property B. which is an insufficient security, and has no occasion, and never will have any occasion, to come to a court of equity with respect to property A., the fact of the two properties being subject to two mortgages gives the court no more power to take from him property A. than it has to take any other property belonging to him, for the purpose of satisfying the debt for which there is insufficient security.

To suppose that that is what was laid down by PAGE-WOOD, V.-C., in *Selby* v. *Pomfret* (1) seems to me is really dealing unfairly, if I may say so, with the language of the judge. The language of a judge is always to be construed with reference to the facts of the case before him. In that case the learned judge was dealing with a case in which two estates had been reduced to the position of equities of redemption, and as the two estates had been reduced to the position of equities of redemption, the court was right in saying they must be consolidated. When a property is reduced to an equity of redemption, all the rights arising from that position follow, and the ground of the decision in *Selby* v. *Pomfret* (1) is

A that the two properties, at the time when the right of consolidation was supposed to have arisen, had been reduced to the position of mere equities of redemption, having only an existence in the Court of Chancery. I am of opinion that there is no authority and no principle for applying that case to one where there is a property in respect to which no default has been made.

With regard to *Beevor* v. *Luck* (2), where it was decided that you could consoli-
B date a security given by a partner for his own private debt with a security given by two or more partners for a partnership debt, I am bound to say I am unable to see myself upon what principle that could be done. It is admitted here, for instance, that Vaughan's partner Neesham could not have been made a party properly in respect of the redemption of the 1871 mortgage, and I cannot conceive any mode in which any action could be instituted bringing those two properties
C into the action for the purpose of redemption, whether it was by the mortgagee or whether it was by Vaughan, which Neesham could not have demurred to as being a person improperly brought in to deal with an estate with which he had nothing whatever to do, either as to the property or as to the debt. The language of the order under appeal, saying his right is to be reserved, seems to me to show how difficult or utterly impossible it is to work out anything which makes a security
D of two or more persons a security of one person only for his own debt. That is a point as to which I think it necessary to express the opinion which I entertain very strongly about it, but I rely upon the first ground, that you cannot bring in by the doctrine of consolidation any security as to which there is nothing existing but the legal right of reconveyance upon certain terms and conditions, and as to which there is no equity of redemption requiring the assistance of a court of equity
E to enforce.

COTTON, L.J.—I am also of opinion that the decision of the vice-chancellor cannot be supported. In considering the present case, one must say this to begin with, that there is certainly no authority and no decided case which supports the present decision, and in my opinion it is not a proper consequence from those
F principles which have been laid down in the authorities with reference to the right of consolidation. In order to deal with the case it is really necessary to consider what that principle is.

I will deal first with the point which was very much relied upon by the respondents, namely that the consolidation is in fact an implied pledging of both estates for both the debts when the mortgage on the second estate is made. Reliance in
G support of that proposition was placed on an expression of PAGE-WOOD, V.-C., in *Selby* v. *Pomfret* (1), where he said this (1 John. & H. at p. 339):

> "The defendants have a right to say, 'the mortgagor pledges two estates, although to two different persons and for different debts, and the law is that, when those become united in the same creditor, both estates become pledged for the whole amount.' "

H

If there had been inserted there "become as if pledged for the whole amount" with reference to the case he had to decide, the expression would have been accurate, because it was a suit for redemption; and, although one of the estates had been sold, and there had been a surplus of the purchase money, yet it was a suit for redemption, and the question really was whether the mortgagor or his
I representatives could come into court insisting on his equitable right to redeem without that right being interfered with by the principle of consolidation. It would be wrong to consider that expression of the vice-chancellor as a decision that the doctrine of consolidation is not an interference with the equitable right of redemption, but the consequence of a pledge of both estates as by contract for both the debts. Really it must be taken as referring to the case before him, and simply as saying that as against the plaintiff coming to redeem, the defendant has a right to say he cannot take one without paying off the debt on the other, and treating them as if they were both pledged—not laying down that they were in fact pledged,

or that the consequence must be in all respects the same as if they were pledged, but only in the particular case the consequence would be the same as if they were pledged for both debts.

But the principle really is this, as already mentioned by JAMES, L.J., that originally it was only, as against the mortgagor, an interference by the court of equity with his right of redemption, where that right to redeem was the creature of equity, against the legal right of the parties; the court of equity holding that, as against him, it was inequitable that he should take from his creditor the sufficient estate and leave him with an insufficient estate as a security for a different debt, and in granting its own special relief it refused to do so except upon the term of his doing what the court of equity thought equitable. That was extended to persons taking from him with notice or with reference to the legal estate, but on the simple ground that the purchaser of an equity took with all the equities affecting his vendor existing at the time the purchase took place. That being so, no doubt it has been extended not only to a suit for redemption, but to a suit for foreclosure, on the ground already enunciated by JAMES, L.J., that it is simply calling upon the mortgagor or the owner of the equity of redemption to exercise his equitable right then or never. But in order to enable the mortgagee to file a bill and to consolidate there must be two debts due, there must be two estates where there is only an equitable right in the debtor to redeem or claim them back, and that cannot apply to a case where, as regards one of the securities, there has been no forfeiture at all, where the debt is not due, and where, as regards that estate and that security—an independent security—steps could not be taken as against the owner of the equity of redemption to bring him into court, and to call upon him to redeem or to be foreclosed. It cannot apply to a case where the stipulation is that certain monthly payments are to be made, and the contract goes on to say that if those payments are all made, then the estate shall re-vest, there having been no forfeiture so as to make the right of the owner of the estate, subject to the security, an equitable one not depending upon legal contract.

This really disposes of the present case as regards the bank. The bank owns a property or is mortgagee of a property as a security to provide for the payment of certain monthly sums, and there has been no default made in any of those payments. When those payments are completed, the estate will, by the original legal contract between the parties, revest in the person who conveyed it to the society, or to those who claim through him—the bank, who will stand exactly in his place. That seems to me to be already dealt with upon this ground, independently of what I have already laid down, that as against the bank there is no right whatever to bring them into court at all. There has been no default. There is no right, therefore, on behalf of this society, the first mortgagee, to bring the bank before the court—no right to call upon it to redeem, and no right therefore to bring it here to have this consolidation enforced against it. That again would dispose of the matter, because, of course, the right of consolidation as against a particular individual can only arise where, independently of the consolidation, there is some right to bring him before the court. That is not so here. As against the bank there can be no consolidation.

But I would deal with the matter as it was put by counsel for the plaintiffs in his argument. He said: "Assuming that all these instalments had been paid, and we had come to the end of the term during which, under the original deed, those payments were to be made, then I should say I should have a right to come into court and say to the bank or to any one else claiming through it, 'Still this remains as a security for that other debt in respect of which there has been default.'" In my opinion that is wrong, because there the right of the bank would depend not on an equitable right independently of legal contract, but on the very terms of the deed, which stipulated that if at the end of the time all these monthly payments had been duly discharged then the society would endorse upon the mortgage a discharge; that would have the effect of putting an end to it, and vest the estate in the hands of the persons who conveyed it to the society.

There is only one other point which has to be dealt with, and that is this—that there has been a notice given by the bank insisting upon the right to redeem, which notice has been given according to the rules of the society. That is called inaccurately, a right to redeem. It is simply a right to anticipate the payments stipulated to be made over a long period of years, and once for all to pay down the amount as calculated in the tables. When that is paid there is no redemption in the sense of a person who has lost his right to the property at law, coming into a court of equity and asking equitable assistance on its own special principles, to relieve him from the legal forfeiture. He is in the same position as if at the end of the term he had duly paid all the stipulated sums, and was asking that the contract might be performed, and that the discharge might be endorsed on the mortgage. In fact, the rule in question is introduced by this: "If any member shall be desirous of having his property discharged from the mortgage under which it may be liable to the society, before the expiration of the full term," and, although it has not been referred to in the deed, when you come to look at the stipulation it is merely what I have stated—an anticipation or payment down in a lump sum of that which by the security was to be spread over a term of years. So that even if the bank were coming to insist on the notice, although it is not necessary to decide the question, in my opinion this right of consolidation could not be insisted upon as against it.

There is one other point which I ought to mention, with reference to the right of consolidation. No doubt it has been applied where property has been sold, and the money arising from the sale of one mortgage property has left a surplus, and there is another insufficient estate not sold. That was the case in *Selby* v. *Pomfret* (1). A mortgagor coming to redeem was not allowed to take away the surplus without redeeming the other. That may possibly be considered in some respects inconsistent with what I have said before. Now that is established, but whether it is proper or desirable to extend it is another question. But in such a case the court is still administering its own peculiar jurisdiction in assisting the party to get the surplus of the purchase money. It is enforcing a trust, and not enforcing or aiding a contract enforceable at law under which there is a right to have the surplus paid back again to the party claiming it; and, therefore, it really comes within the same principle, and may be considered as consistent with the principle upon which the rule was originally established, and as a more legitimate extension of that rule where a court of equity is giving its own peculiar remedy and its special assistance. Where there is not a legal right to any assistance to the party claiming it, it imposes this fetter or condition upon him, that he shall not have that assistance without doing that which the court of equity, independently of the contract, considers it is equitable to enforce against him.

THESIGER, L.J.—I have very little to add to what has fallen from the other members of the court, beyond expressing my concurrence in their views.

The doctrine of the consolidation of mortgages forms part of the established law of the land, and, however undesirable we, or any of us, may think that doctrine to have been in its origin, we are bound to give effect to it so far as we can see the principles relating to it apply to the particular case before us.

In the course of the argument there has been pointed out by more than one member of the court, the injustice to which the principles which are contended for by the plaintiffs in this case, would lead, if carried out and adopted by the court; but at the same time, when it is pointed out that the whole doctrine has—and I cannot doubt that it has—led in many cases to injustice, the mere fact that there is injustice or hardship in the particular case, although some argument, is not a very strong argument against applying the principles contended for. It appears to me, for the reasons which have already been given, that here we have an attempt to extend the principle far beyond anything that can be collected from the decided cases, or from the principles laid down in those cases. The very foundation of this doctrine is that a person who is compelled to seek the assistance of

equity, shall himself do equity. That has been applied as regards a person who has an equity of redemption, and seeks to enforce that equity of redemption by imposing upon him a correlative obligation. It has also been applied in favour of a person seeking the assistance of the court of equity by an action for foreclosure by giving him a correlative right. But both as regards the obligation and as regards the right, the court has to see that the case is one in which it has to deal with equitable obligations and equitable rights.

Now here, we have neither to deal with the one nor the other. The right of the bank is a right which exists at law, and, for myself, I utterly fail to see what defence at law before the Judicature Act, and I may say since the Judicature Act also, there would have been, or would now be, to an action founded upon an arrangement between a mortgagor and mortgagee, by which arrangement the mortgagor has a right to have his property discharged from any mortgage upon it, upon payment of certain sums which are to be ascertained according to the rules. That being so, unless some decision can be pointed to which shows that courts of equity have gone beyond the principles which I have suggested, namely, the principles which show that the obligations and rights are founded simply upon equitable obligations and rights, and relate to them and to them only, certainly, for myself, I would not carry the principles with regard to the doctrine of consolidation of mortgages beyond what has been distinctly and expressly laid down.

I need not add anything more to the reasons given, beyond this, that there is a subsidiary point in this case upon which JAMES, L.J., has expressed his opinion. I do not as at present advised, in any way dissent from that opinion, but, as it is unnecessary to express an opinion upon the point in this case, I would prefer to reserve my judgment upon it.

Appeal allowed.

Solicitors: *Wilde, Berger & Wilde*; *J. Crowdy & Son*, for *Trotter, Bruce & Trotter*, Bishop Auckland.

[*Reported by* E. S. ROCHE, ESQ., *Barrister-at-Law.*]

A

ROBSON *v.* NORTH EASTERN RAIL. CO.

[COURT OF APPEAL (Lord Coleridge, C.J., Mellish, L.J., Brett, J.A., and Amphlett, J.A.), November 10, 1876]

[Reported 2 Q.B.D. 85; 46 L.J.Q.B. 50; 35 L.T. 535; 41 J.P. 294; B 25 W.R. 418]

Carriage of Passengers—Railway—Negligence—Passenger injured while alighting from train—Railway carriage stopping short of platform.

A woman passenger travelling on the defendants' railway arrived at a small station, the carriage in which she was travelling stopping short of the platform. The only railway servant at the station was engaged with the luggage, and the C passenger, after waiting until she feared that the train would move on, attempted to descend without assistance and in so doing she slipped and was injured.

Held: there was evidence of negligence on the part of the defendants which ought to be left to the jury.

D **Notes.** Considered: *Rose* v. *North Eastern Rail. Co.* (1876), 2 Ex.D. 248; *Watkins* v. *Great Western Rail. Co.* (1877), 46 L.J.Q.B. 877; *Sayers* v. *Harlow U.D.C.*, [1958] 2 All E.R. 342. Referred to: *Metropolitan Rail. Co.* v. *Jackson* (1877), 3 App. Cas. 193.

As to the degree of care necessary for carriers of passengers entering or alighting from trains, see 4 HALSBURY'S LAWS (3rd Edn.) 181 et seq.; and for cases see 8 E DIGEST (Repl.) 86 et seq.

Cases referred to:

(1) *Bridges* v. *North London Rail. Co.* (1874), L.R. 7 H.L. 213; 43 L.J.Q.B. 151; 30 L.T. 844; 38 J.P. 644; 23 W.R. 62, H.L.; 8 Digest (Repl.) 87, *587*.

(2) *Siner* v. *Great Western Rail. Co.* (1869), L.R. 4 Exch. 117; 38 L.J.Ex. 67; 20 L.T. 114; 17 W.R. 417, Ex. Ch.; 8 Digest (Repl.) 87, *590*.

F (3) *Cockle* v. *London and South Eastern Rail. Co.* (1872), L.R. 7 C.P. 321; 41 L.J.C.P. 140; 27 L.T. 320; 20 W.R. 754, Ex. Ch.; 8 Digest (Repl.) 89, *601*.

Also referred to in argument:

Adams v. *Lancashire and Yorkshire Rail. Co.* (1869), L.R. 4 C.P. 739; 38 L.J.C.P. 277; 20 L.T. 850; 17 W.R. 884; 8 Digest (Repl.) 83, *553*.

G **Appeal** by the defendants from a decision of the Court of Queen's Bench (BLACKBURN and FIELD, JJ.), reported L.R. 10 Q.B. 271, making absolute a rule to enter judgment for the plaintiff for £100 in an action for personal injuries caused by the defendants and tried by ARCHIBALD, J., at Newcastle Assizes, who held that there was no evidence of negligence and directed a non-suit with leave to the plaintiff to move to enter judgment for £100 if the court should think that there was evi- H dence of negligence.

The plaintiff, a woman passenger, was travelling by the defendants' railway to a small station called Benton, and it appeared that, on the arrival of the train at that station, the carriage in which the plaintiff was travelling was driven past the end of the platform, the door of the plaintiff's compartment being, when the train stopped, beyond the end of the platform. The plaintiff then rose, and opened the I door, and stepped on to the iron step, looking at the same time to see whether there were any railway servants about. She saw that the station master was engaged with the luggage; but she did not see the guard or any other railway servant, and, after standing on the step looking for somebody to help her, until she became afraid that the train would move away, she tried to alight by getting on to the footboard, and, in doing this, she slipped and fell down by the carriage side, and thus sustained the injury for compensation for which the action was brought. She had hold of the door with her right hand, and had got one foot on to the footboard, and it was then that she lost her hold of the carriage door, and slipped and

fell, with two small articles in her left hand. Benton station is a very small one, the platform is short, and the station master is the only servant kept there.

Herschell, *Q.C.*, and *Crompton* for the defendants.
Kay, *Q.C.*, and *Gibbs* for the plaintiff.

LORD COLERIDGE, C.J.—In all cases connected with accidents on railways each separate decision depends on the special facts of each separate case. The question which we have to decide, and the only question with which we have to deal is, whether there was any evidence upon which the jury could, as men of ordinary reason act, and therefore this case must stand entirely on its own facts. There has doubtless been a considerable difference of opinion among judges as to the liabilities of railway companies in actions brought by passengers for accidents caused by alleged negligence such as is charged against the defendants in the present case. Some judges have held opinions favourable, and other judges opinions unfavourable, to the railway companies. That difference of opinion has, however, been set at rest by *Bridges* v. *North London Rail. Co.* (1), for although the judgments delivered in that case were confined to the particular facts of that case, still if the judgments of the judges who were summoned to the House of Lords on that occasion, and whose opinions are referred to by Lord Cairns, L.C., when addressing the House, be studied, it will be seen that the general view taken in this case is that where there is any evidence of negligence at all, a case should not be withdrawn from the jury, but that it is the duty of the jury and not of the court to inquire into that negligence.

The case which has been pressed on our notice is *Siner* v. *Great Western Rail. Co.* (2). Without doubt that case is in some respects like the one before us, the train was too long for the platform, and the carriage in which the plaintiff was riding was driven beyond the end of the platform; but the case now before us differs from that case in this, that here there was what was held in *Cockle* v. *London and South Eastern Rail. Co.* (3) to be an invitation to alight, and if after such an invitation to alight has been given, it should prove that there is danger in so alighting, that is, in my opinion, evidence of negligence on the part of the railway company. I will read from the judgment of the Lord Chief Justice of England in that case some words which seem to me applicable to the present case. Sir Alexander Cockburn, C.J., says (L.R. 7 C.P. at p. 326):

> "It is established that an invitation to passengers to alight on the stopping of a train without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence, and it appears to us that the bringing up of a train to a final standstill for the purpose of the passenger's alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at that particular station."

The facts of the present case seem to bring it within the principles laid down in *Cockle* v. *London and South Eastern Rail. Co.* (3), and as in that case *Siner* v. *Great Western Rail. Co.* (2) was referred to and at the same time distinguished, I am of opinion that both on authority, and on the principles of common sense, there was in this case evidence of negligence for the jury, and that the judgment of the Court of Queen's Bench ought to be affirmed.

MELLISH, L.J.—I am of opinion that a railway company is bound to provide the passengers travelling over its line with reasonable means of alighting from the train, and if there is evidence of an invitation to alight and of injury received in alighting after such an invitation, that there is a prima facie case of negligence for the jury. The facts of this case show that there was an invitation to alight, that the door of the carriage in which the plaintiff was was beyond the end of the platform, that the plaintiff opened the door and stepped on to the iron step, that

A the only attendant at the station was busy with the luggage, that she could not alight without assistance, that there was no one to assist her, and that at length becoming afraid that the train would move away she attempted to descend by herself and so received the injuries for which this action was brought. I, therefore, think that there was evidence for a jury, inasmuch as a jury was entitled to bring the ordinary knowledge of reasonable men to bear in order to determine whether B the plaintiff might not have had such assistance as would have saved her from being injured. The evidence was distinct that the plaintiff waited for assistance and that none came, there was also evidence that she might reasonably fear that the train would move on, and that she would be carried on with it, and I, therefore, think that there was evidence for a jury to take into consideration, and that such a case ought to be left to a jury.

C **BRETT, J.A.**—I think that the decision of the House of Lords in *Bridges* v. *North London Rail. Co.* (1) ended a long controversy as to the way in which judges should deal with railway cases; some judges having thought that the courts should settle what was reasonable conduct on the part of railway companies and passengers, while other judges have taken a different view of their duty. *Siner* v. *Great* D *Western Rail. Co.* (2) was decided in the height of the dispute by judges who inclined to the former view. *Bridges* v. *North London Rail. Co.* (1) shows that if there are any facts on the reasonable consideration of which a jury can say that there has been on the part of a railway company a want of care that then there is evidence for a jury to consider, and that the case is one that they must decide. In the present case the passenger waited so long that there was reasonable ground E for supposing that she must either get out or be carried on, and if so she had, I think, a right to alight unless the danger of getting out was so great and apparent as to prevent any person acting with ordinary prudence or taking reasonable precaution getting out at that place. The danger of descending was not great here, and it was quite reasonable for a passenger to attempt to alight, it is, therefore, now settled that in such case the court cannot hold that there is no evidence to go to F a jury.

AMPHLETT, J.A.—I agree with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Williams, Hill & Co.*; *Brownlows.*

BOSLEY *v.* DAVIS

[Queen's Bench Division (Sir Alexander Cockburn, C.J., Mellor and Quain, JJ.), November 20, 1875]

[Reported 1 Q.B.D. 84; 45 L.J.M.C. 27; 33 L.T. 528; 40 J.P. 550; 24 W.R. 140]

Licensing—Offence—"Suffers any gaming"—Constructive knowledge sufficient—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 17.

In order to support a conviction under the Licensing Act, 1872, s. 17 [now s. 141 of Licensing Act, 1953; as from Jan. 1, 1965, s. 177 of Licensing Act, 1964], for permitting gaming on licensed premises, it is not necessary to prove actual knowledge on the part of the licensee, but it must appear that there was gross negligence or wilful ignorance on the part of those with authority to stop the gambling.

Notes. Considered: *Redgate* v. *Haynes* (1876), 45 L.J.M.C. 65; *Bond* v. *Evans*, [1886–90] All E.R.Rep. 1035; *Thomas* v. *Lindop*, [1950] 1 All E.R. 966.

As to gaming in licensed houses, see 18 Halsbury's Laws (3rd Edn.) 193, 22 Halsbury's Laws (3rd Edn.) 686; and for cases see 25 Digest (Repl.) 459 et seq.

Cases referred to in argument:

Mullins v. *Collins* (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 207; 14 Digest (Repl.) 49, *161.*

Fitzpatrick v. *Kelly* (1873), L.R. 8 Q.B. 337; 42 L.J.M.C. 132; 28 L.T. 558; 38 J.P. 55; 21 W.R. 681; 25 Digest (Repl.) 83, *104.*

Case Stated by Hereford justices.

At Hereford Petty Sessions on July 29, 1875, an information was preferred by the respondent John Davies, a superintendent of police against the appellant John Bosley, a person, licensed under the Licensing Acts, 1872 and 1874, for the sale of intoxicating liquors, as managing director of the Green Dragon Hotel under s. 17 of the Licensing Act, 1872, for unlawfully suffering gaming on licensed premises. A police constable had in the early hours of the morning heard laughing and shouting coming from the Hotel, and on approaching it heard voices coming from an upstairs room. Through the half-drawn blinds he saw three gentlemen, and realised that they were playing cards. Some minutes later a waiter opened the door and the constable entered and went to the room and found six gentlemen playing cards for money. There was also drink in the room. The constable met the manageress who stated that she did not know they were playing cards, and that she had not supplied them. It was admitted by the appellant that the gentlemen were playing cards for money, but it was contended that it was necessary that the gaming should have gone on with the knowledge of the appellant, or manageress, or other persons employed in the hotel. The respondent drew the attention of the court to the fact that s. 17 of the 1872 Act did not include the word "knowingly." On these facts the justices convicted the appellant.

By s. 17 of the Licensing Act, 1872:

"If any licensed person—

(1) Suffers any gaming or any unlawful game to be carried on his premises; or (2) Opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the [Betting Act, 1853] he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds. . ."

Poland for the appellant.

Sawyer for the respondent.

SIR ALEXANDER COCKBURN, C.J.—We can direct the magistrates to convict only if they are satisfied that there was gross absence of care or wilful abstin-

A ence from knowledge on the part of the persons managing the hotel. I think the conviction, as it stands, is very unsatisfactory, although I cannot say, in answer to the question reserved for us, that actual knowledge is necessary. The effect of the Licensing Act, 1872, will be carried out if we convey to the magistrates this expression of our opinion, in order that they may inquire if anything occurred from which it must be necessarily inferred that the authorities knew, or ought to have B known, of this gambling. We cannot say that there was no evidence on which to base such an inference, but as the Case is stated I cannot come to that conclusion myself.

MELLOR, J.—My impression is that a licensed person may be liable under s. 17 of the Licensing Act, 1872, even without knowledge of any gaming going on in C the house, if the waiters or persons whose duty it is to enter these rooms and to attend to the wants of the guests occupying them omit to report their knowledge to the managers of the premises. A constructive knowledge on the part of the managers might justify a conviction, but in our opinion this case as it stands does not establish such a constructive knowledge.

QUAIN, J.—I am of the same opinion.

D [The following was the order of the court: "It is ordered that this case be remitted to the justices who stated and signed the same with the opinion of this court that actual knowledge on the part of the licensed person is not necessary, but that constructive knowledge on his part must be proved. That although the word 'knowingly' is not in s. 17 of the Licensing Act, 1872, it is not sufficient merely to prove that persons gambled in the hotel, but that proof must be given that the E manageress or servants in attendance on the guests in the room knew of the gambling. That wilful ignorance of the persons in authority at the hotel would not be an excuse. That this court is of opinion that the evidence set out in the case is not sufficient to justify a conviction; but the said case is hereby remitted with the opinion of this court as to the law."]

F Solicitors: *Thos. Fortune*, for *John Gwillim*, Hereford; *G. F. Cooke*, for *J. Carless*, Hereford.

DAWES *v.* DOWLING

[Court of Exchequer (Cleasby and Amphlett, BB.), June 25, 1874]

[Reported 31 L.T. 65; 22 W.R. 770]

Landlord and Tenant—Use and occupation—Occupation by contracting party before lease executed—Liability to pay for occupation.

Where a party, no contract having been made, has entered into possession of premises in the expectation that a formal lease will be duly executed, and, having so entered, has occupied and enjoyed the premises beneficially, then he must, if the matter is broken off before any lease is executed, pay for such occupation, and he is liable in an action for use and occupation to pay such a sum as the occupation may be found reasonably to be worth.

Coggan v. *Warwicker* (1) (1852), 3 Car. & Kir. 40, and *Smith* v. *Eldridge* (2) (1854), 15 C.B. 236, applied.

Notes. As to an action for use and occupation, see 23 Halsbury's Laws (3rd Edn.) 559–560; and for cases see 31 Digest (Repl.) 299 et seq.

Cases referred to:

(1) *Coggan* v. *Warwicker* (1852), 3 Car. & Kir. 40; 19 L.T.O.S. 350, N.P.; 31 Digest (Repl.) 307, *4443*.

(2) *Smith* v. *Eldridge* (1854), 15 C.B. 236; 2 C.L.R. 855; 23 L.T.O.S. 161; 139 E.R. 412; 31 Digest (Repl.) 308, *4451*.

Also referred to in argument:

Swatman v. *Ambler* (1852), 8 Exch. 72; 22 L.J.Ex. 81; 19 L.T.O.S. 312; 155 E.R. 1264; 31 Digest (Repl.) 295, *4325*.

Neal v. *Swind* (1832), 2 Cr. & J. 377; 149 E.R. 161; sub nom. *Neale* v. *Sweeney*, 2 Tyr. 464; 31 Digest (Repl.) 307, *4442*.

Jones v. *Reynolds* (1836), 4 Ad. & El. 805; 7 C. & P. 335; 6 Nev. & M.K.B. 441; 111 E.R. 986; 33 Digest (Repl.) 813, *784*.

Crouch v. *Tregonning* (1872), L.R. 7 Exch. 88; 41 L.J.Ex. 97; 26 L.T. 286; 20 W.R. 536; 31 Digest (Repl.) 460, *5869*.

Grimman v. *Legge* (1828), 8 B. & C. 324; 2 Man. & Ry.K.B. 438; 6 L.J.O.S.K.B. 321; 108 E.R. 1063; 31 Digest (Repl.) 286, *4216*.

Furnivall v. *Grove* (1860), 8 C.B.N.S. 496; 30 L.J.C.P. 3; 141 E.R. 1259; 31 Digest (Repl.) 581, *7017*.

Winterbottom v. *Ingham* (1845), 7 Q.B. 611; 14 L.J.Q.B. 298; 5 L.T.O.S. 328; 10 Jur. 4; 115 E.R. 620; 40 Digest (Repl.) 207, *1688*.

Kirtland v. *Pounsett* (1809), 2 Taunt. 145; 127 E.R. 1032; 40 Digest (Repl.) 207, *1687*.

Hegan v. *Johnson* (1809), 2 Taunt. 148; 127 E.R. 1033; 30 Digest (Repl.) 412; *552*.

Rumball v. *Wright* (1824), 1 C. & P. 589, N.P.; 31 Digest (Repl.) 307, *4446*.

Appeal from an order of Cleasby, B., in an action brought by the plaintiff against the defendant for the sum of £150 "for the use and occupation, and the exclusive right of shooting and sporting in, over, and upon the lands, farm, or manor known by the name of Moelogan, and situate in the parishes of Llanrwst and Grotherin, in the county of Denbigh, during the above period, by the defendant, his servants and agents" from August, 1873, to February, 1874.

In the summer of 1873 the defendant, who had in the previous year rented the shooting upon the plaintiff's Moelogan estate, desired to take it again for a term of three years and he entered into a treaty with the plaintiff for that purpose. After an exchange of letters but before the conclusion of a formal agreement the defendant went into possession of the estate in order to shoot on Aug. 20. A dispute then arose as to the terms of the draft agreement submitted to the defendant by the plaintiff's solicitors and eventually the defendant proposed that the negotiations

should be dropped and he vacated the estate on Sept. 20. The plaintiff consented to the ending of the negotiations upon payment by the defendant of £125 for the present season, which the defendant refused to pay.

At the trial the learned judge gave judgment for the plaintiff and assessed the damages at £25. He reserved leave to the defendant to move to set the verdict aside and to enter a non-suit or a verdict for the defendant on the ground that there was no evidence to go to the jury in support of an implied contract for use and occupation, and that no action could be brought before the end of a year from the date of the contract between the parties. The defendant subsequently obtained a rule nisi to this effect.

A. Wills and *J. O. Griffits* for the plaintiff.

Hume Williams (*Seymour*, *Q.C.*, with him), for the defendant.

CLEASBY, B.—We are all of opinion that this rule must be discharged. There is no ground whatever, in this case, for supposing that there was an agreement between the parties that, in case the matter should come to an abrupt or unexpected end, no rent should be paid. It is, of course, quite possible, and it might not have been an unreasonable arrangement, that taking all the circumstances into consideration, the plaintiff might have agreed to such an arrangement, but no such arrangement was made in the present case, and the facts negative such an idea altogether. Having then disposed of that matter, the question arises whether on the evidence that was properly given there was or not an actual binding agreement between the parties, and I am of opinion that there was none. The letter that might or not have shown that was not put in. The defendant entered into possession of the premises, in the expectation of having his possession duly confirmed by a regular lease for the proposed term of three years, at a yearly rent to the amount of which he had agreed. There was then an entry by the defendant and an occupation by him under and consequent upon such entry; and it cannot be denied that the occupation, though only a short one, was a beneficial occupation.

Then comes the question whether the defendant is or not bound to pay anything for this. It is impossible to entertain the idea that such entry and occupation were not to be accompanied by the payment of rent. There was an entry into possession and a beneficial occupation, and then the bargain goes off. Is or not the defendant to pay rent? Extreme cases may, no doubt, easily be suggested of hardship on one more than on the other of the parties, but it is not of much use to discuss such matters unless they arise in the case actually before the court; what we have to do is to deal with facts as they actually occur. No doubt it would be better and more prudent if persons would not act upon expectations and probabilities, but would abstain from entering into possession of premises for a lease of which they are in treaty, until the lease has been duly executed; but, as we all know, people do and will so act, and will enter into possession before the completion of the necessary legal documents, and in practice it is not possible, I fear, for the more cautious conduct to be always adopted.

The cases which have been cited of *Coggan* v. *Warwicker* (1) and *Smith* v. *Eldridge* (2), really conclude the present case. They show it to be clearly settled that where a defendant, no contract having been made, has entered into possession of premises in the expectation that a formal lease would be duly executed, and having so entered has occupied and enjoyed the premises beneficially, then in that case he must, if the matter is broken off before any lease is executed, pay for such occupation, and that he is liable, in an action for use and occupation, to pay for the same such a sum as a jury may find the occupation to be reasonably worth.

AMPHLETT, B.—I am of the same opinion. The facts are very simple and clear. This is a case of a bargain for letting and taking the shooting on certain lands of the plaintiff, for a term of three years, in the course of the treaty for which the parties almost, but not quite, came to a distinct and definite agreement. There was a proposal made on the one side which was accepted in part by the other.

and then a new term was introduced which was not accepted. One single point remained in dispute between them, and then, without any demur or objection on the part of the lessor, the lessee (if I may so term the plaintiff and defendant) on the arrival of the commencement of the shooting season, goes down and enters into possession and occupation of the premises, both parties then contemplating that a regular formal agreement for a lease would be completed and executed. Then come the difficulties with regard to the terms of the proposed lease, but the defendant did not at once thereupon give up possession. He still continued to occupy, although he well knew that there was no completed agreement between him and the plaintiff. There is no fraud, nor the suggestion of any on either side. A little time goes on and then the defendant quits and the plaintiff permits him to do so; but not on the understanding that he is to pay no rent. On the contrary, the plaintiff, through his attorneys, made a distinct demand for the full year's rent, a fact which in itself is strong to show that there was no arrangement between them that the defendant, in case the agreement went off, should pay nothing for his occupation. The legal question then is, what, under such circumstances, is the lessee to do? Ought he or not to pay for such occupation?

Extreme cases have been put during the argument pointing to most outrageous conclusions. The present case may be illustrated by the case of a house at the West End of London, for the taking of which, say for a couple of years, a person (A.) enters into treaty with its owner, and before the terms are definitely settled and agreed upon, A. enters into possession and occupies the house for the whole of a London season, and then, the treaty being still incomplete, he quits by consent of the owner, no formal agreement having been come to or executed, would it not be a monstrous and outrageous proposition to say that, although A. has occupied and had the benefit of the occupation of the house during the most valuable portion of the year, yet he is to be allowed to quit without paying a farthing for such occupation? Clearly, where there has been a beneficial occupation, it must be paid for. With regard to the cases of vendor and purchaser which have been referred to, it has long been settled by authority that where a purchaser has been let into possession during the progress of the treaty for purchase, and the purchase afterwards goes off by reason of the default of the vendor, then no rent is to be paid by the intending purchaser for the time that he may have been in the occupation of the premises. In such cases, it is said, the parties may easily secure themselves by stipulating for the event of non-completion of the purchase in their contract: see SUGDEN ON VENDORS AND PURCHASERS (14th Edn.) p. 179. Those cases, however, do not apply to or bear upon a case like the present.

Then it was urged, on behalf of the defendant, that there had been no beneficial occupation at all; that he went there to raise up and get together a good stock of game for the two next following years. That, however, would be a question for the jury to arrive at a conclusion upon from all the circumstances of the case before them; and had it been proved in the present case, my learned brother CLEASBY, who was here acting in the place of the jury, might have found that the defendant's occupation was not a beneficial one. He did not, however, so find; but, on the contrary, he found (and it must be taken that he duly took all the circumstances of the case into consideration) that the occupation was beneficial, and he awarded to the plaintiff the amount which he considered to represent its reasonable worth.

Rule discharged.

Solicitors: *Sharpe, Parkers, Pritchard & Sharpe*, for *Ryland, Martineau & Carslake*, Birmingham; *G. C. James.*

A

BEESTON *v.* BEESTON

[Exchequer Division (Cleasby, Pollock and Amphlett, BB.), November 22, 1875]

[Reported 1 Ex.D. 13; 45 L.J.Q.B. 230; 33 L.T. 700; 40 J.P. 152; 24 W.R. 96]

B

Gaming—Joint fund for gaming—Liability to account—Gaming Act, 1845 (8 & 9 *Vict.*, *c.* 109), *s.* 18.

The plaintiff and the defendant agreed to contribute money to a joint fund to be used by the defendant to bet upon horse races, and they agreed to share any winnings in specified proportions. In pursuance of the agreement the C defendant used money from the joint fund for betting, but he refused to account to the plaintiff for certain winnings, and, when sued by the plaintiff on the agreement, he contended that the agreement was a wagering contract prohibited by s. 18 of the Gaming Act, 1845.

Held: the defendant, as the plaintiff's agent, was bound to account to the plaintiff for moneys received by him in respect of bets made by them jointly, D and the agreement between them was not a "contract by way of gaming or wagering" within s. 18.

Per Pollock, B.: The section applies to a case where the action is brought by one party to the wager against the other party to it, or by the winner of the bet against the stakeholder between the two.

Notes. Distinguished: *Higginson* v. *Simpson* (1877), 2 C.P.D. 76. Approved: E *Bridger* v. *Savage*, [1881–5] All E.R.Rep. 1065. Referred to: *Read* v. *Anderson* (1882), 10 Q.B.D. 100; *Lilley* v. *Rankin*, *Rankin* v. *Lilley and Baird* (1886), 56 L.J.Q.B. 248; *Cohen* v. *Kittell* (1889), 22 Q.B.D. 680; *Hyams* v. *Stuart King*, [1908] 2 K.B. 696; *Maskell* v. *Hill*, [1921] 3 K.B. 157; *Ellesmere* v. *Wallace*, [1929] 2 Ch. 1.

As to recovery by principal of money won in respect of a gaming transaction in F general, see 18 Halsbury's Laws (3rd Edn.) 177; and for cases, see 25 Digest (Repl.) 435 et seq. For the Gaming Act, 1845, s. 18, see 10 Halsbury's Statutes (2nd Edn.) 755.

Cases referred to:

(1) *Johnson* v. *Lansley* (1852), 12 C.B. 468; 138 E.R. 989; 25 Digest (Repl.) 444, *260.*

G (2) *Fitch* v. *Jones* (1855), 5 E. & B. 238; 24 L.J.Q.B. 293; 25 L.T.O.S. 160; 1 Jur.N.S. 854; 3 W.R. 507; 3 C.L.R. 1226; 119 E.R. 470; 6 Digest (Repl.) 139, *1012.*

(3) *Sharp* v. *Taylor* (1849), 2 Ph. 801; 14 L.T.O.S. 1; 41 E.R. 1153, L.C.; 36 Digest (Repl.) 580, *1388.*

H Also referred to in argument:

Knight v. *Cambers* (1855), 15 C.B. 562; 3 C.L.R. 565; 24 L.J.C.P. 121; 24 L.T.O.S. 241; 1 Jur.N.S. 525; 139 E.R. 544; 25 Digest (Repl.) 433, *151.*

Jessopp v. *Lutwyche* (1854), 10 Exch. 614; 24 L.J.Ex. 65; 3 C.L.R. 359; 156 E.R. 584; 12 Digest (Repl.) 302, *2321.*

Tenant v. *Elliott* (1797), 1 Bos. & P. 3; 126 E.R. 744; 1 Digest (Repl.) 512, *1473.*

I *Farmer* v. *Russell* (1798), 1 Bos. & P. 296; 126 E.R. 913; 1 Digest (Repl.) 512, *1474.*

Nicholson v. *Gooch* (1856), 5 E. & B. 999; 25 L.J.Q.B. 137; 26 L.T.O.S. 258; 2 Jur.N.S. 303; 4 W.R. 285; 119 E.R. 752; 5 Digest (Repl.) 699, *6115.*

Hill v. *Fox* (1859), 4 H. & N. 359; 157 E.R. 879; sub nom. *Fox* v. *Hill*, 32 L.T.O.S. 337; 23 J.P. 261; 5 Jur.N.S. 964; 7 W.R. 263, Ex. Ch.; 25 Digest (Repl.) 438, *209.*

Flight v. *Reed* (1863), 1 H. & C. 703; 32 L.J.Ex. 265; 8 L.T. 638; 9 Jur.N.S. 1016; 12 W.R. 53; 158 E.R. 1067; 12 Digest (Repl.) 246, *1882.*

Bubb v. *Yelverton* (1870), L.R. 9 Eq. 471; 39 L.J.Ch. 428; 22 L.T. 258; 18 W.R. 512; 25 Digest (Repl.) 423, *64*.

Action in which the plaintiff sued the defendant on a cheque or order drawn by the defendant in favour of and made payable to the plaintiff for £50. The defendant pleaded that the sum of £50 was due to the plaintiff under an agreement made between them by way of wagering and was, therefore, illegal. The plaintiff demurred to this plea on the ground that the illegality of bets and wagers between the defendant and persons other than the plaintiff is no defence to the plaintiff's claim to a certain proportion of such sum as the defendant should win by such betting and wagering.

By s. 18 of the Gaming Act, 1845:

"... All contracts or agreements whether by parole or in writing, by way of gaming or wagering, shall be null and void; and ... no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: ...."

R. Purvis for the plaintiff.

W. Graham for the defendant.

CLEASBY, B.—I am of opinion that s. 18 of the Gaming Act, 1845, does not apply to the present case. It is necessary that we should see what the cause of action here is. It is the receipt by the defendant of money for which he ought and is bound to account to the plaintiff. Why is he bound to account for it? Because it has been paid to him, and he agreed to do so. The obligation to account for this money to the plaintiff is on the defendant, and the only reason given by him in answer to the plaintiff's claim is, that he is not bound to account by reason of its being a wagering contract which the Gaming Act, 1845, s. 18, has prohibited and rendered illegal and void, and which therefore cannot be enforced in an action by the plaintiff. I am of opinion that that is not so. I do not think that this was an illegal transaction. It was not, in my opinion, a contract "by way of gaming or wagering," which is what s. 18 says "shall be null and void." The mere act of betting on a horse race is not illegal in the sense that any and every transaction connected with or arising out of such betting is tainted with illegality.

Johnson v. *Lansley* (1) which was cited in argument, is in point, and cannot, I think, be distinguished from the present case. A. and B. there jointly made bets on a horse race, and B. received the money and gave A. a bill for his proportion of the winnings. In that case, as in the present, there was an attempt to raise the defence that A. was precluded by s. 18 of the Gaming Act, 1845, from suing or recovering on the bill; but the court held that he was not prohibited by that statute from recovering the amount of the bill. The observations of JERVIS, C.J., and MAULE, J., in that case, are in point here, and show the ground on which the decision there proceeded. JERVIS, C.J., says:

"Before the passing of the Gaming Act, 1845, there were various statutes relating to betting on horse races, all of which were repealed by s. 15 of that Act."

Then, after reading s. 18, the Chief Justice proceeds as follows:

"There is nothing there (s. 18) to show this transaction illegal. Hunt was bound upon every principle of justice to pay this money to Johnson, and the circumstance of Lansley being substituted for Hunt, cannot make that illegal which, as between Johnson and Hunt would not have been so."

MAULE, J., says:

"The money which was the consideration for this bill was money which Hunt was bound to account for to the plaintiff. The losers could not get it back from Hunt, and it would be a very unjust thing that he should keep the whole.

Before the Gaming Act, 1845, he clearly would have been bound to pay over the money, and I find nothing in that statute to excuse him from doing so."

The ground on which the court held that A. the plaintiff, was entitled to recover in that case was that the defendant, or B., for whom the defendant was substituted, was A.'s agent, and had, as such, received money in respect of bets made by them jointly, of which he was bound to account to A. for his share. That is precisely the present case, with this difference only between the two cases, that there it was known that A. and B. were jointly interested in the bets, whereas here it was not known that the plaintiff had any interest at all in the matter. On the authority of that case, therefore, I am clearly of opinion that the plaintiff may recover from the defendant the money which has been paid to the defendant under this contract. This is not "a contract by way of gaming or wagering," and is, therefore, not void under s. 18 of the statute in question, nor is this an action to recover money due on such a contract. The demurrer to the plea must, therefore, be allowed, and our judgment be for the plaintiff.

POLLOCK, B.—I also think that it is clear that this is a bad plea. In the first place the cheque on which this action has been brought was given for money which had been paid to and was then actually in the defendant's hands, and which was in fact the money of the plaintiff. There was, therefore, beyond all question, good consideration for the cheque. But it is said that the defendant is not bound to account for this money, or to pay the amount of the cheque to the plaintiff, because s. 18 of the Gaming Act, 1845, prohibits the bringing or maintaining any suit for the recovery of any money alleged to have been won upon any wager. [HIS LORDSHIP read the section.]

I do not think that this section avails the defendant here. It is clear that this action is not brought "for the recovery of money won upon a wager," within the meaning of that section; that section does not apply to a case like the present, but to a case where the action is brought by one party to the wager against the other party to it, or by the winner of the bet against the stakeholder between the two. But it is said that this betting between the defendant and third persons is illegal, and therefore the agreement between the plaintiff and the defendant is tainted with illegality. But betting is not in itself illegal at common law, nor by the Gaming Act, 1710, or the Gaming Act, 1835, s. 1; which latter Act relates only to securities given in respect of money lost at play, and enacts that such securities shall not, as theretofore, be absolutely void, but shall be deemed to have been made and given for an illegal consideration. The Gaming Act, 1845, s. 18, makes such wagering contracts void, but does not make them illegal. I agree with the observation of SIR J. BYLES on this matter, in BYLES ON BILLS (10th Edn.), p. 137, where referring to the Gaming Act, 1845, s. 18, the learned writer says: "It further makes all gaming contracts, written or oral, null and void," and then he adds the following note:

"But not illegal in the sense of criminal, or in such a sense as to impose on the subsequent holder of a negotiable instrument the obligation of proving the consideration he himself gave for it,"

and he then cites *Fitch* v. *Jones* (2). For these reasons I am of opinion that our judgment on this demurrer should be in favour of the plaintiff.

AMPHLETT, B.—I am entirely of the same opinion. When we look at the contract between the plaintiff and defendant in this case, it appears to me that there is nothing illegal in it. [HIS LORDSHIP read the agreement as set forth in the plea]. That is an agreement between them that the defendant should employ the plaintiff's money, together with money of his own, in betting upon horse races, and that the winnings should be shared between them; and to such a case the Gaming Act, 1845, s. 18, has no application. What that Act means and what it says is, that no money lost on a bet of this kind shall be recoverable from the loser, but it says not a word about making betting, or such a contract as the present one,

illegal. That being so, what illegality is there in A. saying to B.: "Go and make bets on our joint account, and whatever the winnings on such bets may be shall be shared between us." That is exactly what took place in the present case. The defendant, using the plaintiff's money and his own, made certain bets which he won, and which were paid to him; when he received money in payment of such bets, he received it to the joint use of the plaintiff and himself, and he then gave the cheque in question to the plaintiff for his agreed proportion of such winnings. Now I see nothing illegal in that transaction.

Sharp v. *Taylor* (3) to which I referred during the argument, is in point very strongly in favour of the plaintiff here. There A. and B., subjects of this country, purchased an American built ship on a joint speculation with a view of employing her in the trade between the two countries until they could sell her at a profit, and for that purpose they had her registered in America in the name of C., a citizen of that country, upon a false declaration that she was bona fide the sole property of C. After some voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, and in spite of A. sent her on another voyage to America. In a suit by A. against B. for an account and payment of his share of the realised profits, the contention on the part of B., the defendant, was that A.'s (the plaintiff's) case, involved the confession of a falsehood, and a deliberate violation of the navigation laws of both countries, and that a title to relief in a court of justice could not be founded on it; that if the plaintiff's case was correct, the ship had been engaged in an illegal traffic, and the plaintiff could not assert in a court of justice any title to the profits of it. But it was held by Lord Cottenham, L.C., that, even supposing the declaration and registration to have been a fraud upon the American law, and the employment of the ship as registered to have been a fraud upon the English navigation laws, such fraud would not prevent A. from maintaining his suit for an account and payment of his share of the realised profits of the speculation. In his judgment in that case, Lord Cottenham said (2 Ph. at p. 818):

> "As between these two, can their supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this partnership, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some Act of Parliament has been violated or neglected? Can one of these two partners, in any trade, defeat the other by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be that the transaction is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties."

Therefore, in the present case, I say that, if it be made out that there was something illegal in this kind of wagering, yet, if the loser has not raised the question of illegality, but has paid the money over, it is not recoverable back by the other party. But it is not necessary to go so far here, because there is nothing illegal in horseracing. As to the other point that was raised by counsel for the defendant, viz., that this cheque was a void security under s. 1 of the Gaming Act, 1835, I agree with my learned brothers that that objection is not maintainable. The securities made void by that Act are securities given in payment of a gambling debt. This cheque was not given for the security of such debt, but in payment of half the amount of money which had been received by the defendant, and which he actually had in his possession at the time, and was bound to account for to the plaintiff.

Judgment for plaintiff.

Solicitors: *J. T. Luscombe*; *Monckton, Long & Co.*

A

LUKE *v.* SOUTH KENSINGTON HOTEL CO.

[Court of Appeal (Sir George Jessel, M.R., James and Bramwell, L.JJ.), March 4, 6, 1879]

B [Reported 11 Ch.D. 121; 48 L.J.Ch. 361; 40 L.T. 638; 27 W.R. 514]

Mortgage—Foreclosure—Joint mortgagees—Foreclosure action by one—Competency—Joinder of co-mortgagees as defendants.

Trustee—Decision of several trustees—Need of unanimity.

One of several joint mortgagees can maintain an action to foreclose the C mortgage, making his co-mortgagees defendants if they are unwilling to be joined as co-plaintiffs or have by some act precluded themselves from being made plaintiffs.

The act of a majority of trustees cannot bind the trust estate with a dissenting minority of trustees.

Notes. Considered: *Naas* v. *Westminster Bank, Ltd.*, [1940] 1 All E.R. 485. D Referred to: *Palmer* v. *Mallet* (1887), 36 Ch.D. 411; *Webb* v. *Jonas* (1888), 39 Ch.D. 660; *Re Continental Oxygen Co., Elias* v. *Continental Oxygen Co.*, [1897] 1 Ch. 511.

As to who may institute foreclosure proceedings, see 27 Halsbury's Laws (3rd Edn.) 376–377; and for cases see 35 Digest (Repl.) 622–3. As to duty of trustees to act personally and jointly, see 38 Halsbury's Laws (3rd Edn.) 970 et seq.; and E for cases see 17 Digest (Repl.) 234; 43 Digest 870, 871.

Cases referred to:

(1) *Fowler* v. *Wyatt* (1857), 24 Beav. 232; 53 E.R. 347, L.C.; 12 Digest (Repl.) 111, *658.*

(2) *Adams* v. *Paynter* (1844), 1 Coll. 530; 14 L.J.Ch. 53; 4 L.T.O.S. 193; 63 E.R. 530; sub nom. *Adams* v. *Paynter*, *Adams* v. *Lloyd*, 8 Jur. 1063; 43 Digest F 795, *2323.*

Also referred to in argument:

Bigg v. *Strong* (1858), 42 L.T.O.S. 98; 4 Jur.N.S. 983; 6 W.R. 536, L.C. & L.JJ.; 12 Digest (Repl.) 75, *417.*

Appeal from a decision of Fry, J., reported 7 Ch.D. 789.

G The plaintiff, William Luke, and the defendants, Edmund Davies Browne and Sampson Sandys, were the trustees of the will of Dr. Luke, the plaintiff's father, who died in 1829. In 1866 there were standing in their names as trustees two sums of £7,188 9s. 4d., and £753 2s. 2d. reduced three per cent. annuities, and two sums of £2,000 and £373 1s. 3d. new three per cent. annuities. Mrs. Blakeley, a granddaughter of the testator, was tenant for life of the sums of £7,188 9s. 4d. H and £2,000, and also of one-fifth part of the two smaller sums. The plaintiff was entitled to one-fifth of the two smaller sums, and the remaining three-fifths belonged to three of his brothers.

In May, 1864, the plaintiff and the defendants Browne and Sandys sold the four sums of stock, and invested the proceeds, which amounted to £9,216 cash, on the security of a second mortgage of leasehold property belonging to the South Kensing- I ton Hotel Co. (hereinafter called "the old company"). This mortgage was dated May 23, 1864, and the interest payable under it was at the rate of 6½ per cent., reducible to 5½ per cent. on punctual payment.

In 1869, the old company being in difficulties and unable to pay the interest on its mortgages, a new company (the defendant company in the present case) was formed for the purpose of taking over its assets and liabilities. As part of the scheme of reconstruction it was proposed to the trustees of Dr. Luke's will to accept a composition of £5,725 on their mortgage debt of £9,216, and to leave that sum on the security of the mortgaged property for a term of ten years, at

5 per cent. interest, reducible to 4 per cent. on punctual payment, the new company covenanting for payment of the interest. Browne and Sandys assented to this proposal, but the plaintiff, who was then acting by a separate firm of solicitors, declined to assent. The new company, however, proceeded as if the assent of all the trustees had been obtained. The old company was wound-up, and, with the sanction of the court, its assets were transferred to the new company. A deed was prepared, dated Aug. 24, 1870, and purporting to be made between the new company of the one part, and the plaintiff and the defendants Browne and Sandys of the other part. It was expressed that the plaintiff and the defendants Browne and Sandys did thereby release and discharge the old company, and the new company and the property comprised in the mortgage from all interest then due on the mortgage, and also from £3,456, part of the principal sum of £9,216. And the new company covenanted to pay to the trustees the sum of £5,760 on Jan. 1, 1871, with interest at 5 per cent., and to pay interest at the same rate by half-yearly payments on so much of the sum of £5,760 as should from time to time remain unpaid, with a proviso for reduction of the interest to 4 per cent. on punctual payment. This deed was executed by the new company and by the defendants Browne and Sandys, but the plaintiff refused to execute it.

On Feb. 6, 1875, the plaintiff filed the bill in the present suit against the new company, C. N. Mayhew, who held a third mortgage on the property, and Browne and Sandys. Mrs. Blakeley was also made a defendant, but none of the other cestuis que trust was made a party. The bill prayed for a declaration that the deed of Aug. 24, 1870, was invalid and ineffectual, and ought to be delivered up to be cancelled, and prayed for the usual foreclosure decree against the company and Mayhew under the original mortgage of May 23, 1864. No relief was prayed against Browne and Sandys or Mrs. Blakeley. At the trial Fry, J., having held that the plaintiff was not bound by the arrangement contained in the deed of August 24, 1870, dismissed his bill on the ground that one of several co-mortgagees could not maintain a suit to foreclose the mortgage without making his co-mortgagees co-plaintiffs. The plaintiff appealed.

Kekewich, Q.C., and *S. Dickinson* for the plaintiff.
North, Q.C., and *Rendall* for the defendant company.
Fischer, Q.C., and *Millar* for the defendants, Browne and Sandys.
Cookson, Q.C., and *Bush* for Mrs. Blakeley.

SIR GEORGE JESSEL, M.R.—This is an appeal from a decision of Fry, J., who was entirely with the plaintiff upon the merits, but dismissed the action on a technical point. I entirely concur with him in the conclusion at which he arrived as to the merits.

The plaintiff was one of three trustees who held a mortgage for £9,216 on some freehold property. The company, which was the mortgagor, was, there being prior mortgagees, unable to pay, and a proposition was made that the trustee mortgagees should take 12s. 6d. in the pound, and accept a new mortgage for that amount from a new company to be formed to take over the business of the old one. To that proposition a willing ear was lent, but it was never, in fact, agreed to, for the only letters on the subject, which are in evidence preceded the formation of the new company. When the new company was formed, the solicitors of that company were informed that the plaintiff, one of the three trustees, desired not to come into the arrangement, and declined to do so by reason of his being a trustee, and not being able to obtain the assent of all his cestuis que trust. With this knowledge, two of the trustees, who, though they thought the plaintiff would come in, had not ascertained it, executed the deed of composition. The company also executed it, and for sometime afterwards the reduced sum of interest was received from the new company in the ratio of 12s. 6d. in the pound. The plaintiff instituted this suit to foreclose the mortgage, and he insists that the original mortgage is unaffected because he never agreed to release it and that the consent of his two co-trustees did not bind him for two reasons.

In the first instance, any consent of the two was only conditional on the third agreeing also, indeed, the form of the indenture shows it. It recites an agreement by the three, which was intended to be carried out. It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity, if the third refuses to execute it, and consequently on that ground the deed would not have bound the two. Then it was suggested that the two, not having dissented in sufficient time, would still be bound, having acted on the deed. To that it is answered that the two were trustees as well as the one, and that they had no power to bind their cestuis que trust by such an arrangement. All three together might or might not; that depends on the nature of the arrangement. It is not every agreement for a composition, or to accept less than the full amount due, that is a breach of trust; but two out of three trustees have no power to bind cestuis que trust. There is no law that I am acquainted with which enables the majority of trustees to bind the minority. The only power to bind is the act of the three, and consequently the act of the two, even if it could not bind them by reason of delay or acquiescence, could not bind the trust estate, and therefore in no way was the trust estate bound or the mortgage released.

So far I am of the same opinion as Fry, J. He, however, dismissed the bill on this ground; he said that it was a suit for foreclosure by one of three mortgagees, making the other two defendants, and that such a suit could not be maintained. I must say that I should have thought the law was quite settled the other way. It is difficult to find authorities exactly in point, but I recollect one very strongly in point. It was *Fowler* v. *Wyatt* (1) (not reported on this point), which was a suit to set aside a release of an equity of redemption and to redeem. Fowler became bankrupt. He had two assignees, one the trade assignee, and the other the official assignee. The official assignee, being afraid of the cost of the litigation, declined to join as plaintiff, and the trade assignee alone revived the suit. That was objected to first at the Rolls, where Sir John Romilly, M.R., overruled the objection on the ground that one of two trustees acting in bankruptcy could maintain a suit to redeem. It was appealed to Lord Cranworth, L.C., who affirmed the decision, and the suit afterwards came on for hearing.

There is another case, *Adams* v. *Paynter* (2), where two trustees filed a bill to foreclose. It was objected that the third trustee had not been discharged and should have joined them. How? The objection was, that he had not been made a party, and the objection was allowed, and he was made a party as defendant. They did not add plaintiffs in those days, and, therefore, that was considered sufficient; and on general principles I cannot see why this should not be done. It is familiar to us in equity for two of three trustees to file a bill to recover the trust estate, and if the third trustee has been implicated at all in the loss of it, to make that one trustee a defendant, although the trust fund is ordered to be restored to all for the benefit of the cestuis que trust. I cannot see any reason for altering what I consider a settled rule. As to the reasons given by the judge in the court below, they are not well founded. He says:

> "Take the case, with which we are very familiar, of a mortgage for a large sum of money made to half a dozen persons as trustees for an insurance company, the name of the company not appearing on the face of the deed. You might have six foreclosure actions, one brought by each of the mortgagees against the mortgagor, naming the other five as defendants on the record."

But five of such actions would assuredly be stopped, because the court would tell the plaintiffs in them that they must show some good reason for not joining the others as plaintiffs, and if the court found that all the other five were willing to be made plaintiffs, it would stop the other actions. There would be no difficulty in dealing with the case if it occurred. One has no right capriciously to make persons defendants when they ought to be plaintiffs, and thus increase the costs of the other defendants. There must be some substantial ground for it, and when

there is a substantial ground all are made parties to the suit, some plaintiffs and others defendants, and the evil which the judge thought would arise cannot arise. A

Then it is said that some of the mortgagees might not wish to foreclose, and others might. We will deal with that case when it arises, whether one can foreclose without the consent or against the wish of the others. That is not the case here. The other two mortgagees, who are defendants, do not oppose the foreclosure. They were not willing to be plaintiffs, but they do not refuse to foreclose. If two out B of three trustees should decline to foreclose or to agree to any other remedy, it might be a reason for removing them from being trustees; but that is not the case here, and we have not, therefore, to consider that case which may be dealt with when it arises. There is no ground whatever for preventing the plaintiff from obtaining the relief he asks, and there is ground for maintaining this action. If it is not maintained, I do not see how he can by any possibility obtain the relief to C which he is entitled. For these reasons I think the appeal ought to be allowed, and judgment ought to be given for foreclosure.

JAMES, L.J.—I am entirely of the same opinion. On the facts of this case I am satisfied that no binding agreement was ever entered into by anybody to reduce the amount of the mortgage money either as principal or interest, but that D the company went on expecting the proposed reduction to be accepted, and bought the property with that expectation, but without taking care to have a binding agreement. That was their misfortune or their imprudence. They may have been misled, or they may have misled themselves, but they got the property subject to a mortgage which retained its original validity and amount. Further, beyond all question the mortgage money was part of the trust estate. Two of the trustees E have so dealt with the matters as to make it an embarrassment for them to be made co-plaintiffs, and it is an established rule of the old Court of Chancery, that if there were three trustees having a common right, and two of whom had done something which might probably have prohibited them from going to law, the one who had not done anything to prejudice himself, or to prejudice his right of action, might be sole plaintiff, making the others defendants, in order that they might be F present at the litigation, and concur in everything necessary for them to concur in.

I remember a case in which there were three mortgagees holding a joint mortgage. Two of them afterwards by separate instruments and on their own separate account became assignees of the equity of redemption, second and third mortgagees of the property comprised in the original mortgage. In that case it was absolutely impossible for the three to join as plaintiffs in the suit, because they were both G mortgagees and mortgagors. That difficulty was avoided by the one mortgagee filing his bill on behalf of the trust estate, making the others interested in the equity of redemption defendants. In the old Chancery practice there was this difficulty, that the misjoinder of plaintiffs was fatal, and if you had any one person among the plaintiffs who had done anything which might have amounted to a release of his right the whole suit failed, and there was no remedy for it. Therefore, as a H general rule, you selected, if you could, one person as plaintiff whom you knew to be free from any charge or imputation on his conduct, and made all the others defendants. There never was any objection to that in practice. Now that is rendered unnecessary by the fact that under the new practice (see R.S.C., 1875, Ord. 16, r. 13 [now R.S.C. (Revision) 1962, Ord. 15, rll. 6, 8]) the courts may deal with misjoinder of plaintiffs according to the justice and equity of the case. I

BRAMWELL, L.J.—I am of the same opinion, for the same reasons.

Appeal allowed.

Solicitors: *Janson, Cobb & Pearson*; *Mayhew, Salmon & Whiting*; *Sandys & Trevenen*; *W. & A. Ranken Ford.*

[*Reported by* H. Peat, Esq., *Barrister-at-Law.*]

A

HAMPTON *v.* RICKARD

[Court of Queen's Bench (Sir Alexander Cockburn, C.J., Blackburn, Quain and Archibald, JJ.) May 30, 1874]

[Reported 43 L.J.M.C. 133; 30 L.T. 636; 38 J.P. 646]

B *Bastardy—Affiliation order—Jurisdiction of justices—Child conceived abroad born in England—Bastardy Laws Amendment Act*, 1872, *s.* 3.

Provided that a child is born in England, justices have jurisdiction to make an affiliation order against the putative father, even though the child was conceived out of England.

C **Notes.** Section 3 of the Bastardy Laws Amendment Act, 1872, has been replaced by s. 1 and s. 2 (1) of the Affiliation Proceedings Act, 1957.

As to requisites for jurisdiction in affiliation proceedings, see 3 Halsbury's Laws (3rd Edn.) 110 et seq.; and for cases see 3 Digest (Repl.) 441 et seq. For the Affiliation Proceedings Act, 1957, ss. 1 and 2 (1), see 37 Halsbury's Statutes (2nd Edn.) 37, 38.

D Cases referred to in argument:

Scott v. *Lord Seymour* (1862), 1 H. & C. 219; 32 L.J.Ex. 61; 11 W.R. 169; 158 E.R. 865; sub nom. *Lord Seymour* v. *Scott*, 1 New Rep. 129; 8 L.T. 511; 9 Jur.N.S. 522, Ex. Ch.; 11 Digest (Repl.) 451, *887*.

The Karnak (1869), L.R. 2 P.C. 505; 6 Moo.P.C.C.N.S. 136; 38 L.J.Adm. 57; 21 L.T. 159; 17 W.R. 1028; 3 Mar.L.C. 276; 16 E.R. 677, P.C.; 1 Digest E (Repl.) 147, *341*.

Case Stated by Cornwall justices.

At a court of summary jurisdiction sitting at Torpoint on Aug. 12, 1873, the respondent preferred an application against the appellant under s. 3 of the Bastardy Laws Amendment Act, 1872, that she had been delivered of a bastard child since the passing of that Act, within twelve calendar months from the date of her appli- F cation, of which bastard child she alleged the appellant to be the father. It was proved or admitted that the bastard child was born on Sept. 4, 1872, at the parish of St. Germans, Cornwall, where the respondent was then living with her mother, the appellant, who was an Irishman, having been in Ireland at the time of the birth. The connection which resulted in the birth of the child took place in Ireland (no connection having taken place elsewhere than in Ireland), where the G respondent was then living in domestic service.

On behalf of the appellant it was contended that, inasmuch as the Bastardy Laws Amendment Act, 1872, did not extend to Ireland, and the connection which resulted in the birth of the child took place in Ireland, notwithstanding the fact of the birth taking place in England, the justices had no jurisdiction. On behalf of the respon- dent it was contended that the child being born of an English woman in England, H in the county of Cornwall, the justices had jurisdiction. The justices being of opinion that, as the child was born in England they had jurisdiction in the matter, adjudged the appellant to be the putative father of the child, and the appellant appealed.

Anstie for the appellant.

I *Charles* for the respondent.

SIR ALEXANDER COCKBURN, C.J.—I think that this is the simplest matter possible. The statutes on bastardy were intended to make the father liable and to protect the parish in which the child is born from liability for its maintenance. The Bastardy Laws Amendment Act, 1872, s. 3, like the previous Acts, gives the justices jurisdiction to make orders for this purpose whenever the child is born in England. It is perfectly immaterial what may be the rules of international law. It is the law of England that if a woman is delivered of a bastard child in this country, and the father is within the jurisdiction, she may apply for an order

against him; and if the paternity be established, he is liable for the child's maintenance. The father's presence is material, and the place of the child's birth; but it matters not where the connection took place, nor to what country the parents belong.

BLACKBURN, J.—I am entirely of the same opinion. If the Bastardy Laws Amendment Act, 1872, made the illicit intercourse between the father and mother penal, it might have been necessary to show the father's liability according to the law of his country. As it is we have only to apply the words of s. 3 of the Act, which limit the jurisdiction only to the place of the child's birth, and the presence of the father.

QUAIN and **ARCHIBALD, JJ.**, concurred.

Judgment for respondent.

Solicitors: *Futvoye & Paige*; *Coode, Kingdon & Cotton*, for *Smith & Benett*, Devonport.

MITCHELL AND OTHERS *v.* LANCASHIRE AND YORKSHIRE RAIL. CO.

[Court of Queen's Bench (Blackburn and Field, JJ.), April 22, 1875]

[Reported L.R. 10 Q.B. 256; 44 L.J.Q.B. 107; 33 L.T. 161; 39 J.P. 645; 23 W.R. 853]

Carriage of Goods—Common carrier—Goods carried to destination—Storage by carrier as warehouseman—Damage to goods—Liability as bailee.

The defendants carried goods consigned to the plaintiffs to their nearest station, and requested immediately that the plaintiffs would remove them, giving notice that the goods were held by the defendants, not as carriers, but as warehousemen, "at owner's sole risk," and subject to the usual warehouse charges. The plaintiffs acquiesced in these terms, and the goods, being left on the defendant's premises, were damaged in consequence of the want of reasonable care on the part of their servants.

Held: when the goods had been carried to their destination the defendants ceased to be liable in respect of them as carriers and insurers and became liable as bailees; the words "at owner's sole risk" in the notice did not absolve them from that liability, and, therefore, they were liable for the damage to the goods.

Notes. Applied: *Price* v. *Union Lighterage Co.*, [1903] 1 K.B. 750. Considered: *Hirschel and Meyer* v. *Great Eastern Rail. Co.* (1906), 96 L.T. 147.

As to liability of carriers as warehousemen, see 4 Halsbury's Laws (3rd Edn.) 149; and for cases see 3 Digest (Repl.) 87 et seq.

Cases referred to:

(1) *Gatliffe* v. *Bourne* (1838), 4 Bing.N.C. 314; 1 Arn. 120; 5 Scott, 667; sub nom. *Bourne* v. *Gatliffe* (1841), 3 Man. & G. 643; 3 Scott, N.R. 1, Ex. Ch.; on appeal (1844), 7 Man. & G. 850; 11 Cl. & Fin. 45; 8 Scott, N.R. 604; 135 E.R. 345, H.L.; 8 Digest (Repl.) 38, *218*.

(2) *Cairns* v. *Robins* (1841), 8 M. & W. 258; 10 L.J.Ex. 452; 151 E.R. 1034; 3 Digest (Repl.) 88, *202*.

(3) *McCawley* v. *Furness Rail. Co.* (1872), L.R. 8 Q.B. 57; 42 L.J.Q.B. 4; 27 L.T. 485; 37 J.P. 358; 21 W.R. 140; 8 Digest (Repl.) 111, *718*.

Also referred to in argument:

Gallin v. *London and North Western Rail. Co.* (1875), L.R. 10 Q.B. 212; 44 L.J.Q.B. 89; 32 L.T. 550; 39 J.P. 518; 23 W.R. 308; 8 Digest (Repl.) 111, *720.*

D'Arc v. *London and North Western Rail. Co.* (1874), L.R. 9 C.P. 325; 30 L.T. 763; 38 J.P. 710; 22 W.R. 919; 8 Digest (Repl.) 67, *447.*

Robinson v. *Great Western Rail. Co.* (1865), Har. & Ruth. 97; 35 L.J.C.P. 123; 14 W.R. 206; 8 Digest (Repl.) 65, *437.*

Philips v. *Clark* (1857), 2 C.B.N.S. 156; 26 L.J.C.P. 168; 29 L.T.O.S. 181; 3 Jur.N.S. 467; 5 W.R. 582; 140 E.R. 372; 41 Digest 424, *2664.*

Ohrloff v. *Briscall, The Helene* (1866), L.R. 1 P.C. 231; 4 Moo.P.C.C.N.S. 70; Brown. & Lush. 429; 35 L.J.P.C. 63; 14 L.T. 873; 12 Jur.N.S. 675; 15 W.R. 202; 2 Mar.L.C. 390; 16 E.R. 242, P.C.; 41 Digest 467, *2989.*

Czech v. *General Steam Navigation Co.* (1867), L.R. 3 C.P. 14; 37 L.J.C.P. 3; 17 L.T. 246; 16 W.R. 130; 3 Mar.L.C. 5; 41 Digest 425, *2667.*

Great Northern Rail. Co. v. *Swaffield* (1874), L.R. 9 Exch. 132; 43 L.J.Ex. 89; 30 L.T. 562; 8 Digest (Repl.) 38, *219.*

Action to discharge a rule nisi obtained by the defendants calling upon the plaintiffs to show cause why a verdict found for them at the trial before DENMAN, J., and jury at Liverpool Spring Assizes in 1874 should not be set aside.

The plaintiffs, Mitchell Bros., were felt merchants near Newchurch, to which place the defendants were carriers. In July, 1873, the defendants as carriers brought to their Newchurch station sixty bales of flax or tow, and on the 26th of that month forwarded to the plaintiffs an advice note requesting them to remove the bags as soon as possible, and also giving notice that the goods were held by the defendants as warehousemen, and not as carriers, at owner's sole risk and subject also to the usual warehouse charges.

Nine bales of tow were taken by the plaintiffs' carter on the 25th, and soon after the advice note arrived one of the plaintiffs went to the station and ordered two tons more to be removed. These were in good condition, but as the tow was not of the quality ordered, the plaintiffs refused to receive any more, and told the defendants of their intention. However, after correspondence with the vendors, the plaintiffs took more bales in October, and found they were spoilt by wet. The tow had not been stacked properly; nor was it sufficiently covered by tarpaulins.

The plaintiffs declined at first to accept, but since the defendants repudiated all liability, relying on the conditions in the advice note, the plaintiffs sold the tow at a greatly reduced price and sought to recover the loss on the resale. It was admitted that if the defendants were bound to take reasonable care they had not done so. Verdict was given for the plaintiffs for £115, with leave to move to enter a verdict for the defendants, if there was no evidence on which the jury could properly find for the plaintiffs. A rule nisi was obtained for the defendants.

Crompton for the plaintiffs.

Herschell, Q.C., for the defendants.

BLACKBURN, J.—I think this rule should be discharged. I take it the law is very clear to this extent, that where a carrier receives goods to carry to their destination, with a liability as carrier (except so far as that duty is qualified by exceptions), he may be said to be an insurer. The goods are then to be carried at the risk of the carrier to the end of the journey, and when they arrive at the station to which they were forwarded, the carrier has then complied with his duty when he has given notice to the consignee of their arrival. After this notice, if the consignee does not fetch the goods away, but delays, I think the carrier ceases to incur any liability as carrier, but is subject to the ordinary liability of bailee.

There are several cases in which the question has been very much discussed as to when a carrier's liability ceases as an insurer, and his liability is changed into that of warehouseman. Such, for instance, as that of *Bourne* v. *Gatliffe* (1) and

Cairns v. *Robins* (2). In the first a fire had taken place after the goods had been put from on board defendant's ship on to a wharf, and the liability of the carrier was held still to continue. In the other, a similar case, there having been delay in the owner, the carrier was still held liable for the loss of the goods as bailee for reward. But I do not think there has been any case decided to this extent, that, because the owner of goods was idle, and blameable for leaving them in the carrier's hands, therefore he as bailee held them under no responsibility whatever.

I think in this case the railway company in holding these goods could have charged warehouse rent, and, that being so, I think there can be no doubt that prima facie there was a liability in them as bailees for reward. The liability of an ordinary bailee is to take ordinary and reasonable care. If the defendants in this care are under that liability, there is ample evidence that they did not do that. There is ample evidence on which a jury might find that they did not use ordinary care. Counsel for the defendants has taken two points, and I will deal with the second first. He says: The plaintiff in the first instance said, "We will not have these goods because they do not fulfil our order; we are not the owners of them, we will not take them; you do not hold them for us, but for the consignors"; and then afterwards, when they find out that they were the owners of the goods, they said, "We do take them." Counsel for the defendants has argued that, having once said that, they cannot sue for injury to the goods between the time they said, "We are not the owners, but the consignors," and the time they found out the mistake and said they would take them.

I must say I cannot agree with that argument. The obligation of the railway company was what they themselves point out, viz., to hold them for the owner of the goods; and although the plaintiffs may have been mistaken in saying: "We are not the owners of the goods," yet when they found out they were, and took them, they were entitled to say: "During the time of keeping them you were under an obligation to us, the owners of the goods, to take care of them; and you have neglected to do that, and it is we who have sustained the damage, and we now seek to recover it." That seems clear. It might have been that, during the interval, damage would occur to the goods necessarily through lapse of time—such, for instance, as a fall in price, or in the case of fruit which had become rotten, or articles that required to be brought very fresh, such as vegetables and fish, which in a very few days would become stale. I think, in all these instances, the damage would arise from the owner's fault; but this is not a case of that sort at all. These were goods which could be taken care of, and remain safely at the station; but not being taken care of at all, but allowed to remain unprotected from the rain, they get drenched with rain, and suffer damage for the want of being taken care of, and not from the mere delay.

That being so, I take it the plaintiffs are entitled to say: "Whatever liability you incur, you incur to us." Counsel for the defendants says, secondly, that the defendants' liability was none at all, because, when the goods arrived, the defendants sent the notice which has been discussed. The plaintiff's attention having been drawn to this notice, I think counsel is right in saying that there is evidence that when one of the plaintiffs came to take away part of the goods, he, as the consignee, consented to the goods being held by the defendants, not as common carriers but as warehousemen, at the owner's sole risk. What we have to consider is, whether the defendants can have the benefit of receiving warehouse rent without any liability whatever, for that is what counsel's argument came to—we are to be paid warehouse rent, and keep them as warehousemen, but we are not to be bound to take any care of them at all. It is but reasonable to suppose that if the defendants meant to express any such thing as that, it should have been expressed clearly and distinctly. It is the company's own language, and must be taken as much as possible against them. I do not think that the words, "at owner's sole risk," applied to such a case as this, mean that the company are to hold the goods, not as common carriers but as warehousemen, and subject to warehouse charges, but that none of the liability of warehousemen is to be attached. I think that the

words of that note mean to point out that they would hold them as warehousemen, and therefore they would be bound to take care of them; and at the owner's risk so far as this, that they did not hold as carriers with a liability (with the exception of lightning and one or two excepted perils) as absolute insurers.

In *McCawley* v. *Furness Rail. Co.* (3) we had to consider, not the meaning of the terms of the contract, but the plea, and the plea gave us the legal effect of the contract. There a drover went gratis with cattle, on the terms that he was to go at his own risk (which was stated in the plea), and taking that as the legal effect of the contract, we thought, and thought quite rightly, that if any accident happened from the negligence of the servants of the company, the company were not responsible. This is a different contract, and it is one upon which I cannot put such a construction as that. On these grounds I think the rule should be discharged.

FIELD, J.—I am of the same opinion upon both points. With reference to the principal point, it seems to stand thus: the defendants were originally under a contract to carry these goods to Newchurch station, and I take it their duty was to do that which they did; and on the arrival of the goods at the station they gave the consignee notice of it, and then it became the consignee's duty to send for them within a reasonable time. During that reasonable time it might be a question whether the company held the goods as carriers or warehousemen. In order to prevent all doubt, the company adopted the usual course, that is, they gave notice to the consignees, "Your goods have come; you must send for them, and fetch them away as soon as possible." And then they go on to say, "If you do not do that, we give you notice that we will no longer be liable as carriers, but we will hold them as warehousemen." If the notice had stopped there, of course there would have been no question at all about it, because, even if the defendants were not bound to hold the goods, they did in point of fact hold and retain the goods as bailees, and they did in point of fact hold and retain them on the terms of their own notice; therefore, the only question is as to what is the true construction of their own advice note.

Undoubtedly the words "at owner's sole risk" do create a difficulty of construction. I must confess, for myself, that I do not at present see what element that expression provides for looking at the exact nature and character of the warehouseman's liability; but then I am bound to look at the whole contract, and read it altogether; and I find these words "at owner's sole risk" follow affirmative and positive words describing what the obligation is under which they came, and in what character they held the goods, viz., as warehousemen. They say, we will not hold them any longer as carriers—we will get rid of those risks by which carriers are very often harassed—but we will hold them under a known character and definition as warehousemen. I cannot hold, reading the words "at owner's sole risk" in connection with these other words, that that frees them from liability as warehousemen to take reasonable care of the goods, but only from the liabilities of carriers as insurers. I am, therefore, obliged to come to the conclusion that the defendants became liable as warehousemen, and in that respect they are liable. On the other point I agree with my learned brother.

Rule discharged.

Solicitors: *Milne, Riddle & Mellor*, for *Hargreaves & Knowles*, Newchurch; *Clarke, Woodcock & Ryland*, for *Grundy & Co.*, Manchester.

A

LOWS *v.* TELFORD AND ANOTHER

[House of Lords (Lord Cairns, L.C., Lord Hatherley and Lord Selborne), May 9, 11, 1876]

[Reported 1 App. Cas. 414; 45 L.J.Q.B. 613; 35 L.T. 69; 40 J.P. 741; 13 Cox, C.C. 226]

B

Real Property—Forcible entry—Possession taken by person lawfully entitled thereto—Attempt by trespasser to regain possession—Statute of Forcible Entry, 1391 (15 *Ric.* 2, *c.* 2).

If any person, being lawfully entitled to the possession of real property, places himself in possession, albeit by force, it is not competent for another person by force to attempt to disturb him in that possession which he has so acquired. If such other person does seek to eject him by force he brings himself within the provisions of the statute of 1391 relating to forcible entry, 15 Ric. 2, c. 2.

C

Mortgage—Mortgagee—Powers—Right to treat unauthorised tenant of mortgagor as trespasser.

D

Per Lord Selborne: In the absence of any contract or conduct to vary the application of the law, a mortgagee having the legal estate may, without any notice to quit, treat a tenant of the mortgagor as a trespasser.

Notes. Considered: *Hemmings* v. *Stoke Poges Golf Club, Ltd.*, [1918–19] All E.R.Rep. 798. Referred to: *Beddall* v. *Maintland* (1881), 17 Ch.D. 174; *Jones* v. *Foley*, [1891–4] All E.R.Rep. 678.

E

As to penalties for forcible entry and a mortgagee's right of entry, see respectively Halsbury's Laws (3rd Edn.) vol. 10, pp. 590–593 and vol. 27, p. 277 et seq. For cases see 15 Digest (Repl.) 795–800, and 35 Digest (Repl.) 451–457. For the Statute of Forcible Entry, see 13 Halsbury's Statutes (2nd Edn.) 841.

Cases referred to:

F

(1) *Keech* v. *Hall* (1778), 1 Doug.K.B. 21; 99 E.R. 17; 30 Digest (Repl.) 420, *631.*

(2) *Jones* v. *Chapman* (1849), 2 Exch. 803; 18 L.J.Ex. 456; 14 L.T.O.S. 45; 13 J.P. 730; 154 E.R. 717, Ex. Ch.; 43 Digest 406, *284.*

(3) *Harvey* v. *Brydges* (1845), 14 M. & W. 437; 3 Dow. & L. 55; 14 L.J.Ex. 272; 5 L.T.O.S. 287; 9 Jur. 759; 153 E.R. 546; affirmed (1847), 1 Exch. 261, Ex. Ch. 43 Digest 406, *283.*

G

Also referred to in argument:

Butcher v. *Butcher* (1827), 7 B. & C. 399; 1 Man. & Ry.K.B. 220; 6 L.J.O.S.K.B. 51; 108 E.R. 772; 43 Digest 387, *121.*

Reynolds v. *Kennedy* (1748), 1 Wils. 232; 95 E.R. 591; 33 Digest (Repl.) 417, *356.*

H

Ireland v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 1 Digest (Repl.) 485, *1275.*

Pechell v. *Watson* (1841), 8 M. & W. 691; 11 L.J.Ex. 225; 151 E.R. 1217; 1 Digest (Repl.) 84, *640.*

Newton v. *Harland* (1840), 1 Man. & G. 644; 1 Scott, N.R. 474; 133 E.R. 490; 31 Digest (Repl.) 44, *2034.*

I

Mitchell v. *Jenkins* (1833), 5 B. & Ald. 588; 2 Nev. & M.K.B. 301; 3 L.J.K.B. 35; 110 E.R. 908; 33 Digest (Repl.) 407, *238.*

Appeal by the defendant in an action for malicious prosecution brought against him by the respondents.

The appellant preferred an indictment against the respondents at Cumberland Quarter Sessions for a forcible entry contrary to the statute 15 Ric. 2, c. 2, riot, and assault, charges on which they were acquitted. The action for malicious prosecution was tried at the Manchester Spring Assizes in 1872, and a verdict was entered for the respondents. This verdict was set aside by the Court of Exchequer, but their

decision was reversed by the Exchequer Chamber. The appellant was mortgagee in fee of a house in Carlisle. The mortgagor had retained possession, and afterwards let the house to the respondent Telford as a warehouse. Some disputes having arisen, on the morning of July 14, 1870, Lows went accompanied by two men, one of whom was a carpenter, and took possession of the premises by taking off the lock of the outer door and so effecting an entrance. One of the men went into the building itself. While the other man, the carpenter, was engaged, with the door half open, in putting on a new lock, Lows being with him at the time, the respondents, Telford and Westray attempted to turn away Lows and the carpenter, but did not succeed. After a time they effected an entrance into the premises by a window and then they did forcibly eject Lows. Lows indicted them at the Carlisle borough sessions for a forcible entry. The jury acquitted them, and they then brought a joint action against Lows for malicious prosecution. The trial took place before MELLOR, J., at the Manchester Spring Assizes, 1872, when it was agreed that £55 was the sum properly incurred by the respondents in defending themselves against the charges made against them. It was then contended for the appellant that there was no proof of malice, and that the circumstances showed reasonable and probable cause. The learned judge was of opinion that the respondents had established a cause of action, and a verdict was given for them for £55, but leave was reserved to the appellant to move to enter the verdict for him. On motion, the Court of Exchequer ordered that the verdict should be entered for the appellant. On appeal to the Court of Exchequer Chamber that decision was reversed, and the appellant now appealed.

Charles Russell, Q.C., and *Trevelyan* for the appellant.
Herschell, Q.C., and *Kenelm Digby* for the respondents.

LORD CAIRNS, L.C.—In the view which I take of the case now before your Lordships, there is little, if anything, to be determined in point of law, but the decision of the case appears to me to depend mainly, if not altogether, upon a just appreciation of the facts which appear upon the Special Case. Thereupon Lows indicted Telford and Westray for a forcible entry. They were acquitted on the trial at quarter sessions, and they brought this action against Lows for indicting them without any reasonable or probable cause, and with malice. At the trial of this action the damages were agreed upon, and a verdict was entered for the plaintiffs, with liberty to the defendant to move to enter a verdict for himself. The Court of Exchequer, before whom the case first came, were unanimously of opinion that there was reasonable and probable cause for the indictment, and that, therefore, the verdict should be entered for the defendant. But the Court of Exchequer Chamber were, also unanimously, of a different opinion, and held that there was no reasonable or probable cause for the indictment, and that, therefore, the verdict should stand for the plaintiffs.

I am bound to say that in that state of things I am unable to arrive at any other conclusion than this—differing in opinion, with great respect, from the judges of the Court of Exchequer Chamber—that there was reasonable and probable cause for this indictment. That there was the violence attending the transaction which would be necessary to bring it within the statute was not in any way denied, and the whole question turns upon whether, at the time when that violence took place, Lows was in possession of these premises, or they were still in the possession of Westray and Telford, so that Westray and Telford, in place of entering upon the possession of others, were merely defending a possession which was their own. As I view the facts, the possession which Telford and Westray were found to have had on the morning of July 14, was put an end to by the proceedings of Lows. Whether those proceedings were all we should have desired to see, whether they were courteous or discourteous, rough or the contrary, is immaterial; they were the proceedings of one who had a right to take possession, who took possession by the way that I have described, and who, it may be not for any great length of time, but for a definite and appreciable length of time, obtained and retained

possession of the property. From that possession he was dislodged by the means I have stated. Those means appear to me to have amounted to a forcible entry, and I think, therefore, it would be impossible to hold that there was not a reasonable and probable cause for preferring the indictment that was preferred. I will only add to what I have already said, that if I look to the evidence of the plaintiff Westray himself, it is almost impossible not to see in every sentence of it that he states the case exactly in the way that I have stated it, namely, that Lows had obtained possession, and that Westray and Telford were endeavouring to re-take possession as against him.

I turn now to the opinions of the learned judges of the Court of Exchequer Chamber. Passing over that of BLACKBURN, J., I take the expression of opinion of KEATING, J., as showing the ground upon which the court proceeded. He says:

> "If in this case the facts had shown that the defendant, having the right which he unquestionably had of possession, had taken possession, and having taken possession the plaintiffs had entered upon that possession, why then I should have said there would be reasonable and probable cause for indicting the plaintiffs for forcible entry."

I think that exactly describes the condition of the argument, but I venture to think that the conclusion at which he arrives is erroneous. I think it is exactly the case that the facts show that the defendant had the right of possession and had taken possession, and, having taken possession, that the plaintiffs had entered on that possession. Further on KEATING, J., says:

> "That brings the question to a question of fact, had he taken possession? It seems to me that in order to constitute possession it must be complete possession, exclusive of the possession of any other person, and here, I think, the facts show that there was not such possession taken. All that occurred seems to have occurred in the nature of an act, and the transaction was this: The defendant was endeavouring to take possession and the plaintiffs were resisting him."

I think that is a mistake. Lows had taken possession; there was no resistance whatever; there was nobody there to resist; he had taken possession, and that act was completed. KEATING, J., continues:

> "That seems to me to furnish no foundation for an indictment for a forcible entry on the part of the plaintiffs, who were defending a possession which they partially had had, at all events for a considerable time."

There, again, I think there is a misapprehension. They were not defending the possession; they had lost their possession and they were endeavouring, as Westray himself says, to re-take that which they had lost.

All that I have said is quite consistent with the verdict of the jury. The jury acquitted the respondents, and I am not in the least surprised that they did so. A jury do not always proceed upon strictly logical grounds, and I can readily imagine that, seeing the manner in which this transaction was accomplished, seeing the want of any notice given before Lows took possession, they would decline altogether to convict those who were indicted under these circumstances for a forcible entry. But the case before your Lordships is not whether the jury were right or whether they were wrong, or whether the respondents ought to have been convicted on the indictment. The question now is whether they can turn round and bring an action in which they must show affirmatively that there was no reasonable or probable cause for framing the indictment. That, I think, it is impossible they can do. Therefore, in my opinion, the decision of the Court of Exchequer was right, and the verdict must be entered for the defendant.

LORD HATHERLEY.—I entirely concur in the opinion which has been expressed by my noble and learned friend on the Woolsack with regard to the main point in the case. Happily, we are not called on to decide a difficult point of law,

but have only to decide a question of fact to which the law is to be applied. All the learned judges appear to agree in saying that, if a man, being lawfully entitled to possession, does place himself in possession, it is not competent for any person by force to attempt to disturb him in that possession which he has so acquired. The only question is whether Lows, undoubtedly entitled as he was to the possession, had succeeded anterior to the entry of Westray in obtaining the possession of this particular property.

It would appear from the evidence that when Telford and Westray came up and began their attempt to obtain possession of the place in which their goods were, Lows and the men whom he employed were already in actual possession of the premises. Nobody could say anything but that Lows and those he was employing were at that time in possession of the property, they having gained this possession of the property rightfully in every way, as against Telford, although certainly not in a way of which one can altogether approve. I concur entirely with the learned judges in the Court of Exchequer upon that point. One does not approve of Lows' method of obtaining possession, but there de facto he was; being there de facto he was also there de jure; and he was removed in the fashion described by the witnesses.

I agree with my noble and learned friend in not being surprised that the jury under the circumstances of this case refused to convict the persons indicted for an offence against the statute. At the same time, taking the ground of law laid down as common ground by all the judges in both the courts, when you come to apply the law to the facts of this case, when you find there is possession by persons who have the right of possession, it is impossible to say that there was not a reasonable and probable cause, in the circumstances which took place afterwards, for proceeding under the statute, although that proceeding failed because the jury did not think it right to convict the persons against whom that proceeding was taken. It being almost conceded in argument, and I think certainly it was conceded by the learned judges who took the opposite view, that the whole point in the case turned on whether or not Lows had, in fact, obtained the possession he was de jure entitled to, I cannot help thinking that it is established that he was in such possession before Westray came up, and that the attempt to displace him from the possession justified the indictment.

LORD SELBORNE.—I entirely agree with the opinions which have been expressed. *Keech* v. *Hall* (1) established the doctrine that (in the absence of any contract or conduct to vary the application of the law) a mortgagee having the legal estate may, without any notice to quit, treat the tenant or lessee of the mortgagor as a trespasser or wrongdoer, and that the possession held by the mortgagor or those holding under him, until the mortgagee thinks fit to take it, is in the strictest sense precarious, and held at the mere will of the mortgagee. To such a case, the law laid down by LORD COKE, in the passage cited at the Bar from COKE upon LITTLETON, 56b, 1, applies—that "the lessor may by actual entry into the ground determine his will in the absence of the lessee." In the case also cited at the Bar of *Jones* v. *Chapman* (2), it is accurately stated by MAUDE, J., that

> "as soon as a person is entitled to possession and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser. They differ in no other respects. You cannot say that it is joint possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession and the other is a trespasser."

And in *Harvey* v. *Brydges* (3) it is pointed out that so far as relates to the fact of possession and its legal consequences it makes no difference whether it has been taken by the legal owner forcibly or not.

The law laid down by these authorities was not disputed by the counsel for the respondents, but they insisted that, although such was the law for all civil purposes, it was nevertheless not applicable to the present case, in which the question is whether there was reasonable or probable ground for the criminal charge of forcible entry against the respondents. The question, however, whether there was any reasonable ground for that charge, or not, must necessarily depend upon the state of the legal possession of the locus in quo at the time when the acts alleged to constitute the forcible entry were done, and if for civil purposes the legal possession was then in the appellant, the foundation for such a charge, so far as the state of possession is concerned, was sufficiently and properly established. I am unable to see how it can be denied, consistently with these authorities, that the evidence on this record is sufficient to prove a possession of the locus in quo complete in fact and in law by the appellant, before Westray and Telford came upon the ground, on the morning of July 14, 1870. He had the legal title; he had (when no one was present to oppose him) effected an actual entry into the premises, beyond all doubt for the purpose of taking possession, and he by himself and his servants had already acquired such a dominion and control over the property, when Westray first came upon the ground, that the respondents could not enter it without putting a ladder against the house and getting in through the window. I cannot doubt that in these circumstances and upon this evidence the appellant's possession was legally complete and exclusive, and that it was forcibly disturbed by the respondents, who knew of the mortgage before they became occupiers under the mortgagor and whose own evidence shows that they understood their own act to be an attempt, not to maintain an existing possession, but to resume a possession which had been displaced.

Appeal allowed.

Solicitors: *G. Mayor Cooke*; *Phelps & Sidgwick.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

Re HOSKIN'S TRUSTS

[Chancery Division (Malins, V.-C.), December 15, 1876, February 9, 1877]

[Reported 5 Ch.D. 229; 46 L.J.Ch. 274; 35 L.T. 935]

B *Executor—Powers—Fund appointed under general power—Power to receive fund, pay debts, give discharge to trustees, and administer fund.*

By a settlement, a married woman had a general power of appointment by will over personal property. She exercised her power in favour of certain persons, and appointed executors. The trustees were willing to pay the executors the costs of the probate and the duty on the property appointed, but C refused to pay them the balance of the fund without the concurrence of the beneficiaries, which, being refused, they, with the consent of the executor, paid the fund into court under the Trustees Relief Act, 1847, At the time of paying in the fund there were questions as to who were the parties beneficially entitled. A petition was presented by some of the beneficiaries for payment out of the fund. All who would be entitled in any event were before the court, D and agreed to the proposed distribution.

Held: the executors were the proper persons to receive the money under the will, to pay the debts, to give a discharge for the money to the trustees of the settlement, and to administer the fund; the payment into court was, therefore, unnecessary, and the cost of the petition for the payment out of the E fund should be borne by the trustees:

Notes. The trustees in this case appealed from so much of the order of Malins, V.-C., as directed them to pay the costs of the petition, with certain exceptions. The Court of Appeal (James, Baggallay and Brett, L.JJ.), held that the case was governed by *Taylor* v. *Dowlen* (1869), 4 Ch. App. 697, and an appeal for costs alone would not lie: see 6 Ch.D. 281.

F Provisions regarding the discharge of trustees by payment into court are now contained in s. 63 of the Trustee Act, 1925 (26 Halsbury's Statutes (2nd Edn.) 145).

Considered: *Turner* v. *Hancock* (1882), 20 Ch.D. 303; *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231. Referred to: *Re Treasure, Wild* v. *Stanham*, [1900] 2 Ch. 648; *Re Power, Re Stone, Acworth* v. *Stone*, [1901] 2 Ch. 659; *Re Peacock's* G *Settlement, Kelsey* v. *Harrison*, [1902] 1 Ch. 552; *Re Pryce, Lawford* v. *Pryce*, [1911] 2 Ch. 286; *Re Wernher, Wernher* v. *Beit*, [1918] 2 Ch. 82.

As to payment into court by trustees, see 38 Halsbury's Laws (3rd Edn.) 950–954; and for cases see 43 Digest 802 et seq. As to trustees' right to release, see 38 Halsbury's Laws (3rd Edn.) 956; and for cases see 43 Digest 758.

H Cases referred to:

(1) *Re Philbrick's Settlement* (1865), 5 New Rep. 502; 34 L.J.Ch. 368; 12 L.T. 261; 11 Jur.N.S. 558; 13 W.R. 570; 23 Digest (Repl.) 317, *3828*.

(2) *Platt* v. *Routh* (1840), 3 Beav. 257; affirmed *Drake* v. *A.-G.* (1843), 10 Cl. & Fin. 257; 1 L.T.O.S. 382; 8 E.R. 739, H.L.; 21 Digest (Repl.) 99, *481*.

(3) *Hayes* v. *Oatley* (1872), L.R. 14 Eq. 1; 41 L.J.Ch. 510; 26 L.T. 816; 37 I Digest (Repl.) 345, *874*.

Also referred to in argument:

Re Woodburn's Will (1857), 1 De G. & J. 333; 26 L.J.Ch. 522; 29 L.T.O.S. 206, 222; 3 Jur.N.S. 799; 5 W.R. 642; 44 E.R. 752, L.C. & L.JJ.; 43 Digest 816, *2591*.

Re Cater's Trust (No. 1) (1858), 25 Beav. 36; subsequent proceedings sub nom. *Re Cater's Trusts (No. 2)*, 25 Beav. 366; 53 E.R. 676; 43 Digest 816, *2592*.

Re Foligno's Mortgage (1863), 32 Beav. 131; 55 E.R. 51; 43 Digest 816, *2594*.

Petition by beneficiaries for payment out to them of an appointed fund.

By an indenture of settlement, dated July 15, 1836, and made between Philip Hoskin, of the first part, Sarah Hoskin (then Sarah Dunkley, spinster), of the second part, and certain persons as trustees, of the third part, a sum of £500 consols, to which Sarah Hoskin was entitled in expectancy as therein mentioned, was assigned to the trustees, and it was declared that the trustees should stand possessed of the same, and also of a sum of £200 consols upon trust after the marriage of the said Philip Hoskin and Sarah Hoskin to pay the interest thereof during the lives of the said Philip Hoskin and Sarah Hoskin, and the survivor of them as therein mentioned, and after the decease of the survivor of them upon certain trusts as to capital and income thereof in favour of the child or children if any of the marriage, and if there should be no such child, then in case the said Sarah Hoskin should die in the lifetime of the said Philip Hoskin from and after his decease, in trust for such person and persons, for such intents and purposes, and subject to such powers, provisoes, and declarations as the said Sarah Hoskin by her last will or any codicil should, notwithstanding coverture, appoint. By an indenture, dated May 24, 1851, it was declared that a further small amount of consols in part consisting of accumulations of the settled fund of £200 should be held by the trustees of the settlement, upon trust as to part thereof after the decease of the said Philip Hoskin and Sarah Hoskin in the events which happened, for such person and persons, for such intents and purposes, and subject to such powers, provisoes, and declarations as the said Sarah Hoskin by her last will or codicil should, notwithstanding coverture, direct or appoint.

Sarah Hoskin made her will, dated Jan. 23, 1860, and thereby in pursuance of the powers contained in the indentures of July 15, 1836, and May 24, 1851, she appointed certain small legacies, and she directed all the rest, residue and remainder of the said two sums of £200 and £500 consols, and the dividends, interest, produce, and accumulations thereof, and of any other fund or personal estate over which she had a disposing power by or under either of the said two indentures to be divided into five equal portions, and she appointed and bequeathed such five shares as therein mentioned, and she appointed William Patching and Edward Reynolds, executors of her will. Sarah Hoskin died on June 27, 1863, and her will was proved by Reynolds alone on Mar. 31, 1875. Philip Hoskin died in December, 1874.

In August, 1876, the trustees of the settlements had in their hands the sum of £720 19s. 2d., as representing the amount of the settled funds, appointed by the will of Mrs. Hoskin, which amount they paid into court under the Trustees Relief Act, after deducting therefrom £34 6s. 6d. for the expenses of so doing. The affidavit of the trustees filed in support of the payment into court stated the names of the parties whom they believed to be entitled to the fund. The trustees had agreed to pay to the executor out of the fund, the duty on the probate of the will, and the costs of obtaining it, but they declined to pay him the balance without the concurrence of the beneficiaries. At the time the money was paid into court there were questions on the will as to the parties beneficially entitled, but on the petition all the parties interested according to any view were before the court, and concurred in the proposed distribution. A petition for payment out of the fund to the parties beneficially entitled was now presented, and the petition prayed that the costs of the petition might be paid by the trustees of the settlement on the ground that they were not justified in relieving themselves of the responsibility of administering the trust fund by payment into court.

Bristowe, *Q.C.*, and *Bardswell* for the petitioners.

Dunning for the executor of the will and some of the beneficiaries.

Yate Lee (*Glasse*, *Q.C.*, with him) for the trustees of the settlement.

Cur. adv. vult.

Feb. 9, 1877. **MALINS, V.-C.**—The Trustees Relief Act, 1847 [see now Trustee Act, 1925, s. 63], under which this money has been paid into court, is, no doubt,

a very useful Act. In numerous cases it has been most beneficially acted upon, and frequently points of law have been decided in the most inexpensive mode, to the great advantage of the parties. It is, therefore, a most beneficial Act, but it is one which may be turned to great oppression if its powers are abused. In this case the fund, which is a very small one—only £668—has been paid into court by the trustees, and I am sorry to find, from the statement made by the solicitors on each side, that the costs will amount to at least £100. Where parties hold trust funds of this nature, it is most important that, before any step is taken under the Trustees Relief Act, they should well consider whether it is really necessary to pay the money into court.

What, then, is the statement of the case? Here is a settlement executed in 1836, under which certain trusts were declared of this money, but under which the appointor had a general power of appointment over the fund, which is equivalent to the ownership of it so that a person having a general power of appointment may, if he thinks fit, direct that the fund shall be assets for payment of debts. The appointor executed the general power by will, and appointed executors. According to the law at that time, the executors could not do anything without first proving the will, and they could not obtain probate without paying the probate duty. On general principles, therefore, the general power of appointment creating ownership and giving the executors power to obtain probate, they were the parties to pay debts in the first instance and to receive the money under the will, and they had power to give a discharge for any moneys paid to them by the trustees of the settlement. When once the money was paid to the executors and a receipt obtained from them, although the trustees misapplied the funds the next minute, the person having the receipt from them would be entirely discharged from liability.

Why, then, was not this money at once paid over to the executors and divided by them between the persons entitled to it? Instead of that course being taken, there is a ridiculous correspondence between the parties about a release being given. Then it appears that two counsels were consulted upon the subject, but they raised untenable objections, notwithstanding that they had the guidance of the decision of SIR JOHN ROMILLY, M.R., in *Re Philbrick's Settlement* (1). There the very point arose. A married woman had a general power of testamentary appointment over a trust fund, and she appointed the fund among certain persons, and appointed executors. SIR JOHN ROMILLY, M.R., said (34 L.J.Ch. at p. 369):

> "Where the donee of a general power appointed the property to certain persons beneficially, the original trustees were bound to carry the appointment into execution; but if the donee appointed the property to trustees, those trustees were entitled to receive the property to be held upon the trusts declared by the donee; and when a married woman made a will in exercise of a power and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees. . . . By the appointment of executors, the duty of administering the fund was, in his opinion, taken away from the original trustees and committed to the executors, and the provisions of the Probate Duty Act, 1860, rather confirmed this view than otherwise."

The Master of the Rolls also said, when referring to *Platt* v. *Routh* (2), that the expression in the judgment that the executor could not have administered any part of the appointed property, only meant that, "but for the will exercising the power," the executor could not have administered.

That is a formal decision upon the point, and there is a still more formal decision on the same point in *Hayes* v. *Oatley* (3). There there was a general power of appointment under settlement given to a married woman, who executed the power and appointed an executor. The trustees of the settlement paid the whole fund to the executor, and part of it, £5,000, which was applicable to the payment of the

pecuniary legacies, was lost by him, but the Master of the Rolls held that the payment to the executor was proper and that the trustees were not answerable for the loss, and the bill against them was dismissed with costs. He said that nothing could be more unfounded than the supposition that the trustees could be made to pay over again.

After these decisions, I cannot understand why there should have been such a hankering after a release. What could be the use of a release? If you have money belonging to A.B., and you pay it to him and take his receipt for it, that is the best release you can have. In this case, if the trustees had paid the fund to the executors and had taken a receipt for it, that would have been the most complete discharge they could have required. The proper course would have been for the trustees to pay the money to the executors. Instead of that, the executors took no steps to obtain the money or to prevent the money being paid into court.

Solicitors: *Burton, Yeates & Hart*; *Brownlow*; *Merediths, Roberts & Mills.*

Re ROBERTS. Ex parte BROOK

[Court of Appeal (James, Baggallay and Thesiger, L.JJ.), December 5, 12, 1878]

[Reported 10 Ch.D. 100; 48 L.J.Bcy. 22; 39 L.T. 458; 43 J.P. 53, 286; 27 W.R. 255]

Bankruptcy—Disclaimer—Lease—Fixtures—Sale by trustee of tenant's fixtures —Subsequent disclaimer of lease—Landlord's right to proceeds of sale.

A tenant became bankrupt, and the trustee arranged a sale of the tenant's fixtures. Some of the fixtures were bought by the landlord and the remainder by other persons. The trustee subsequently disclaimed the lease.

Held: the landlord was entitled to the proceeds of the sale of the fixtures, including those purchased by himself.

Notes. The Bankruptcy Act, 1869, s. 23, has been replaced by the Bankruptcy Act, 1914, s. 54. Under sub-s. (3), a trustee shall not be entitled to disclaim a lease without the leave of the court, except in any cases which may be prescribed by the general rules, and the court may, before or on granting such leave, require such notices to be given to the persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the court thinks just.

Considered: *Lowrey* v. *Barker* (1880), 5 Ex.D. 170; *Re Latham, Ex parte Glegg* (1881), 19 Ch.D. 7; *Leschallas* v. *Woolf*, [1908] 1 Ch. 641. Referred to: *East and West India Dock Co.* v. *Hill* (1882), 22 Ch.D. 14; *Re Glasdir Copper Works, English Electro-Metallurgical Co.* v. *Gladir Copper Works*, [1904] 1 Ch. 819.

As to disclaimer by trustee in bankruptcy, see 2 Halsbury's Laws (3rd Edn.) 457 et seq.; and for cases see 5 Digest (Repl.) 1006–1007, 1014–1021. For the Bankruptcy Act, 1914, s. 54, see 2 Halsbury's Statutes (2nd Edn.) 389.

Cases referred to:

(1) *Re Lavies, Ex parte Stephens* (1877), 4 Ch.D. 127; 47 L.J.Bcy. 22; 37 L.T. 613; 26 W.R. 136, C.A.; 5 Digest (Repl.) 1015, *8209.*

(2) *Poole's Case* (1703), Holt, K.B. 65; 1 Salk. 368; 90 E.R. 934; 31 Digest (Repl.) 210, *3424.*

(3) *Weeton* v. *Woodcock* (1840), 7 M. & W. 14; 10 L.J.Ex. 183; 151 E.R. 659; 31 Digest (Repl.) 222, *3592.*

(4) *Mackintosh* v. *Trotter* (1838), 3 M. & W. 184; 1 Horn. & H. 20; 7 L.J.Ex. 65; 150 E.R. 1108; 31 Digest (Repl.) 222, *3591.*

(5) *Leader* v. *Homewood* (1858), 5 C.B.N.S. 546; 27 L.J.C.P. 316; 23 J.P. 56; 4 Jur.N.S. 1062; 141 E.R. 221; 31 Digest (Repl.) 220, *3568.*

(6) *Saint* v. *Pilley* (1875), L.R. 10 Exch. 137; 44 L.J.Ex. 33; 33 L.T. 93; 23 W.R. 753; 31 Digest (Repl.) 224, *3610.*

Also referred to in argument:

Minshall v. *Lloyd* (1837), 2 M. & W. 450; Murp. & H. 125; 6 L.J.Ex. 115; 1 Jur. 336; 150 E.R. 834; 31 Digest (Repl.) 220, *3575.*

Smyth v. *North* (1872), L.R. 7 Exch. 242; 41 L.J.Ex. 103; 20 W.R. 683; 5 Digest (Repl.) 1018, *8238.*

Stansfield v. *Portsmouth Corpn.* (1858), 4 C.B.N.S. 120; 27 L.J.C.P. 124; 30 L.T.O.S. 317; 22 J.P. 355; 4 Jur.N.S. 440; 6 W.R. 296; 140 E.R. 1027; 5 Digest (Repl.) 724, *6275.*

Penton v. *Robart* (1801), 2 East, 88; 102 E.R. 302; 31 Digest (Repl.) 212, *3453.*

Parsons v. *Hind* (1866), 14 W.R. 860; 31 Digest (Repl.) 208, *3391.*

Re Solomon, Ex parte Dressler (1878), 9 Ch.D. 252; 48 L.J.Bcy. 20; 39 L.T. 377; 43 J.P. 23; 27 W.R. 144, C.A.; 5 Digest (Repl.) 1021, *8262.*

Appeal by Messrs. Brook & Sons, landlords of a property, from a decision of Bacon, Chief Judge, reported sub nom. *Re Roberts, Ex parte Foster*, 38 L.T. 888, whereby he allowed an appeal by the respondent Frederick Foster, the trustee in bankruptcy of the tenant, from a decision of the Halifax County Court holding that the landlords were entitled to the proceeds of sale of certain fixtures.

A liquidating debtor was at the date of the filing of his petition in the occupation of a room situate in premises belonging to the landlords, under an agreement in writing made on June 10, 1874, in the following terms: Brook & Sons thereby agreed to let and Roberts to take a room in their premises on the following conditions: (i) That steam power be conveyed and supplied to the room to enable Roberts to run a steam-engine turning the card-setting machines from 6 a.m. to 9 p.m. daily; (ii) the room to be let for the term of one year (containing fifty-one weeks) from the date of the agreement, and so on from year to year until one of the parties should give to the other in writing six months' notice to quit; (iii) the rent of the room was to be £40 per annum; (iv) Roberts was from time to time during his period of occupation under the agreement to keep repaired, at his own expense, all the windows, doors, locks, fastenings, and all other fixtures in, upon, and belonging to the room, and to leave the same in as good repair and condition as the same were then in, reasonable wear and tear and accidents by fire only excepted. Attached to the room at the date of the petition were certain fixtures which, it is agreed by both parties to this appeal, were tenant's fixtures, and in respect of which the present dispute arose.

The petition for liquidation was filed on Jan. 24, 1878, in the Halifax County Court; the respondent was appointed receiver on the same day; and on Feb. 14, 1878, he was appointed trustee. On Mar. 9 an advertisement of an intended sale by auction of the tenant's fixtures appeared in a local newspaper, and on Mar. 11 the landlords, having seen the advertisement, caused to be served personally upon the trustee a notice in writing requiring him to decide within twenty-eight days whether he would disclaim the property occupied by the debtor under the agreement of June 10, 1874. No immediate answer was given to this notice, and on Mar. 13 the sale took place. At the sale the fixtures in question were sold, the landlords themselves purchasing some of them, and, with the exception of those so purchased by them, all were severed and delivered to their respective purchasers. On Mar. 27 the trustee, by writing under his hand, disclaimed the property of which the debtor had been tenant to the landlords, and thereupon they asserted their title to the fixtures which had been sold, and claimed the proceeds of their sale. Upon motion to have the proceeds paid over to them, the county court judge of the district in which the liquidation proceedings were, decided in favour of the motion, but his order directing the proceeds to be paid

over by the trustee was upon appeal to the Chief Judge reversed, and against that reversal the present appeal was brought. A

By the Bankruptcy Act, 1869, s. 23:

"When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt, but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

De Gex, *Q.C.*, and *Finlay Knight* for the landlords.
Winslow, *Q.C.*, and *J. Beaumont* for the respondent, trustee in bankruptcy.

Cur. adv. vult.

Dec. 12, 1878. **THESIGER, L.J.,** read the following judgment of the court in which after stating the facts as set out above, he continued: The question in dispute turns upon the effect to be given to s. 23 of the Bankruptcy Act, 1869, which provides with reference to the disclaimer of a lease that such lease shall be deemed to have been surrendered at the date of the order of adjudication, or, in the case of a liquidation by arrangement, by reference to s. 125 of the same Act, at the date of the appointment of a trustee.

In the recent case before this court of *Re Lavies*, *Ex parte Stevens* (1), the effect of the disclaimer of a lease in respect of tenant's fixtures, severed by the trustee subsequently to the disclaimer, was considered, and it was decided that the landlord was entitled to them as against the trustee. The Chief Judge has held that the circumstance in the present case of the severance having taken place before disclaimer constitutes such a distinction between it and the case just cited as to render the latter no authority upon the point now to be decided. We, however, are of opinion that the ratio decidendi in that case is wide enough to govern the decision of the present. The premise upon which our judgment was founded was, that where a trustee disclaims, there, by the joint operation of the disclaimer and the provisions of the Bankruptcy Act, the term is to be deemed for all purposes to have come to an end on the day of the appointment of the trustee. In other words, the trustee is placed in the position of never having had any estate at all. But, from this premise, the logical and legal conclusion is, not merely that a severance by the trustee of fixtures after the disclaimer is wrongful, although that is concluded and was all that was necessary to be decided in *Re Lavies* (1), but that any severance which has taken place after the date when the term is put an end to for all purposes, and by a person who, like a trustee, is in the position of never having had any interest in the term, must necessarily be wrongful.

Apart, however, from the authority of *Re Lavies* (1), we arrive at the conclusion that the landlords' claim in the present case is a well-founded one. The general presumption of law with reference to tenants' fixtures remaining affixed to the freehold when a term comes to an end is that they become a gift in law to him in the reversion, and are, therefore, not removable: per Lord Holt in *Poole's Case* (2). That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer in *Weeton* v. *Woodcock* (3) (7 M. & W. at p. 19) in these terms—viz.,

> "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant";

or, in the language of PARKE, B., in *Macintosh* v. *Trotter* (4) (3 M. & W. at p. 186),

> "that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered an excrescence on the term."

Much reliance has been placed in argument on the part of the trustee upon this qualification of the general presumption of law, and it has been urged upon us that in this case the period between the appointment of the trustee and the disclaimer was such an "excrescence" on the term, and that the trustee had during such period a right to consider himself as tenant. We cannot accede to that argument. It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe that, as regards the rule laid down in *Weeton* v. *Woodcock* (3), the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by WILLES, J., in delivering the judgment of that court in *Leader* v. *Homewood* (5). It may be that, in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in a case where an interest of uncertain duration comes suddenly to an end and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenants' fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties.

If that be so, then when the legislature, by s. 23 of the Bankruptcy Act, 1869, says that a lease disclaimed shall be deemed to be surrendered, are we justified in attributing to the language used any meaning other than that which is its natural meaning, viz., that the ordinary consequences of a surrender shall follow the disclaimer? No doubt difficulties will always arise when courts are called upon to treat a thing as being in law that which in fact it is not; and if in this case the strict carrying out in all points of the analogy of an ordinary surrender were to lead to consequences manifestly absurd or unjust, it would be the duty of the court to find, if possible, some construction of the section in question which would not entail such consequences. In the present instance no such consequences are the result of the construction which the language of the section naturally requires. Extreme cases may, it is true, be put in which it would work a hardship upon the creditors, and the present case is, perhaps, an example; for, if the trustee had kept the property on for a year, he might, at the expense of the small payment of £40, have obtained the fixtures in dispute. But in a vastly greater number of cases any

different construction would work a considerable hardship upon the landlord. Indeed, in *Saint* v. *Pilley* (6), AMPHLETT, B., appears to have considered the dismantling of a house by severance of tenant's fixtures inconsistent with the exercise of the right of disclaimer, and to have been disposed, as stated by him (L.R. 10 Ex. 141) to agree with the view taken in AMOS ON FIXTURES (2nd Edn.), p. 239, that after the sale of fixtures a trustee could not disclaim. When, too, it is remembered that the section under consideration is one which, upon any construction of it, favours the interests of the creditors at the expense of the landlord, we think that it would be unreasonable to allow possible cases of hardship upon the creditors to weigh against an interpretation of it which gives to the analogy of a surrender its natural and proper effect.

A suggestion was made in argument, although not much pressed, that even though the appellants may be entitled to recover the proceeds of fixtures sold to third parties, they cannot recover moneys paid by themselves under no mistake of fact. But we think that a distinction ought not to be made between those moneys and the remainder of the moneys arising from the sale. At the time when that sale took place no disclaimer had been made, the trustee was acting apparently within the scope of his powers, and the landlord could do no more than give him notice that he was required to exercise his election as to whether he would disclaim or not; and, looking to the fact that the time limited by s. 24 of the Bankruptcy Act, 1869 (twenty-eight days) for the exercise of his election had not expired when the sale took place, it would be contrary to justice to hold that the landlord under such circumstances, endeavouring to prevent the complete dismantling of his property, and having no other means of doing so than by himself purchasing and paying for fixtures, is, when by the subsequent conduct of the trustee the fixtures purchased by him turn out to be his own, precluded from recovering the money which he had paid for them. Whether a sale of fixtures by a trustee has or has not in ordinary cases the effect attributed to it by AMPHLETT, B., it is unnecessary in this case to decide, for we are of opinion that it does not lie in the mouth of the trustee, as between him and the appellants, to assert the invalidity of the disclaimer.

The effect, therefore, of a disclaimer generally being such as we have laid down, and there being in the agreement between the debtor and his landlord no special stipulation as regards fixtures which make this case in any way exceptional, the necessary conclusion must be that the trustee, by disclaiming the property to which the fixtures were attached after his sale of those fixtures, constituted himself by relation a wrongdoer in respect of that sale, and is liable to pay over to the landlords the whole of the moneys which by his wrongful act he has realised. The appeal must be allowed, and the judgment of the Chief Judge reversed, and the order of the county court judge restored, with costs here and in the court below.

Appeal allowed.

Solicitors: *Williamson, Hill & Co.*, for *Foster & England*, Halifax; *Learoyd, Learoyd & Pearce*, for *J. Longbottom*, Manchester.

[*Reported by* H. PEAT, ESQ., *Barrister-at-Law.*]